DEPARTMENT OF JUSTICE
AUTHORIZATION AND OVERSIGHT, 1981

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BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

DEPARTMENT OF JUSTICE
AUTHORIZATION AND OVERSIGHT, 1981

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DEPARTMENT OF JUSTICE AUTHORIZATION AND OVERSIGHT, 1981

TUESDAY, MARCH 11, 1980

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 1:30 p.m., in room 2228, Dirksen Senate Office Building, Senator Howell Heflin, acting chairman, presiding.

Present: Senators Heflin, Baucus, Thurmond, and Dole.

OPENING STATEMENT OF SENATOR HEFLIN

Senator HEFLIN. Today the Senate Judiciary Committee begins a series of 13 hearings on the Department of Justice's policies, performance, and resource needs.

We are pleased to have as our first witness, the Attorney General of the United States, Hon. Benjamin R. Civiletti.

With Mr. Civiletti, and the other witnesses, we will be hearing from over the next 2 months, this committee will explore such key issues as law enforcement coordination, Government litigation, case management, professional responsibility, immigration and naturalization, and the Department's own priority programs.

It is the committee's intent to pursue with the Department, the resolution to problems surfaced during last year's hearings, as well as to assist the Department to prepare itself for the issues that it will face during the fiscal year 1981.

We look forward to this challenge.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Today, the committee begins its oversight hearings on the Justice Department's budget request for fiscal year 1981.

The committee will hold a number of hearings over the next few weeks in an attempt to learn more about the Department's activities and priorities. I believe this is a useful process because it helps make our Government more responsive to the Congress, and, in turn, the American people.

Mr. Chairman, I am committed to holding Federal spending to the lowest possible levels. I intend to examine this budget request with that goal in mind. The Justice Department must be able to carry out its legal and law enforcement duties, but it should also be able to do so without substantial increases in funds. We need more efficiency and productivity out of the existing personnel and resources. If we can achieve that throughout the Government, we will have gone a long way toward making this Nation fiscally sound.

Mr. Chairman, I welcome the Attorney General to the hearing today and look forward to his testimony.

Senator **Heflin**. Welcome to you, Mr. Civiletti. We will be delighted to hear from you at this time.

STATEMENT BY HON. BENJAMIN R. CIVILETTI, ATTORNEY GENERAL OF THE UNITED STATES

Mr. **Civiletti**. Thank you, Senator Heflin.

I am always pleased to be before this distinguished committee and to discuss in outline form the funding authorization for the activities of the Department of Justice for fiscal year 1981.

Last year, while testifying before the committee, I stated that the authorization process guarantees that there is a partnership between the Congress and the executive branch in the formulation of policy and program direction regarding this Nation's criminal and civil justice system. That position is as true today as it was then, and again, I welcome the opportunity to share with you and with the committee the Department's program and its fiscal plans.

Supporting data and material, including the Department's proposed fiscal 1981 authorization bill, have already been submitted. I believe these contain sufficient information to assist the committee in its deliberations and considerations.

I would like to examine with you at this time the more pertinent factors which influence our request and highlight some of the activities in which we intend to increase the Department of Justice's efforts.

There are three themes expressed in this authorization request.

First, our request is consistent with the President's policy of minimizing Federal Government spending to assist in the fight against inflation.

Second, it represents our continuing effort to focus and concentrate funding in our law enforcement bureaus on areas of a national priority which cannot effectively be handled at the State and local level for a wide variety of reasons.

Finally, the authorization request reflects our policy of establishing realistic priorities.

The setting of priorities, as we all know, requires difficult tradeoffs and decisions among various competing and worthwhile programs.

This request represents such hard decisions in certain instances.

You will note that our request represents a net decrease in positions, but we have nevertheless increased resources for those high priority programs. The priorities are consistent with the major initiatives the Department has undertaken in recent years.

In the law enforcement and criminal prosecution areas, we propose to apply additional resources to fight organized and white collar crime, prosecute criminal civil rights violations, conduct foreign counterintelligence operations, address fraud against the Government, and combat high level narcotics trafficking.

In addition, we are encouraging State and local governments to assume as much responsibility as possible for crimes which are local in nature and for which there is concurrent jurisdiction with the Federal Government.

The Department will diligently investigate and prosecute the denaturalization and deportation cases of alleged Nazi war criminals.

I would like to point out here that to assist in reviewing our commitment to this effort we have included a distinguishable provision for this special unit in the proposed fiscal year 1981 authorization bill.

Turning to corrections, antiquated penitentiaries will continue to be phased out in the Federal correctional program, and we are recommending statutory authority to permit the use of funds from the "Support of U.S. Prisoners" activities to provide limited financial assistance to improve local detention facilities which house Federal prisoners, usually on a short-term and contractual basis.

In the area of litigation, the Department has plans to further correct a long-time weakness of the Department; namely, in litigation support and management systems.

Finally, a significant initiative of this committee during last year's authorization process, the authorization for the appointment of a special investigator for the Immigration and Naturalization Service, is reflected in the Department's proposed fiscal year 1981 authorization proposal.

As you have noted, in the coming weeks, officials from all units of the Department will be coming before the committee and subcommittees to discuss their proposals and to answer questions on specific programs under their direction.

I would like to simply take a few more minutes to outline briefly our request in support of program plans for 1981.

LITIGATION

Our request for the Department's general litigative activities in the 6 divisions and throughout the U.S. attorneys' offices is modest and it represents an increase of $2.6 million and 38 positions over the current level.

Requested staff increases are intended for expanding the efforts of our Economic Crime Units and the Criminal Division, increasing our investigation and prosecution of criminal civil rights violations, and improving our coordination and review of title VI programs.

To improve management of existing litigation resources, which is a commitment of mine, and an area which has been of considerable interest to this committee, we are requesting resources to develop or improve current automated litigation management and support systems.

I feel strongly that we can use current resources more efficiently by utilizing these techniques, and a member of my staff, Ned Slaughter, is coordinating the Department's efforts in this area.

Our request also reflects a $4 million decrease due to the discontinuance of the State antitrust grant program, which was begun in 1977, and I believe was a $25 million program at initiation. This is the last year of its application. By the end of 1980, the entire sum of $25 million will have been provided to State governments to develop their antitrust activities, largely through the State attorney general's offices.

We believe that the initiative has served its purpose in providing this seed money, and that it is now appropriate for the Federal Government to end its financial assistance. The community or the State should now fund the programs which have proved to be effective or useful based on their own judgment, and place them under their own control and their own responsibility.

For the U.S. attorneys, we are requesting an increase of 33 positions. This includes the transfer of 11 positions from the Associate Attorney General's Office for the Legal Education Institute, which trains Government lawyers in basic governmental representation, 4 positions for the Attorney General's Advocacy Institute, which trains litigators in the skills of advocacy, and which is actively conducting a program to improve attorney training, and 18 positions relating to automated information systems.

The request also includes $4.5 million to bring the total of on-board U.S. attorney employment closer to the current authorized position level. The current gap is due to the salary differential between actual positions and those authorized.

I have also made it one of my goals to insure the highest degree of professional competence for practicing lawyers. For this reason, I intend to merge the Legal Education Institute and the Attorney General's Advocacy Institute, with respect to administrative responsibility. The new unit within the executive office of U.S. attorneys will be called the Office of Legal Education. It will offer courses in administrative and nonlitigation matters and will emphasize the effects of new regulations and laws in the representation of the Government interest.

In addition, techniques of vigorous and ethical advocacy will be taught through intensive practical training sessions.

LAW ENFORCEMENT

Law enforcement, always a principal objective and high priority in the Department of Justice is the next subject.

An effective criminal justice system begins with proper law enforcement activities. The Department will continue to pursue vigorously the detection and investigation of criminal law violators.

For fiscal 1981, the highest national law enforcement priorities will continue to be foreign counterintelligence activities, organized crime, white collar crime, public corruption, and narcotics trafficking.

To demonstrate our commitment to these priorities, we are requesting an increase in positions for the FBI's organized crime and white collar crime programs.

We are confident that these increases will do much to facilitate the prosecution and conviction of major offenders in these areas, as increases have done in the past.

The proposed increases are offset by decreases in lower priority programs and more efficient field programs, such as fugitive apprehension and State and local assistance programs primarily fingerprint identification.

None of the reductions that we are suggesting include any special agents, and the reductions is the fingerprint incentification program are the result of automation of the fingerprint program and the conversion of a number of full-time positions to part-time positions.

With regard to the Drug Enforcement Administration the authorization request includes a personnel increase for domestic enforcement. This will enable Federal agents to concentrate on the disruption of organized trafficking of the most dangerous drugs, heroin in particular, and staffing levels will be slightly reduced for State and local assistance programs in areas where State and local governments can and, in some instances, have assumed additional responsibility.

A funding level increase of $1 million is requested to begin the development of a voice privacy communication system. This is necessary for the success of DEA enforcement activities and for the protection of agents, who are from time to time being jeopardized by the interception of operational radio communications.

The request for the United States Marshals Service includes modest staff increases for the execution of Federal fugitive warrants, which was turned over to the Marshals Service in part from the FBI last year. In addition, an increase for the witness security programs will improve and augment assistance and social services for essential protected witnesses.

These new resources will also enable the Marshals Service to increase the extraordinary protection to critical Government witnesses whose lives may be in jeopardy because of their testimony.

Staff decreases for the Marshals Service will occur in two areas. One, there will be a 370 position decrease for the court security program, which is merely a "paper" decrease, since they were never employed or implemented in the first place. It will not result in any actual reduction in security services. It represents the decision to have the Department continue to reimburse the GSA for judicial security guard services in lieu of the Marshal Service establishing its own separate program.

Second, we have proposed a decrease of 234 positions as a result of proposed legislation to discontinue the service of civil process for private litigants. Section 8 of our proposed fiscal year 1981 authorization bill addresses this issue. We believe the service of private process can and should be performed by private enterprise.

In the past, the Government's failure to recover the costs involved has had the effect of granting a subsidy to a small segment of society which uses this service.

You will note that our proposed legislation makes allowances for this service in the cases of indigents, or when the court orders it in extraordinary circumstances.

Increases are also included for the Immigration and Naturalization Service to held reduce wating time for adjudication benefits, address the additional workload resulting from the increased numbers of Indo-Chinese refugees, and to complete the rehabilitation of the Port Isabel, Tex., Service Processing Center.

While actual onboard Board Patrol staff will remain at or exceed current levels, the budget requests a modest reduction in authorized positions. We believe that increases of any significant border enforcement personnel should be postponed until the Select Commission on

Immigration and Refugee Policy issues its comprehensive report with recommendations.

The report should assist all of us in developing agreement on statutory changes to remove the incentives for illegal immigration, an action that, we believe, may obviate the need for large resource increases for border enforcement personnel.

I also want to assure you that management practices within INS are receiving my personal attention. As I have stated, the special investigator provision, developed by Congress and made part of the 1980 Authorization Act, is part of the Department's proposal for 1981, and we are moving forward with a major management review of INS by the President's Management Improvement Council

I am confident the results of these two initiatives will greatly assist in proving the management and efficiency of the Immigration and Naturalization Service, which certainly needs it.

CORRECTIONS

Recent prisioner declassification efforts and the increased use of halfway houses have contributed to a reduced Federal prisoner population. As a result, the authorization request reflects the closing or phase down of three antiquated penitentiaries—McNeil Island, Wash., Leavenworth, Kans., and Atlanta, Ga.

I am aware that the closing or restructuring of these antiquated facilities has been a longstanding objective of this committee and the Congress. We believe our proposed actions address the concerns of the committee.

Again, with regard to corrections, new resources are requested for the activation and expansion of previously approved institutions to assure humane care and custody of offenders. Modest staff increases are requested for inmate services, medical care, vocational training, and drug aftercare programs.

Improved medical care was another major initiative of the committee last year. Medical services at the Springfield, Mo., Medical Center will be improved, and additional resources will be made available to expand and upgrade the quality of medical services at a number of other existing facilities.

OTHER REQUIREMENTS

In conclusion, the authorization request also proposes small personnel increases in key staff offices within the Department. Included in these items are staff increases to support essential activities in my immediate office, the Office of Professional Responsibility, and the Office of Information Law and Policy, as well as for the critical library support services and equal employment opportunity efforts conducted by the Justice Management Division.

A decrease of $5 million is proposed from the current 1980 level for the special State and local drug grant program for which funds were included in the "general administration activity" account.

This concludes the overall statement with regard to the Authorization Act for fiscal year 1981. I would be pleased to try to answer any questions you may have with regard to the operations of the Department, or with regard to particular priorities within the Department.

Senator Heflin. I didn't know until about an hour ago that I had to start this hearing. Senator Baucus is here and will continue it. I have to return to another committee meeting where we are marking up a bill.

So, if you will excuse me, I will go. Senator Baucus will ask you all the loaded questions prepared by staff.

Mr. Civiletti. Fair enough.

Senator Dole. Mr. Chairman.

Senator Baucus [acting chairman]. Yes, Senator Dole.

Senator Dole. On page 7, of the statement, Mr. Attorney General, you mentioned the closing or phasing down of three antiquated penitentiaries. I think there is also some modernization involved, at least, as far as Leavenworth is concerned.

Mr. Civiletti. Yes, sir.

Senator Dole. I want to make certain the phase down includes modernization.

Mr. Civiletti. Yes; and the change in certain of the facilities in order to accommodate a different mix of prisoners.

Senator Dole. Then, on an unrelated matter, you have addressed a letter to the chairman today, concerning requests of four Republican Senators for special prosecutor. Just to make the record clear, you have indicated that releasing that to the public will not prejudice the rights of any individual

Mr. Civiletti. I believe that to be true.

Senator Dole. We are now in the process of polling the members of the committee to determine whether or not it is the committee's desire to make it public. Under the statute, I certainly will not comment on it until that information or that vote has been taken.

Oh, it has been polled? I understand the committee has been polled and the letter will be released to the public. I am not certain whether copies are available.

Thank you, Mr. Chairman.

Senator Baucus. Thank you, Senator Dole.

Mr. Attorney General, I apologize for the delay. The majority leader called up last night and wanted me to attend a meeting that began this morning at 9 o'clock to figure out how we are going to balance the budget.

Mr. Civiletti. I hope you found the answer.

Senator Baucus. Hopefully not at the expense of the Justice Department. I have to return to the budget balancing session at 3 o'clock.

Mr. Civiletti. I am glad to see you.

Senator Baucus. What is your view on whether Congress ought to create an Inspector General for the Department of Justice. Several other Departments have an Inspector General. Should the Department of Justice have an Inspector General?

Mr. Civiletti. Pursuant to this committee's request, we studied that issue and reviewed the operations and practices of the Office of Professional Responsibility. We considered some of the problems within the grant agencies that led to our support of Inspectors General at HEW and at Labor and Agriculture and HUD and others. We have also done some looking at our own performance in certain areas.

My conclusion is that an Inspector General modeled on the framework of Inspectors General for benefit and grant agencies is not appropriate for the Department of Justice and not necessary.

I think that there are material distinctions between the Department's employees and the business which they perform, and Departments which are charged with the responsibility of administering million and billion dollar grant programs which do not present the same needs that Inspectors General have, and we hope will continue to meet in those other agencies.

So, the short answer to your question is that although Maury Rosenberg and Mike Shaheen and others are going to address this issue in detail, my overall view is that I don't support an Inspector General for Justice on the model of the Inspector General Act of 1978.

Senator BAUCUS. I infer from your statement that perhaps the Office of Professional Responsibility, perhaps combined with the internal audit sections should at the very least have a charter or some kind of statutory basis? Is that correct?

Mr. CIVILETTI. No.

Senator BAUCUS. By no you mean you don't see the need for any changes in these parts of the Department of Justice?

Mr. CIVILETTI. No; I haven't seen a demonstration that an office will operate better if it is made part of a statutory charter than when it has well-developed regulations, policies, and procedures and is made an institutional part of an organization.

I don't see the magic in giving it a charter. I certainly would not think it would be an appropriate attempt or effort in an authorization bill. If it is going to be proposed as a piece of legislation, I think it ought to be a part of an independent bill and be thoroughly considered in subcommittee and reviewed by the committee as a whole.

Senator BAUCUS. But you are not then necessarily opposed to a separate bill prescribing statutory authority?

Mr. CIVILETTI. It depends. I would not necessarily be opposed to a bill which addressed the principles under which an Office of Professional Responsibility was intended to work. That would not trouble me. I would become troubled if such a bill began to develop a laundry list of do's and don'ts or if it separated out an office within the Department from the control and review of the officials responsible for the conduct of the Department's business.

For instance, with respect to the audit function, I have been evaluating and reflecting on its proper location. I haven't yet made up my mind. I haven't seen the arguments concern whether it ought to function in combination with an evaluation unit in the Justice Management Division or whether it should be in a separate office such as the executive office for U.S. attorneys, which has substantial responsibility for field operations in 95 U.S. attorney offices and has over 1,800 employees in the field who are removed from the main Department of Justice. Perhaps the internal audit function ought to be combined with the professional responsibility investigation function in an office such as OPR.

Right now, I would hesitate to recommend that all three functions, that is, evaluation, internal audit, and professional responsibility be combined. I think that that probably dilutes the importance of the investigations and the recommendations of the Office of Professional Responsibility and the head of that office.

I am not sure, and I have an open mind with regard to internal audit functions.

Senator BAUCUS. Do you personally review internal audits conducted by the Department?

Mr. CIVILETTI. Occasionally; not as a regular matter.

Senator BAUCUS. What percentage, roughly?

Mr. CIVILETTI. Probably 10 percent or less.

Senator BAUCUS. What about GAO audits of the Department of Justice? Do you personally review those?

Mr. CIVILETTI. Again, it depends on the audit and the nature of the audit. I would say as Deputy, I reviewed most of the audits that dealt with the criminal justice system. As Attorney General, where they are critical, I either review them or review summaries of them.

If they dealt with the civil side, say with civil rights, the Civil Division, the Tax Division, or the Antitrust Division, I would not have reviewed many of those at all when I was Assistant Attorney General and Deputy Attorney General.

So far, as Attorney General I have become aware of very few. One I recall particularly was an appropriate criticism of debt collection and the Department's role and share in that.

Senator BAUCUS. Let me turn now to judgeships. I would like to raise with you some questions concerning the role of the Justice Department in reviewing the background of nominees for the Federal bench.

Do you believe the Department has an obligation to help the Judiciary Committee thoroughly investigate all allegations made against nominees for the Federal bench?

Mr. CIVILETTI. Indirectly. Our obligation initially is to conduct as thorough a background investigation as we can in order to make sound recommendations to the President on which he can base his nominations.

Once those nominations are made, the process, in my view, is turned over to the Judiciary Committee. We have a duty to cooperate with that committee to the extent we possibly can under the law, but there is a separation of functions just as there is a separation of branches. I don't know the extent to which the Judiciary Committee should ask the FBI to respond to investigative requests which are developed by the committee after the nomination process is complete.

Senator BAUCUS. Where should that line be drawn? Is it once the nomination has been sent up to the Judiciary Committee?

Mr. CIVILETTI. Well, the process has worked fairly well for the last 9 months or so, which is how far back my personal knowledge goes From general historical knowledge, I believe the process has long worked fairly well at all stages: First the outreach effort and commission efforts before they ever reach the Department of Justice; then, the dual and sometimes triple or quadruple investigations by Justice, by the FBI, by the ABA, by the National Bar Association, and sometimes by the Women's Bar Association; after that the review of information or allegations received during the consideration process; and finally, the recommendation made to the President.

When the President has made his nomination, the Judiciary Committee and its investigators, on both the minority and majority sides, are given complete access to the FBI files at the Department of Justice for review and consideration. As I understand it, they review them at the Department of Justice and independently conduct their own investigations.

From time to time, we get a question from one of those investigators or from the chairman of the committee about a particular issue or particular subject. Where we can we respond to that request or we conduct some further investigation if it is not a massive effort and we even go back, from time to time, to the ABA to ask for their opinion on a particular subject. We forward that to the Judiciary Committee as well.

We do not pass judgment again. We do not keep contemporaneously involved, for example, with the viewpoints of the committee or the facts that they may be developing. It is something of a one-way street. We do not ask for reports from the committee or from the investigators as to what they have found or not found and then make redeterminations. That is a general sketch of one relationship in the matter of judgeships.

Senator BAUCUS. I am not sure I understand you. You are saying that by the time the President sends up a nomination the Justice Department and the Bureau have completed their background investigation.

Mr. CIVILETTI. Yes.

Senator BAUCUS. What should happen when the Judiciary Committee and its staff subsequently find new information that raises questions about a nominee? When the committee requests the Justice Department and or the Bureau to conduct further checks to determine whether or not the subsequent questions are serious or not, are you saying then that the Bureau and or Justice will conduct those additional checks or that they won't because Justice sent up the nomination in the first place?

Mr. CIVILETTI. I am saying both. I am saying that we do it on a case-by-case basis. Ordinarily we consider the background investigation done at the time the nomination is made and the committee then begins its business. But there have been instances wherein we have furnished additional information or found additional information, particularly tax or tax analysis information, or a particular affidavit or interview which was limited in scope.

But background investigations are just that. They are to determine character. They are to determine quality. They are to determine integrity. They are to determine, as best you can, reputation in the community, education and so forth. They are not criminal investigations.

Senator BAUCUS. What about problems that the FBI raised in the first place, but did not investigate thoroughly?

Mr. CIVILETTI. They go to the point where we can make an overall judgment. They cannot always resolve a high degree of certainty whether or not an event happened or may have happened.

Senator BAUCUS. What is your view of the ABA's role with respect to judicial nominations? Do you think it works well? Does ABA play too great a role or not enough of a role? What is your view on that?

Mr. CIVILETTI. I think it plays an important role. I think it adds a further analysis from a different point of view, of lawyers long experienced at the bar, who come from different parts of the country, and who take their review seriously. They are usually intimately familiar with the bench, the law, and the reputation of people within the community, which is sometimes best known by the legal community. They have some guiding rules which perhaps are not as universally sound as you or I might prefer. Therefore, if one of those guiding rules is the basis for a finding of "unqualified" or "qualified," as opposed to "well-qualified" or "exceptionally well-qualified," I think the judgment has to be somewhat discounted.

I think their recommendations are worthy of serious consideration, but they are not controlling.

Senator BAUCUS. Would you modify the ABA review process at all?

Mr. CIVILETTI. We already have modified it, or rather I have made suggestions to the chairman and several members of the committee for modification of their process in different ways.

For example, I think that every candidate ought to have a closing personal interview of some significant nature.

I think that they ought to present, though they may feel it unnecessary to do so, an opportunity for people with whom they communicate to present both the positive side, the outstanding aspects of someone's career or reputation, as well as, "Do you know anything bad against them."

Senator BAUCUS. I would agree with you. I think exit interviews are helpful.

Mr. CIVILETTI. I have made about three or four recommendations of that kind.

Senator BAUCUS. How are you doing with your Abscam investigation? About a month ago, you indicated to both the House and the Senate that within 90 days you would decide whether or not to proceed with indictments or not to prosecute.

Are you on schedule?

Mr. CIVILETTI. I don't know the answer to that. What I have done since giving that estimate is to make sure that Phil Heymann knows, and that the individual prosecutors conducting the grand jury proceedings know, that if they need additional personnel, they have those personnel available to them.

So, there should be absolutely no delay because of inadequate numbers of persons involved in conducting the investigation. I have heard no complaints from anybody with regard to the number of prosecutors or lawyers or agents involved in the cases.

The grand jury proceedings are underway, so there hasn't been a mechanical delay from the court side as far as I know. The testimony of witnesses and the evidence collected are being evaluated and reviewed.

My answer generally is that as far as I know, it is roughly on schedule. I would not be surprised if some of the cases took somewhat longer than others, but I have heard of no major difficulties or of a necessity to adjust the estimate.

Senator BAUCUS. Thank you very much.

I understand that Senator Dole has a question he would like to ask.

Senator DOLE. Thank you, Mr. Chairman. I need to go over and make quorum in the Agriculture Committee.

Senator BAUCUS. Please proceed.

Senator DOLE. If I could take about 5 minutes.

Senator BAUCUS. Certainly.

Senator DOLE. Just along the line of that question, do you anticipate any successful entrapment defenses in Abscam?

Mr. CIVILETTI. I don't anticipate any, but I wouldn't rule out the possibility. It does happen periodically, in some search and seizure cases, that a judge will disagree with what the authorized conduct was and feel that it didn't meet one of the requirements of the search and seizure law.

But I have been advised by Phil Heymann of the Criminal Division and by Judge Webster that the program was monitored and its operations were reviewed carefully. And, although in any undercover operation entrapment is always a defense at least arguably by a defendant, we ought to be able to proceed with the cases without that being a fatality, or fatal flaw.

Senator DOLE. Has it been used successfully in any distinct cases to date as a defense?

Mr. CIVILETTI. Only one; and it was really not a pure entrapment defense. It had to do with prosecutive overreach and abuse of investigative and prosecutive authority. It was a District of Columbia case involving an assistant U.S. attorney, I believe who was prosecuted as a result of a sting operation conducted here in the District, in connection with stolen property.

Senator DOLE. With reference to the revised budget I understand we are going to have, have you been given some figure for the Justice Department or have you figured out whether you can cut anywhere in your budget?

Mr. CIVILETTI We have been asked to take our share of reductions We have been debating that and developing a dialog back and forth about the budget. At one time it reached——

Senator DOLE. Some $135 million?

Mr. CIVILETTI [continuing]. Much more than that. We made some proposals which were much less than that. I don't know if that is the exact figure, but I haven't heard the final decisions yet. I have written letters and some memoranda, presenting our best views of where we could share the responsibility for balancing the budget and reducing the deficit, arguing all the time, which I consider to be my responsibility, the importance of the Department of Justice functions.

Senator DOLE. There have been some rumors that the administration is going to ask for rescission of unspent LEAA funds for fiscal 1980 and shut down at least the State assistance program.

Do you have any information on that?

Mr. CIVILETTI. I can give you only some general answers. It has gone around the horn about four or five times. In any significant budget reduction from the Department of Justice, we only have two choices. One is to reduce manpower, because we are a labor intensive department. The other is to reduce our one grant program, which is LEAA.

So, if you are talking about 20 men to a million dollars, if you are going to reduce $100 million in some fashion or another as your share of a reduction, you are talking about 2,000 people.

If we are asked to reduce a benefit program and other departments are being asked to also, our only benefit program is LEAA.

Despite how strongly I believe in LEAA, its foundational purposes and its reorganization, I believe more strongly in the ability of 2,000 Federal employees to do important work that they have been assigned.

I have made arguments and I have considered how to preserve the essentials of LEAA and its structure, while accommodating in some fashion the great interest which we all have in reducing the deficit and therefore, thereby to reduce the rate of inflation.

I hope that we will be able to accomplish that, and that the President and OMB will as well, but it is a matter of grave concern.

Senator DOLE. Finally, I won't dwell on the letter we just received, but in that letter, since it has now been made public, you indicated you are without authority, statutory authority to appoint a special prosecutor under the terms of the Ethics in Government Act. That may be accurate, but don't you have the same authority to appoint a special prosecutor that Elliot Richardson possessed in the *Watergate* case?

Mr. CIVILETTI. Probably something close to it. You will recall, Senator, that in the so-called warehouse investigation, which involved some allegations of misfunding, misreporting, and transferring of funds from borrowings outside of the warehouse business. I considered, along with Judge Bell, the application of the Special Prosecutor's Act. We found that, because of the same transition provisions and the existence of the investigation prior to the effective date of the act, that the act really did not apply soundly, and therefore, a special prosecutor should not be appointed under the act.

But Judge Bell found that because of the closeness of the relationship between the warehouse business, the President, and the President's brother, and because of the complicated nature of the facts in that investigation, that the best judgment would be to appoint a special counsel. That was Paul Curran, who had duties, responsibilities, and authority similar to those of a special prosecutor under the act. I agreed with that decision.

I believe that the authorities of the special counsel were very much the same as, if not in some instances a little greater than, the ones that were delegated to the Special Prosecutor by then Attorney General Richardson.

Senator DOLE. Right. I think that is section 515, of title 28.

Mr. CIVILETTI. I think that is the one that we exercised in the warehouse investigation.

Senator DOLE. That could be exercised in this case?

Mr. CIVILETTI. Theoretically, yes.

Senator DOLE. I would just ask that the letter received from the Attorney General, addressed to Senator Thurmond, and the cover letter to Senator Kennedy, along with the letter to Mr. Civiletti, be made a part of the record.

Senator BAUCUS. Without objection, so ordered.

Office of the Attorney General
Washington, D.C. 20530

March 11, 1980

Honorable Strom Thurmond
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

By letter of February 8, 1980, you and three other Republican members of the Senate Judiciary Committee requested that I apply for appointment of a special prosecutor under the Ethics in Government Act of 1978 to investigate allegations against Treasury Secretary G. William Miller. I must respectfully decline this request.

The Criminal Division of the Department of Justice has been conducting an investigation since early 1978 into whether Mr. Miller and others committed perjury or obstructed justice in the course of February 1978 Senate Banking Committee hearings on Mr. Miller's confirmation as Chairman of the Federal Reserve Board. The information cited in your letter, and all other material information received in this investigation relative to Secretary Miller, was known to the Department of Justice either prior to the effective date of the Ethics in Government Act of 1978 or prior to the completion of the 180-day statutory transition period of the Act. 28 U.S.C. 591 note. Section 604 explicitly states that the Special Prosecutor provisions of the Ethics in Government Act "shall not apply" where information is received during or prior to the transition provision. Since all relevant information was received prior to the completion of the 180-day period, I am without statutory authority to appoint a special prosecutor.

We have received the SEC complaint filed January 31, 1980 and the SEC staff report, as well as the testimony before the Committee on Banking, Housing and Urban Affairs during the 1978 confirmation hearing and that Committee's staff report. Throughout the course of the SEC investigation, attorneys for the Criminal Division were kept informed of the nature of the material developed by the SEC, and they are, as nearly as we can tell, familiar with the evidence that formed the foundation for the SEC action. We have also had the attorney in charge of the investigation attend the testimony before the Committee on Banking, Housing and Urban Affairs in February. In light of all of the above, even if the Ethics in Government Act of 1978 were applicable, I have very serious doubts that specific information sufficient to trigger the Act has been developed indicating that Secretary Miller has violated any criminal law.

I can assure you that our investigation into this matter has been, and will continue to be, impartial, thorough and vigorous. The evidence gathering process in a foreign payments case is necessarily cumbersome, in that it involves seeking evidence abroad. In this connection, we have sought, and continue to seek, the assistance of foreign governments and unfortunately, due to the nature of the requests, all could not be made simultaneously.

Your letter states that "a number of Textron executives . . . invoked their Fifth Amendment privilege . . ." leaving "a significant gap in the factual record of the Textron investigation." From the above, it may be inferred that you believe we should have, by now, immunized the persons in the above category.

It might be useful to clarify the factual situation. The Fifth Amendment privilege was invoked by only one Textron official and this was on a matter unrelated to foreign payments. Also, one Bell Helicopter official refused to testify. The balance of the Fifth Amendment invocations was by sales agents and lower-level employees of Bell Helicopter. Of this latter group, to date we have given immunity to six. I anticipate that virtually all of the persons to whom you refer will be called before the grand jury, and where necessary, their testimony compelled.

The continuing investigation of the Criminal Division has not revealed evidence that Mr. Miller was informed by anyone of improper payments by Textron and Bell Helicopter, or that Mr. Miller learned about such payments in any other way. There is some evidence that certain Textron and Bell Helicopter officials who reported to Mr. Miller were told of information relating to some payments. However, all but two of them have denied under oath any recollection of being told. Of the remaining two, each has testified that he did not believe the information and, in any event, did not tell Mr. Miller. In fact, none of the assertions that Secretary Miller has committed a criminal violation has been substantiated by the investigation conducted since early 1978.

This investigation has taken longer than we would like; however, thorough criminal investigations in matters such as this take time. I have directed the Criminal Division to proceed with all possible speed. Should substantial new evidence be developed which makes the provisions of the Special Prosecutor Act applicable, please be assured that I will have no hesitancy in invoking its provisions.

Sincerely,

Benjamin R. Civiletti
Attorney General

Office of the Attorney General
Washington, D.C. 20530

March 11, 1980

Honorable Edward M. Kennedy
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

By letter of February 8, 1980, four Republican members of the Senate Judiciary Committee requested that I apply for an appointment of a special prosecutor under the Ethics in Government Act of 1978. Enclosed is a copy of my response to this request. Pursuant to Section 595(e) of the Act, I would request that the Committee make the response public. I believe this matter has been fully aired publicly and the release of the letter will not prejudice the rights of any individual.

Sincerely,

Benjamin R. Civiletti
Attorney General

Enclosure - copy of letter to Honorable Strom Thurmond
(Identical letter being sent to: Honorable Paul Laxalt
Honorable Orrin G. Hatch
Honorable Robert Dole)

cc: Honorable Strom Thurmond
Honorable Paul Laxalt
Honorable Orrin G. Hatch
Honorable Robert Dole

Senator DOLE. Thank you, Mr. Attorney General.

Senator BAUCUS. Mr. Attorney General, as you know, members of the Senate Judiciary Committee have divided up the divisions of the Department of Justice for the purposes of conducting oversight hearings. I have the honor of conducting the oversight hearings as they apply to the Civil Division at Justice, as well as the Office of Professional Responsibility and the Internal Audit Section.

I have personally requested specific information, specific documents, specific memorandums of Civil Division attorneys, specific memorandums of understanding between the Civil Division and other agencies, and other specific documents.

I would like your full cooperation in turning over that information to us. I would just like you to tell me that you will, in fact, use your best efforts to make sure that we get all the information that we think is legitimate and proper to conduct a meaningful oversight hearing of that Division.

Mr. CIVILETTI. You have my full cooperation. Last year, you conducted oversight hearings effectively, with a lot of hard work and diligence on your part and that of your staff, in connection with the Land and Natural Resources Division, to the benefit of this committee, the American public, and the Department. I would expect that you would devote the same energy with respect to the Civil Division and all its operations, which are very important functions in the Department of Justice. I understand that to date you have done so.

I hope that we can have a mutually beneficial product of all the hard work that you will be putting into it, the hard questions you will ask, and the challenges that you make to that Division. I know personally, because of reports to me, that you began that work several months ago and are hard at it with cartons of documents, materials, and information necessary to your task.

Senator BAUCUS. I appreciate that. I don't mean to belabor this. I just feel that if we in the legislative branch are going to legitimately exercise our responsibilities that we should have if not 100 percent access, nearly 100 percent access to documents and information at the Justice Department.

Mr. CIVILETTI. Yes, I agree with that.

Senator BAUCUS. And we in Congress should not abuse that right, either.

Mr. CIVILETTI. That's right.

Senator BAUCUS. Otherwise we can't make legitimate decisions as to authorization levels——

Mr. CIVILETTI. There are very few exceptions that we sometimes exercise that are of longstanding policy. Even there the vast bulk of the substance can be communicated to you or members of your staff without any difficulty. They relate to pending criminal investigations, grand jury materials, and advisory memoranda. For the case of the latter we don't want to chill the openness and candor of staff attorneys and supervisory attorneys. There are limited categories of things of that kind.

Senator BAUCUS. I might remind you too, as I am sure you will recall, initially, last year, we had difficulty getting memoranda and agreements between EPA and the Lands Division. We pressed our point and we were successful in getting the information and as a result, we recommended and Congress agreed to increase the funding level for the Lands Division.

Mr. **Civiletti.** That's right. That was terrific work.

Senator **Baucus.** I don't know that the same will necessarily occur with the Civil Division, but at least I want you to know that we are open to that possibility.

Mr. **Civiletti.** Well, as long as you keep the litigating authority in the Department of Justice and don't allow it to be fractionalized, I think we will be fine and will get a few more resources.

Senator **Baucus.** Well, that conveniently raises my next question. What advice can you give us on that score? There are several statutes which delegate litigation authority to various Government agencies. There are some formal agreements between Justice and other agencies which spell out the delegation of litigating authority.

What is your view of the delegation of litigation authority from the Department to other agencies? What recommendations do you have to correct some of the problems in this area?

I have an idea what they are going to be.

Mr. **Civiletti.** I think that if we reviewed the existing fractionalization of legal authority and undertook a consideration of the redelegation or reassignment of this disparate litigative authority to all the various units of Government where it is now lodged, with the purpose of reconsolidating the authority in the Department of Justice, that would be a very important first step to gaining efficiency. The Government would be speaking with one voice, there would be greater acceptance in the district courts and in the courts of appeals of the legitimacy and credibility of the Government's position and we would avoid the terrible dissatisfaction of the American public in seeing its Government on one side supporting a particular piece of litigation or proposal, and on the other side, the same Government in effect contesting itself in the court.

Senator **Baucus.** Doesn't Justice have some control over that problem?

Mr. **Civiletti.** Sometimes, yes.

Senator **Baucus.** Has the Department of Justice been sufficiently resisting efforts of agencies to take away litigating authority from the Justice Department?

Mr. **Civiletti.** I doubt whether they have been doing it entirely of their own discretion. I think we fight this battle continually. For instance, we may defeat independent bills that are constantly being submitted to the Congress—and often not to the Judiciary Committee, but to separate jurisdictional committees—for separate litigating authority by having them cross-referenced or transferred over to the Judiciary Committee. That way you who are familiar with the entire justice system and the entire operation of the Department, can express your views and judgment about the wisdom of fractionalizing litigation. Where there seems to be a groundswell because of the peculiarities of a problem or the strength of a particular entity or unit of Government, and it would appear that unless we reach an accommodation with that agency, then the litigating authority or any control with regard to it would be removed, then it is sometimes the case that we enter into a memorandum of understanding, usually, that means that we delegate at least some part of the litigative operation to the affected agency, while retaining a share of policy judgment, control of the initiation or defense of litigation, joint approval of settlements, or arrangements of that kind. That is the case now, for example, with the Department of Energy.

At other times, we see the wisdom of proposals from a particular department or agency for delegating authority over the handling of certain types of cases in certain categories. This may be because their volume, their routine nature, or the very special expertise required overcomes the general argument that centralization and coordination is the first principle to be met.

So those are some of the reasons that give rise to memorandums of understanding with regard to litigating authority.

Senator BAUCUS. Would you favor legislation which would require the Justice Department to comment on legislation within 60 days after the introduction of the bill, wherever the bill would have the effect of delegating legislative authority?

Mr. CIVILETTI. In principle, I would. I don't know enough about the legislative process to know whether that would be a reasonable time period. But in principle, it sounds ideal to me.

Senator BAUCUS. I take it too, that you would support a congressional reform that would give this committee jurisdiction over all bills introduced——

Mr. CIVILETTI. Dealing with litigating authority?

Senator BAUCUS. That is correct.

Mr. CIVILETTI. I certainly would.

Senator BAUCUS. I wish you would talk to the Parliamentarian about that.

I understand that Senator Thurmond has some questions he would like to ask.

Senator THURMOND. Well, thank you, Mr. Chairman.

Mr. CIVILETTI. Good afternoon, Senator.

Senator THURMOND. How are you, Mr. Attorney General?

Mr. CIVILETTI. Fine.

Senator THURMOND. I have a very brief statement. I ask unanimous consent that this appear following the opening statement of the chairman.

Senator BAUCUS. Without objection.

Senator THURMOND. Mr. Attorney General, I just have a few questions here.

In your statement, you indicate that the 1981 fiscal year budget requests less positions, but increased funding. Could you explain briefly why more funding is necessary when overall positions are being reduced?

Mr. CIVILETTI. I think one reason is that it is necessary in order to fully utilize the authorized positions that we have and to meet the salary levels for those positions, along with the increases that are due to employees for one consideration or another.

The problem is that there has been a gap between the amount of money necessary to fill the authorized positions at the rates and salaries which are required, and the level of budget authority.

When that happens we are required, at least in our judgment, to leave some gaps in the vacancies. That is true for example, with respect to the assistant U.S. attorneys.

The other reason is that in the one benefit program that we have which doesn't involve many positions, we are asking for an increase of a little more than three quarters of a million dollars. That doesn't relate to positions at all, so it means more money with the same number of positions.

Senator THURMOND. I note under general legal activities there is a requested increase for 18 new positions and $543,000 for increased prosecution of criminal civil rights violations. What kinds of cases are involved that merit this increase?

Mr. CIVILETTI. We get a very substantial number of requests, I think somewhere in the neighborhood of 12,000 cases or complaints per year of abuse of sections 241 and 242; that is civil rights violations by individuals under color of law, by sheriffs, by police departments, by State police or whatever.

We want to promptly investigate those cases and to advise the affected parties of the results of the investigations.

One of the worst things for the police department and for a community is to have these pending allegations stay open without resolution.

Last year, for example, out of the 12,000 or so which we are duty bound to investigate and consider, some 3,000 were selected for more intensive investigation. In other words, we found 9,000 to be without merit sufficient to justify proceeding with any additional investigation.

We then must be able to proceed expeditiously with the remaining 3,000 to take last year's example. We must quickly and promptly make fair decisions with regard to those cases so that we get down to those which ought to be prosecuted and prosecuted promptly because they may involve wrongdoing. By doing that, we relieve the burden of suspicion on public officials, police officers, sheriffs and whatever, those who may be unfairly accused, and removed that cloud from the performance of their duties. At the same time, we protect the rights of citizens, and particularly minorities, who are from time to time, unfortunately, subject to wrongful conduct under color of law.

Senator THURMOND. Mr. Attorney General, the Department's request for the Immigration and Naturalization Service includes a reduction of 199 positions for Border Patrol and related activities.

Your statement indicates that any increase in Border Patrol positions should be deferred until the Select Commission issues its report.

I was wondering if it would not be reasonable to assume that any significant decreases in Border Patrol personnel also be deferred until after the select commission report?

Mr. CIVILETTI. That is certainly arguable, Senator. We have increased the actual number of people in the Border Patrol. I believe we have done so every year for the last 3 years. The number of men who are now in service would not be affected by this decrease in positions. That is, we are not taking people off the border or out of the Border Patrol. This is an adjustment of unfilled positions only.

As you suggest, it is arguable that that adjustment might be unnecessary.

Senator THURMOND. Mr. Attorney General, what specific steps is the Department planning to take to comply with the consultation requirements of the recent Refugee Act of 1980?

Mr. CIVILETTI. I don't know the answer to that question, Senator. I will have to consult someone here with me to answer. [Pause.] I can give you a quick answer now and submit a more detailed answer to you in writing. We haven't had a consultation since the passage of the act.

As we did prior to this new legislation, when the Attorney General exercised parole authority with regard to refugees, I intend to consult closely with the respective committees in the House and the Senate, as well as with the State Department, before any action of any kind is taken.

Senator THURMOND. If you would like to answer that more fully for the record, feel free to do so.

Mr. CIVILETTI. Thank you sir.

Senator THURMOND. I was just wondering now, the President, I understand it, is going to submit a request to cut the budget maybe $16 billion or some such amount. Have you taken any of that into consideration or have you submitted recommendations as to where the Justice Department could be reduced?

Mr. CIVILETTI. Yes; we have gone back and forth with different proposals, suggestions, and combinations. It is very hard for the Department of Justice, since we only have essentially three types of operations. We have investigators, prosecutors, and LEAA.

So, if you are going to cut the Department of Justice budget, you have to cut either investigators, prosecutors, trial lawyers, or LEAA. We are reluctant to cut any of them. But if we are going to bear our fair share, then we have to try to preserve the best of what we have and still meet the commitments to try to balance the budget.

I have worked with Mr. Rooney of the Justice Management Division, with the Deputy Attorney General, and with the heads of different offices to try to come up with combinations of plans which will have the least substantive impact on the Department and its operations, but still meet the fact of life that inflation is eating all of us alive.

Senator THURMOND. I was just a little surprised to see you asking for this increase of over half a million dollars for these 18 new positions. Do you really feel that it is necessary?

In other words, now is the time, as I understand it, to cut instead of increase.

Mr. CIVILETTI. I think it is necessary. Some of the allegations or assertions to the Department of Justice with regard to civil rights violations have been more than 1 year old. Some of them are 1½ or 2 years old. We have cut into the backlog, but to allow some of those allegations, which are serious, to go unattended is a great jeopardy both to the community and to the policemen and women who are trying to enforce the law.

That was a judgment that we made with regard to this particular effort because of the complaints that we have received, and the attention we have received from both sides of the issue, from associations like the International Association of Chiefs of Police, as well as minority group associations such as the American Civil Liberties Union, MALDEF, LULAC, and others.

Senator THURMOND. I was thinking if you are going to increase something, you might consider increasing that Lands Division. I understand they are years behind and land is going up, and has been going up for a number of years now in value. When the Government postpones those cases they are going to have to pay more money for the land they acquire.

Mr. **Civiletti**. Yes; I agree with that.

Senator **Thurmond**. Wouldn't that be more urgent to the Justice Department than some of these other positions that might be delayed?

Mr. **Civiletti**. We considered that. Last year, your argument and your viewpoint were well considered, and I think we increased the Lands Division last year by about 35 or 40 positions. That is more than twice as many as we are asking for civil rights. It takes a while to integrate some of those positions and get them operating correctly. You don't want to keep adding on positions every year. You get to a point where you have inefficiency and waste built in.

But on land condemnation the point is well taken. I have considered that and I have added extra people. I have also, in some instances, developed a plan to look for counsel from some other parts of the Government to assist in land condemnation work.

I have also specifically assigned some assistant U.S. attorney positions to handle land condemnation cases so they are tried faster, so the number of tracts are reduced and, of course, the interest payments and ultimate jury awards are not subject to the inflationary factors which would arise from having to pay 2 or 3 years from now.

Senator **Thurmond**. That is about all the questions that I have at this time. I want to say this. About a week or 10 days ago, I made a statement on the floor of the Senate to the effect that I felt that Congress should not interfere with your ABSCAM investigations.

I don't think you ought to have to reveal the evidence that you have in those cases. I think you ought to push those cases, whoever it affects, whether it is a Member of Congress or anybody else. If there is corruption or dishonesty there it ought to be exposed and the proper action taken.

I just want to say that I hope you will not give ground on that, that you will stand fast so the truth can come out. I think that the American public is entitled to know the kind of representatives they have in the Congress and in other positions of Government. Wherever the truth falls, that is where it should be.

Mr. **Civiletti**. Thank you, Senator.

Senator **Thurmond**. Thank you, Mr. Chairman.

Senator **Heflin** [acting chairman, presiding]. I believe there will be a number of questions that will be submitted to you in writing later. I have just one or two questions and we can wind this up. This has been requested by another Senator.

The Hispanic American community expressed reservations about your appointment as Attorney General. There groups expressed concern again, with regard to the nomination of Judge Charles B. Renfrew as the Deputy Attorney General.

They specifically requested a progress report on various commitments that you made at the time, and those that were at the time of Judge Renfrew's confirmation. Can you give the committee a progress report on the commitments?

Mr. **Civiletti**. All right. Would you like me to give it to you now?

Senator **Heflin**. I believe if you will, submit it in writing.

Mr. **Civiletti**. All right.

Senator **Heflin**. Unless you want to make a sort of a summary, a brief summary of it.

Mr. **Civiletti**. I can make a brief summary.

I made about 10 or 12 specific commitments which were well within my personal ideals and goals. I think, they fit the needs of the Hispanic community particularly, but also of other minority communities with regard to the Department of Justice activities, and they covered the range of affairs from employment and hiring to litigation and suits. Even more generally, there were commitments made with respect to responsiveness and communication to and from the Department regarding minority interests.

At the time of Judge Renfrew's hearings, he also discussed some of these issues and expressed his commitment to these initiatives and others.

Since August 1979, and through today, I think we have addressed each of the 10 or 12 commitments that I made. These include, for instance, the establishment of civil rights units in U.S. attorneys offices, which is well underway. I think there is a projected total of somewhere around 29 or perhaps 37 U.S. attorneys offices which will have distinct civil rights units in them. In addition, we now make press releases in Spanish, and we have employed two Spanish-speaking secretaries in the Office of Public Affairs so that complaints or inquiries can be made in Spanish.

Another accomplishment has been the hiring, for the first time in the recent history of the Department, of Special Assistants to the Attorney General, in my office, who are of Hispanic origin.

More than that, I have formed a Hispanic advisory group drawn from persons of Hispanic extraction or origin throughout the country, from varvious geographic regions, the public sector, the private sector, and representing the different countries of origin, which even in the United States give rise to different concerns. Among these are Mexican-Americans, Cuban-Americans, Puerto Ricans and others.

Those are some of the actions that have been taken, but as I say, there are about 12 areas in all in which we have taken those kinds of steps and made progress. None of them have been neglected. All of them are of primary interest.

Another area is the difficult question or issue with regard to police brutality or allegations of police brutality. I have two efforts underway with regard to that. One is an LEAA grant for an empirical study of the use of deadly force in police departments in various communities, and the second is the legal analysis of either statutory charters or regulatory requirements with regard to the use of deadly force, when weapons can be carried, when, under what conditions, and with what standards they are to be used. We are preparing to develop a national policy on the use of deadly force for the guidance of State and local law enforcement communities.

Senator **Heflin**. I also have some questions that other Senators requested pertaining to the Immigration and Naturalization Service. When can we expect the President to nominate a Commissioner and for you to select a Deputy Commissioner and special investigator authorized in last year's authorization?

Mr. **Civiletti**. Within 10 days.

Senator **Heflin**. Also, they would like public accounts depicting the plight of the Immigration and Naturalization Service which is often referred to as "grossly understaffed."

In your opinion, what would be the impact of the wisdom of authorizing no increased resources for INS until the completion of the independent management analysis called for in last year's Authorization Act?

Mr. **Civiletti**. My impression is that that is sound. I think that we will find out that many of the questions which relate to inadequacies in INS do not relate to employment numbers or staffing, but rather relate to what people are doing, where they are assigned, and the nature of the work that they do.

I think you would have some danger of compounding the problem by simply adding gross numbers to INS when you have not relieved the inadequacies in policy or in law by sound management decisions.

Senator **Heflin**. One last question. I recently had an interview in my office and was brought up to date by Mr. Ira Schwartz, who I believe is Director or administrator of the Juvenile Justice and Delinquency Prevention Center of the Department of Justice.

In making an analysis , we finally came to the conclusion that, of the funds of that agency or division of the Department, about 98.5 percent was really spent in the administration of delinquency and juvenile justice, and only about 1.5 percent was being spent on programs designed to prevent juvenile delinquency.

It seems to me that there is some imbalance in that. I personally would appreciate it if you would look into it a little bit yourself.

Mr. **Civiletti**. I will.

Senator **Heflin**. Thank you, Mr. Attorney General. We appreciate your being here. We appreciate your kind, candid, forthright answers.

Mr. **Civiletti**. Thank you, Senator.

[The prepared statement of Mr. Civiletti follows:]

PREPARED STATEMENT OF ATTORNEY GENERAL BENJAMIN R. CIVILETTI

I am pleased to have the opportunity to appear before this Committee to seek funding authorization for the activities of the Department of Justice for fiscal year 1981.

Last year, while testifying before the Committee, I stated that the authorization process guarantees that there is a partnership between the Congress and the Executive branch of government in the formulation of policy and program direction regarding this nation's criminal and civil justice system. I reiterate that position, and, again, welcome the opportunity to share with you the Department's program and fiscal plans for fiscal year 1981.

Supporting data and material, including the Department's proposed fiscal year 1981 Authorization bill, have already been submitted to you. I believe these contain sufficient information to assist this Committee in its deliberations. I would like to examine with you at this time the more pertinent factors which influenced our fiscal year 1981 request, and highlight those activities for which we intend to increase our efforts.

Our request reflects three themes. First, our request is consistent with the President's policy of minimizing Federal Government spending to assist in the fight against inflation. Second, it represents our continuing efforts to concentrate funding in our law enforcement bureaus on areas of a national priority which cannot effectively be handled at the state and local level. Finally, the Authorization request reflects our policy of establishing realistic priorities. Priority setting, as you know, often requires difficult trade-off decisions among various programs. This request represents such hard decisions in certain instances.

You will note that while our resource request represents a net decrease in positions, we have increased resources for our highest priority programs. These priorities are consistent with the major initiatives the Department has undertaken in recent years. In the law enforcement and criminal prosecution areas, we propose to apply additional resources to fight organized and white-collar crime, to prosecute criminal civil rights violations, to conduct foreign counterintelligence operations, to address fraud against the Government, and to combat high level narcotics trafficking. In addition, we are encouraging state and local governments to assume more responsibility for crimes which are local in nature and for which there is concurrent jurisdiction. The Department will also diligently investigate and prosecute the denaturalization and deportation cases of alleged Nazi war criminals. I would like to point out here that, to assist you in reviewing our commitment to this effort, we have included a clearly distinguishable provision for this effort in our proposed fiscal year 1981 Authorization bill.

In the corrections area, antiquated penitentiaries will continue to be phased out and we are recommending statutory authority to permit the use of funds from the Support for U.S. Prisoners activity to provide limited financial assistance to improve local detention facilities which house federal prisoners on a contractual basis. In the area of litigation, the Department plans to develop further our litigation support and management systems. Finally, a significant initiative of this Committee during last year's authorization process the appointment of a Special Investigator for the Immigration and Naturalization Service—has also been included in the Department's proposed fiscal year 1981 Authorization proposal.

In the coming weeks, Department officials are appearing before your subcommittees at your request to answer questions on specific programs under their direction. Today, I would like to outline briefly our request in support of our program plans for 1981.

LITIGATION

Our request for the Department's General Legal Activities is modest and represents an increase of 2.6 million dollars and 38 positions over the current level. Requested staff increases are concentrated on expanding the efforts of our Economic Crime Units, increasing our investigation and prosecution of criminal civil rights violations, and improving our coordination and review of Title VI programs.

To improve our management of existing litigation resources, a top management priority of mine and an area which has been of considerable interest to this Committee, we are requesting resources to develop or improve current automated litigation management and support systems. I feel strongly that we can use current resources more efficiently by utilizing these management techniques, and a member of my immediate staff is coordinating the Department's efforts in this area.

Our request also reflects a $4 million decrease due to the discontinuance of the State Antitrust Grant program, which was begun in 1977. By the end of 1980, 25 million dollars will have been provided to State governments to develop antitrust activities. We believe that this initiative has served its purpose in providing seed money and that it is now appropriate for the Federal Government to end its financial assistance.

For the U.S. Attorneys, we are requesting an increase of 33 positions. This includes a transfer of 11 positions from the Associate Attorney General's Office for the Legal Education Institute, 4 positions for the Attorney General's Advocacy Institute, which is actively conducting a program to improve attorney training, and 18 positions related to automated information systems. The request also includes $4.5 million to bring the total of on-board U.S. Attorney employment closer to the current authorized position level. I have also made it one of my goals to ensure the highest degree of professional competence for our practicing lawyers. For this reason, I intend to merge the legal Education Institute and the Attorney General's Advocacy Institute within the Executive Office of U.S. Attorneys. The new unit will be called the Office of Legal Education. The Office will offer courses in administrative and non-litigation matters and will emphasize the effects of new regulations and laws. In addition, techniques of vigorous, and ethical advocacy will be taught through intensive practical training sessions.

LAW ENFORCEMENT

An effective criminal justice system begins with proper law enforcement activities. The Department of Justice will continue to pursue vigorously the detection and investigation of criminal law violators. For fiscal year 1981 the highest national law enforcement priorities will continue to be foreign counterintelligence activities, organized crime, white collar crime, public corruption, and narcotics trafficking.

To demonstrate our commitment to these priorities, we are requesting an increase in positions for the FBI's organized crime and white collar crime programs. We are confident that these increases will do much to facilitate the prosecution and conviction of major offenders in these areas. The proposed increases are offset by decreases in lower priority programs and more efficient field programs, such as fugitive apprehension and state and local assistance programs, primarily fingerprint identification. None of these reductions include special agents, and the reductions in the fingerprint identification program are the result of successful automation of the fingerprint program and the conversion of a number of full time positions to part time positions.

The Department's authorization request for the Drug Enforcement Administration includes a personnel increase for domestic enforcement. This will further enable Federal agents to concentrate on the disruption of organized drug trafficking of the most dangerous drugs. Staffing levels will be slightly reduced for state and local assistance programs in areas where state and local governments can assume additional responsibility. A funding level increase of $1,000,000 is requested to begin development of a voice privacy communication system. The lives of DEA agents and the success of DEA enforcement activities are presently being jeopardized by the interception of operational radio communications.

The authorization request for the U.S. Marshals Service includes modest staff increases for the execution of federal fugitive warrants. In addition, an increase for the Witness Security Program will improve and augment assistance and social services for protected witnesses. These new resources will also enable the Marshals Service to increase extraordinary protection to critical government witnesses whose lives may be in jeopardy because of their testimony.

Staff decreases for the Marshals Service will occur in two areas. There will be a 370 position decrease for the court security program. This decrease will not result in any actual reduction in security services, but represents the decision to have the Department continue to reimburse the General Services Administration for judicial security guard services in lieu of the Marshals Service establishing its own separate program. Second, we are proposing a decrease of 234 positions as a result of proposed legislation to discontinue the service of civil process for private litigants. Section 8, of our proposed fiscal year 1981 Authorization bill addresses this issue. We believe the service of private process can and should be performed by private enterprise. In the past, the Government's failure to recover the costs involved has had the effect of granting a subsidy to a small segment of society which uses this service. You will note that our proposed legislation makes allowances for this service, however, in the case of indigents or when the court orders it in extraordinary circumstances.

Increases are included for the Immigration and Naturalization Service to help reduce waiting time for adjudications benefits, address the additional workload resulting from increased numbers of Indo-Chinese refugees, and to complete the rehabilitation of the Port Isabel, Texas Service Processing Center. While actual on-board Board Patrol staff will remain at or exceed current levels, the budget requests a modest reduction in authorized positions. We believe that increases of any significant border enforcement personnel should be postponed until the Select Commission on Immigration and Refugee Policy issues its report. This report should assist in developing agreement on statutory changes to remove the incentives for illegal immigration, an action that, we believe, may obviate the need for large resource increases for border enforcement personnel.

I also want to assure you that management practices within INS are receiving my personal attention. As I have stated, the Special Investigator provision, developed by Congress and made part of the fiscal year 1980 Authorization Act, is part of the Department's proposed fiscal year 1981 Authorization bill and we are moving forward on a major management review of INS by the President's Management Improvement Council. I am confident that the results of these two initiatives will greatly assist in improving the management and efficiency of the Immigration and Naturalization Service.

CORRECTIONS

Recent prisoner declassification efforts and the increased use of halfway houses have contributed to a reduced federal prisoner population. As a result, the authorization request reflects the closing or phase-down of three antiquated penitentiaries—McNeil Island, Leavenworth, and Atlanta. I am well aware that the closing or restructuring of these antiquated facilities has been a long standing objective of this Committee. We believe our proposed actions address the concerns of this Committee.

New resources are requested for the activation and expansion of previously approved institutions. To assure humane care and custody of offenders, modest staff increases are also requested for inmate services such as medical care, vocational training, and drug aftercare programs. Improved medical care was another major initiative of the Committee last year. Medical services at the Springfield, Missouri Medical Center will be improved and additional resources will be made available to expand and upgrade the quality of medical services at a number of other existing facilities.

OTHER REQUIREMENTS

In conclusion, the Authorization request also proposes small personnel increases in key staff offices within the Department. Included in these items are modest staff increases to support essential activities in my immediate office, the Office of Professional Responsibility, and the Office of Information Law and Policy, as well as for the critical library support services and Equal Employment Opportunity efforts conducted by the Justice Management Division. A decrease of $5 million is proposed from the current 1980 level for the special State and Local Drug Grant Program for which funds were included in the General Administration Activity account.

Senator **Heflin**. Thank you.

This hearing is adjourned, subject to the call of the Chair.

[Whereupon, at 3:15 p.m., the hearing was adjourned, subject to the call of the Chair.]

DEPARTMENT OF JUSTICE AUTHORIZATION
EXECUTIVE OFFICE FOR U.S. ATTORNEYS

WEDNESDAY, MARCH 12, 1980

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 9:35 a.m., in room 2228 of the Dirkson Senate Office Building, Senator Thad Cochran, acting chairman, presiding.

Present: Senator Cochran.

OPENING STATEMENT OF SENATOR COCHRAN

Senator COCHRAN. The hearing will come to order. Today we are going to be considering the fiscal 1981 authorization for the U.S. Attorneys Office. In addition to today's hearing, there will be a second day of testimony from the Executive Office of the U.S. Attorneys on April 21.

The purpose of today's hearing is to develop a committee record on how the U.S. attorneys carry out the duties assigned to them by law. The committee cannot realistically review the day-to-day operations of individual U.S. attorneys; however, it can and should look into first, the management of the U.S. attorneys by the Executive Office of the U.S. Attorneys and, second, the implementation of departmental policies and priorities by the individual U.S. Attorneys.

Our first witness is Mr. William P. Tyson, Acting Director of the Executive Office of the U.S. Attorneys. Mr. Tyson, I want to welcome you in behalf of the committee and to thank you very much for appearing to help us with these hearings. I understand you have a statement which we will include as a part of the record at this point. You may proceed as you like.

STATEMENT OF WILLIAM P. TYSON, ACTING DIRECTOR, EXECUTIVE OFFICE FOR U.S. ATTORNEYS

Mr. TYSON. Thank you very much, Mr. Chairman. We are certainly pleased at the interest of the committee and, in particular, this subcommittee in the activities of the U.S. attorneys, and are most pleased to come here this morning and to address the interest and concerns of the committee. I am accompanied by three U.S. attorneys this morning, Mr. William B. Gray, U.S. attorney in Vermont, Mr. Robert J. Del Tufo, U.S. attorney for New Jersey, and Mr. James K.

Robinson, U.S. attorney for the Eastern District of Michigan, who has not yet arrived but should be here shortly.

I have submitted to the committee staff a 12-page prepared statement addressing issues which a member of your staff requested to be addressed. Messrs. Gray, Del Tufo, and Robinson have also submitted statements concerning themselves and their districts.

I would like to summarize for the committee the remarks in my 12-page statement, if I may submit my statement for the record. My summary will take approximately 10 minutes.

Senator COCHRAN. Thank you.

Mr. TYSON. I will discuss the role of the U.S. attorneys as policymakers, the control and supervision of U.S. attorneys, and factors influencing the operation of the individual U.S. Attorneys offices and the Attorney General's Advisory Committee on U.S. attorneys.

By way of background, I would note that U.S. attorneys are thought of most frequently in their law enforcement role as prosecutors. However, the largest volume of their work is in providing representation for the U.S. Government in civil law suits filed by or against the Government. On the criminal enforcement side, some 99 investigative agencies report alleged violations to the U.S. attorneys. Most of the violations reported to them are violations of both State and Federal law. Therefore, considerable effort is expended by the U.S. attorneys and the Department through Federal-State law enforcement committees and other means to work out cooperative arrangements under which the State and local authorities agree to prosecute their fair share of these violations particularly those that do not merit Federal prosecution.

Accordingly, the vast majority, some 60 to 65 percent, of violations reported to the U.S. attorneys are declined in favor of State and local prosecution. Others are declined due to insufficient evidence and other factors. Federal prosecutorial resources, generally speaking, are minimal as compared to the State and local authorities. For example, the State of California has more prosecutors than the U.S. Department of Justice. Now, this is not true everywhere, of course, and the capability and the willingness of the State and the local authorities is always taken into account in making prosecutorial decisions. By carefully conserving their resources, U.S. attorneys are able to concentrate on the crimes that merit Federal prosecution including the administration's four major priorities of white collar crime, official corruption, major narcotics trafficking, and organized crime.

The total number of criminal cases filed in fiscal year 1979 was approximately 31,000. On the civil side, U.S. attorneys handled about 135,000 civil cases filed with the courts in fiscal year 1979, and some 76,000 unfiled matters principally claims to recover debts owed to the Government.

There are 95 districts and we have 161 staffed offices. This, of course, includes a number of branch offices in the various districts. But we have 95 districts and we have 94 U.S. attorneys. There is one U.S. attorney in Guam and in the Northern Marianas Islands who serves two districts. There are 1,960 assistant U.S. attorneys, 247 paralegals, and 2,064 clerical support persons. The Executive Office of the U.S. Attorneys has 11 attorneys and 44 support persons. The

Executive Office is responsible for some legal support for the professional training of attorneys through the Attorneys General Advocacy Institute and the Legal Education Institute, and is responsible for financial, administrative, and personnel support. With respect to their policymaking roles, the U.S. attorneys are very influential on the criminal law enforcement side. I have pointed out that they establish prosecutorial policies in the light of the needs of the local community and the ability and willingness of State and local law enforcement authorities to handle cases of concurrent jurisdiction cases. The U.S attorneys also influence Department policy through the Attorney General's Advisory Committee and through submission of comments directly on policy proposals including those that are published as "blue sheets" in the U.S. manual as temporary policy proposals.

On the civil side, there is less opportunity for U.S. attorneys to influence policy. Most of the civil litigation is in defense of suits filed against the Government by private parties. The affirmative litigation in which the United States is plaintiff reflects policies and programs of other Federal Government agencies for which the U.S. attorney serves as the plaintiff's attorney.

As to the control and supervision of U.S. attorneys, they are appointed by the President, as you know, with the advice and consent of the Senate. The Attorney General has statutory authority to supervise them and to require reports on their activities. The Attorney General's authority is exercised through the Deputy Attorney General for Criminal Enforcement Matters and the Associate Attorney General for Civil Matters. In the line of the chain of command, U.S. attorneys are under the Deputy Attorney General.

Certain of the Assistant Attorney General's authority and responsibility for conducting litigation has been delegated to the Assistant Attorneys General of the legal divisions and they exercise varying amounts of policy direction over U.S. attorneys in their perspective areas. Management of nonlitigating functions of U.S. attorneys is assigned to the Executive Office for U.S. Attorneys.

Policies promulgated by the Attorney General, the Deputy Attorney General, the Associate and the Assistant Attorneys General are promulgated chiefly through the multivolume, looseleaf United States Attorneys Manual. An enormous amount of authority is delegated to U.S. attorneys in the handling of litigation in their districts. Around 95 percent of criminal cases are referred directly to the U.S. attorney by the agencies and around 60 percent of all civil cases are referred directly to them by investigative and client agencies. The remaining cases are controlled by the legal divisions and, in many instances, are tried by their attorneys.

The Executive Office is responsible for general administration, personnel funds, and training. This includes classification of support positions, the appointment, promotion, and discipline of support employees as well as the authority to impose reprimands on assistant U.S. attorneys.

The authority to appoint, fire, and exercise other disciplinary measures on assistant U.S. attorneys is exercised by the Deputy Attorney General.

As to operations of the various U.S. Attorneys offices, the offices vary in size from 2 assistant U.S. attorneys in Wyoming, Guam, and the Canal Zone, to more than 100 assistant U.S. attorneys in the Southern District of New York and in the District of Columbia. Some 39 districts have less than 10 assistant U.S. attorneys, and 6 districts have more than 50.

Office operations are influenced by geography and by the type of caseload. Many rural districts have several places of holding court and much travel is required by the attorneys to the various places of holding court. Some offices, especially in the wide open spaces in the West, require several branch offices at different locations in order to serve the courts. Most offices that are large enough are divided into criminal and civil sections and, in larger districts, subdivided into units handling specialized matters such as frauds, narcotics, official corruption, organized crime, tax, civil rights, appeals, land condemnation, and other specialized subject areas.

Most offices also have a centralized collection unit to collect the debts owed to the Government as a result of fines and forfeitures imposed by the court.

We try to have a competent nonlawyer administrator in each office to relieve the U.S. attorney of administrative burdens. Unfortunately, there are some offices where we have not been successful and the U.S. attorney or his chief assistant carries out many administrative duties. Then, there are some U.S. attorneys who enjoy administration and prefer to serve in an administrative role. In an ideal situation, the U.S. attorney manages and supervises litigation and is himself or herself an active litigator such as the three U.S. attorneys here with me today.

Finally, a few comments on the Attorney General's Advisory Committee of U.S. Attorneys. The committee was established in 1973 by Attorney General Elliott Richardson. It was formalized in 1976 by an AG order published in the Code of Federal Regulations. The committee is composed of 15 U.S. attorneys who have staggered terms so that one-third changes each year. The membership represents a cross section of U.S. attorneys who are selected to insure geographical distribution, representation by circuit, and representation by size of office. The committee meets approximately quarterly. It advises the Attorney General, the Deputy, the Associate, and the Assistant Attorney Generals. Their advice is both sought and volunteered. The committee has a number of subcommittees that study special issues and areas to make investigative reports or to make reports on areas in their area of interest. For example, today the subcommittee on investigative agencies is meeting here in Washington with the representatives of the various investigative agencies. Also, there are subcommittees on legislation, Indian affairs, and other special subjects.

One of the committee's greatest contributions was to oversee a revision of the United States Attorneys Manual to bring the policy promulgations up to date a few years ago for the first time in about 20 years, and to serve as an editorial advisory board for the publication of the manual. This committee also reviews proposed policy changes that are issued as temporary policies or blue sheets in the manual.

I know there are other sources of interest and concern to the committee. My colleagues and I would be happy to discuss those areas and to further amplify any of the comments that I have just made.

Senator COCHRAN. Thank you very much, Mr. Tyson. I again want to express on behalf of the committee, our sincere appreciation for the work you have done in preparing this information for the committee, giving us this outline of responsibilities and the organizational structure for the various U.S. Attorneys offices throughout the country.

Inasmuch as you will be back before the committee on the second day of hearings on April 21, I think I will defer any real questions until that time. I am curious about one matter, and that is, the selection process for assistant U.S. attorneys. Is that discretionary with the U.S. attorneys themselves, or does your office exercise any power in that regard?

Mr. TYSON. Mr. Chairman, basically the U.S. attorneys recruit the assistants for their office, under some general guidelines issued by my office concerning professional qualifications and personal qualifications. My Office has published material that will be helpful to the U.S. attorneys in screening the applicants so that their applicants will meet professional and personal standards of the Department of Justice Code of Conduct and also there are some policies that have been effectuated over the past several years concerning affirmative action hiring and all of the applicants for the U.S. attorneys jobs must be approved by the Employment Review Committee which is established to insure appropriate affirmative action in filling these jobs. But, as far as the procedure, we of course review the applicants that are submitted by the U.S. attorneys to insure that these guidelines or suggestions have been complied with. As I say, the initial recruiting is done by the U.S. attorneys. We do not hire centrally—we do not accept applications in my Office and refer them to the U.S. attorneys to fill the positions in their office. It is the other way around.

Senator COCHRAN. Well, thank you again, Mr. Tyson, for being here. We appreciate your cooperation with the committee.

Mr. TYSON. Thank you, sir.

[The prepared statement of Mr. Tyson follows:]

PREPARED STATEMENT OF WILLIAM P. TYSON

I am William P. Tyson, Acting Director of the Executive Office for United States Attorneys. The invitation of the subcommittee is most welcome. I appreciate this opportunity to discuss with you today the U.S. Attorneys role in the formulation and execution of Department of Justice policies, the manner in which their offices operate, their relationships with other Department of Justice organizations, and any other specific issues of concern to the Committee. Pursuant to your invitation, the following United States Attorneys are here with me representing small, medium, and large U.S. Attorney's offices, to address the Committee's concerns. They are Mr. William B. Gray from the District of Vermont, Mr. James K. Robinson from the Eastern District of Michigan, and Mr. Robert J. Del Tufo from the District of New Jersey.

BACKGROUND

In order to appreciate fully the functions and responsibilities of U.S. Attorneys, it is important to understand how they operate at a critical link in the fabric of American Government. The concept of federalism, as embodied in the Constitution, has produced a complex arrangement of national, state and local law enforcement institutions to administer justice. The U.S. Attorneys presecutorial authority is confined to the offenses established by the Congress. However, most of the offenses defined in federal criminal law are also offenses under state laws. Thus, for most criminal activity, there is overlapping Federal and State jurisdiction. U.S. Attorneys and their state and local counterparts must attempt to define their responsibilities to avoid duplicating efforts. To this end, many U.S. Attorneys have established federal/state law enforcement committees with the Department's full support, to address common problems including how best to deal with the investigation and prosecution of concurrent jurisdiction offenses.

The resources which the federal government devotes to criminal prosecutions are minimal compared to those of state and local authorities. The State of California, for example, has more prosecutors than the Department of Justice. Accordingly, the Department must focus its resources on those offenses for which the Federal government has exclusive jurisdiction, offenses which involve multidistrict criminal activities of a complex nature that uniquely fit within the capabilities of Federal law enforcement officials, cases in which the Federal government has a particular interest such as fraud against the Federal government, and cases which have been established as the Administration's priorities.

The framers of the Constitution envisioned the administration of justice as a function for the most part reserved to the states and local governments. Since the Judiciary Act of 1789, the organization of Federal judicial districts has deferred to the geographical arrangement of state and local jurisdictions. Thus, no Federal judicial district encompasses more than a single state; and in states with more than one Federal judicial district, the boundaries of each district correspond to the geographical jurisdiction of the county or parish governments established by the states.

There are today 95 Federal judicial districts in which 94 U.S. Attorneys[1] serve as the statutory representative of the national government's legal authority. The duties of U.S. Attorneys are set forth in 28 USC 547, and require U.S. Attorneys to: (1) prosecute for all offenses against the United States; (2) prosecute or defend for the Government all civil actions, suits, or proceedings in which the United States is concerned; and (3) institute and prosecute proceedings for the collections of fines, penalties, and forfeitures owed to the United States. The offices of the U.S. Attorneys are staffed by 1960 Assistant U.S. Attorneys, 247 paralegal specialists, and 2,064 support positions. The Executive Office which is responsible for the management, support and professional development of U.S. Attorneys and their staffs is staffed by 11 attorneys and 44 support personnel.

U.S. ATTORNEYS AS POLICYMAKERS

U.S. Attorneys serve not merely as executors of national litigation policies, but they play a significant role in the formulation of national litigation policy. In administering their offices, U.S. Attorneys develop their own priorities within the guidance provided by the Attorney General and the Department of Justice and within the needs of the communities they serve. The recent report to the Congress entitled "United States Attorneys Written Guidelines for the Declination of Alleged Violations of Federal Criminal Laws" discusses the prosecutorial guidelines which have been established by many U.S. Attorneys to address the law enforcement requirements of their districts within the context of national law enforcement priorities. They also participate in the formulation of national policy through the Attorney General's Advisory Committee and by submitting comments on policy proposals.

An important factor considered by U.S. Attorneys in the formulation of prosecutorial policies is the ability and willingness of state or local authorities to prosecute for the offense. As discussed above, most violations of Federal law also violate state laws, and U.S. Attorneys must consider the capability and willingness of local officials to meet the law enforcement demands on a case-by-case basis. The exercise of the U.S. Attorney's discretion to prosecute a particular violation may be different in a metropolitan area of the district than it is in a rural area that may have limited prosecutive and investigative resources.

Another important factor which is considered by U.S. Attorneys in the formulation of their prosecutorial policies is the concerns and needs of the local community. Districts located on the nation's borders normally have different types of criminal activity from districts in the interior of the country. Highly urbanized districts have different criminal activity from rural districts. In developing the prosecutorial priorities of his or her office, the U.S. Attorney must consider a number of factors in addition to the district's normal caseload and the Administration's priorities, such as the applicability of state laws which may vary considerably, the presence of military installations, V.A. hospitals, national parks, forests, Indian reservations and other areas of special Federal jurisdiction, the presence (or absence) of Federal investigative agencies, the resources of the Federal judiciary, and the needs and desires of the communities served.

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[1] The U.S. Attorney for the District of Guam also serves as the U.S. Attorney for the District of the Northern Marianas; thus there is one less U.S. Attorney than there are districts.

The U.S. Attorneys must decline to prosecute many of the complaints which are presented to them in order to concentrate their limited resources on the Department's priority programs. The offense categories for which U.S. Attorneys have developed declination guidelines represent for the most part crimes for which there is concurrent jurisdiction, such as stolen vehicles, bank robberies, drug offenses, and other stolen property violations. It is significant that the most commonly mentioned factor referred to in these guidelines is whether the offense will be adequately prosecuted at the state or local level or by another Federal district. Other important factors considered by U.S. Attorneys include the seriousness of the offense, alternatives to prosecution, the offender's criminal history, the likelihood of conviction, and the sufficiency of the evidence. The guidelines vary from district to district according to the degree to which the crime is considered "serious," especially if it involves a quantifiable offense involving money, drugs, weapons, etc. All the districts apply these guidelines on a case-by-case basis as a flexible set of criteria to which the indiviual prosecutor must add practical experience, good legal judgment, and a careful consideration of extenuating or aggravating circumstances.

The Criminal Division is now completing the declination study required by Congress in the fiscal year 1979 Authorization Act for the Department of Justice. The data collected for the report indicate that in actual practice, the major reasons cited by the U.S. Attorneys for declining to prosecute include referral to other authorities, insufficient evidence, no criminal violation, no known suspects, and insufficient Federal interest, or trivial offense.

The U.S. Attorneys exercise less policy decision-making authority in civil litigation because much of this work is in defense of the Government and much of the litigation involving precedent-setting cases is handled by the legal divisions of the Department. Most affirmative civil litigation handled by U.S. Attorney reflects policies and program decisions made by other federal agencies for which the U.S. Attorney is the legal representative in court. The U.S. Attorneys are concerned about maintaining high professional standards for all litigation conducted by their offices, regardless of the agency or program they are representing, because they appear constantly before the same Federal judges and must maintain a reputation for excellence.

CONTROL AND SUPERVISION OF U.S. ATTORNEYS

U.S. Attorneys are formally appointed by the President, and the Attorney General possesses statutory authority to supervise them and to require reports on their activities. The Attorney General's authority over U.S. Attorneys is exercised chiefly through the Deputy and Associate Attorneys General for criminal and civil matters respectively. In the line chain of command, U.S. Attorneys are under the Deputy Attorney General. Certain of the Attorney General's supervisory responsibilities for the conduct of litigation have been delegated to the Assistant Attorneys General of the various legal divisions while the responsibility for the management of non-litigative functions has been assigned to the Executive Office.

Each of the six legal divisions has, with the concurrence of the Deputy Attorney General or Associate Attorney General and with the advice of the Attorney General's Advisory Committee of U.S. Attorneys, established policies and procedures for the guidance of U.S. Attorneys in their conduct of litigation. The policies are compiled in the United States Attorneys Manual which contains a separate title for the subject matter over which each division has responsibility. The divisions exercise control over the U.S. Attorneys in several ways: by reserving certain decision-making authority;[2] by requiring reports on specific events;[3] by intervening in the U.S. Attorneys relations with agencies outside the Department of Justice;[4] and by conducting selected cases directly. Although the legal divisions maintain considerable control over the U.S. Attorneys through these techniques, it should be noted that at least 95 percent of all criminal cases and approximately 60 percent of all civil cases are referred directly to U.S. Attorneys from investigative and client agencies[5]. U.S. Attorneys necessarily have substantial latitude to conduct litigation within their districts involving the 170,000 plus cases handled each year.

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[2] *c.f.*, Criminal Division restrictions on the initiation of prosecutions for certain offenses USAM9–2.131 *et. seq.* and Civil Division limitations on the value of claims against the Government which U.S. Attorneys may compromise. USAM4–2.120(b).

[3] *c.f.*, The Solicitor General's requirement that all judicial decisions adverse to the Government be reported promptly.

[4] *c.f.*, Most criminal tax investigations concluded by the IRS are referred to the U.S. Attorney only after the Division has made a determination to institute a prosecution.

While the legal divisions are responsible for the supervision of litigation conducted by U.S. Attorneys, the Executive Office for U.S. Attorneys possesses authority over them with regard to their non-litigative functions including general administration, personnel, funds, and training. The Executive Office exercises final authority over the classification of support positions, and it is responsible for the appointment, promotion, and discipline of support employees.[6] Although the Deputy Attorney General possesses final authority for the hiring, firing, and discipline of attorney staff, the Executive Office occupies a key position as the chief staff advisor to the Deputy Attorney General on such matters. The Director of the Executive Office has limited disciplinary authority over Assistant U.S. Attorneys. With regard to the development of budget requests, the Executive Office collects and evaluates the forecasts of individual U.S. Attorneys and then assembles a succession of budget submissions which represent its estimates of the U.S. Attorneys collective needs. Once an appropriation is established, the Executive Office is responsible for the management of available funds. Financial management is accomplished through direct control over the number of staff positions allocated to each district, the assignment of space, and the procurement of office equipment. U.S. Attorneys may, without the specific approval of the Executive Office, incur other types of expenses; however, the Executive Office closely monitors accounting reports on these areas of expenditure. The Executive Office also serves a liaison function for U.S. Attorneys with the legal divisions.

U.S. ATTORNEY OFFICE OPERATIONS

The organization of a U.S. Attorneys office is influenced by its size and the geographic location of the courts. U.S. Attorneys offices range in size from two Assistant U.S. Attorneys (Wyoming, Guam, and the Canal Zone) to over 100 Assistant U.S. Attorneys (the Southern District of New York and the District of Columbia). Thirty-nine districts have fewer than ten Assistant U.S. Attorneys, 30 districts have between ten and 24, and 25 have 25 or more Assistants. Six districts have more than 50 Assistant U.S. Attorneys. In many districts, court is held in more than one location and U.S. Attorneys must meet their needs through extensive travel or by staffing branch offices with Assistants and support personnel. This may divide the resources of a medium-sized district into two or three small offices.

The size of the office will determine the degree to which specialized functional units can be formed. Most offices split their resources into civil and criminal units. The larger offices may subdivide these units by type of offense or litigation, such as frauds, narcotics, official corruption, organized crime, tax, civil rights, and appeals. Some civil units may assign certain specialized litigation related to a specific agency or program to specific attorneys. Most offices have a centralized collections unit. The legal divisions in the Department normally delegate more case handling responsibility to those districts which have the resources to establish specialized expertise.

Another variation in office operations is the handling of cases in a vertical or horizontal fashion. Cases handled horizontally are assigned to the same Assistant U.S. Attorney through all stages of the process. Vertical handling involves assigning a case to more than one Assistant depending on the status of the case. Many offices, for example, have a special complaint unit which processes the initial stages of a case including the preliminary hearing and arraignment. Other offices may rotate the complaint unit function among the criminal division attorneys. In some instances the attorney who handled the initial proceedings keeps the case through its disposition while in other offices the case is assigned to another attorney for trial. In most districts the attorney who terminated the case at the district court level has the responsibility for any appellate activities.

The larger offices account for the largest caseload volume and the largest allocation of attorney resources. The seven largest districts handled about 22 percent of the national caseload in fiscal year 1979 and have about 30 percent of the attorney resources. These districts therefore have a lower average caseload per Assistant U.S. Attorney than the smaller districts. For example, the Southern

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[5] *Justice Litigation Management*, "A Review of the Process, Policy, Authority, Direction", April 1975, p. 17.

[6] 28 C.F.R. 139.

District of New York averaged 130 cases handled per Assistant in fiscal year 1979 while at least 18 small districts averaged over 200 cases handled per Assistant during the same period. This attorney/caseload ratio is not as inequitable as it appears because the larger districts normally handle more complex and manpower-consuming litigation. Workload studies have shown that the caseload in the larger districts is about three times more demanding in terms of attorney time required than the caseload in some of the smaller districts. The ability to assign attorneys to only one or two cases or investigations is usually possible only in the larger districts.

The number of supervisory attorneys in an office is also a function of size. It is very rare for a supervisory attorney to be totally without litigating responsibility in any office. Supervisory attorneys assign cases, review, work products, control decisions to authorize or decline prosecutions and to make compromises or settlements, deal with agents on sensitive matters, monitor the status of cases, and evaluate the performance of Assistants. Most large districts have a formal training and rotation program for new Assistants, in addition to training provided by the Attorney General's Advocacy Institute, that includes assignment to a special unit where activities are closely supervised, moot court sessions, seminars with experienced attorneys, observing courtroom performance, and second-chairing cases with experienced attorneys. This practice is unusally found in the larger districts because those districts tend to have a higher attorney turnover rate than the smaller offices because of the relatively higher salaries paid by law firms in large metropolitan areas.

The U.S. Attorneys handled about 135,000 civil cases filed with the courts in fiscal year 1979. This workload is largely uncontrollable as it represents defending other Federal agencies in suits filed against them or pressing their claims to recover money or enforce their programs. In addition, the U.S. Attorneys handled about 76,000 unfiled civil matters which represent primarily claims to recover debts owed to the Government. The criminal caseload volume is more controllable because the U.S. Attorneys normally decline to prosecute approximately 60 to 65 percent of the complaints brought to their attention. In addition, the criminal caseload volume has been decreasing in several areas as a result of the Department's emphasis on prosecuting those offenses which the Federal criminal justice system is best equipped to handle such as white collar crime, organized crime, and other major multi-district and international criminal activity, etc. The decline in the overall criminal caseload volume is more than offset by the increase in the workload impact associated with the emphasis on prosecuting complex business frauds, organized crime activities, narcotics smuggling, and large scale fraud in Government programs.

The administrative functions of a U.S. Attorneys office are normally handled by the administrative officer who is a non-attorney. The administrative officer hires and manages the clerical support staff which includes secretaries, legal technicians, docket clerks, librarians, receptionists, and personnel who sort and deliver mail and dispose of records. This function also includes controlling the use of equipment, space, and finances. These activities are monitored centrally by the Executive Office for U.S. Attorneys. Normally the number of support staff positions allocated to an office is equal to or slightly more than the number of attorney positions. In recent years paralegal positions have been added to the U.S. Attorneys appropriation and these positions have assisted the offices greatly in extending the capabilities of the professional staff.

THE ATTORNEY GENERAL'S ADVISORY COMMITTEE OF U.S. ATTORNEYS

The Advisory Committee was originally established in 1973 and was formalized in 1976 by order of the Attorney General (see C.F.R. 0.10). The Committee is made up of 15 representative United States Attorneys who serve at the pleasure of the Attorney General. The Committee makes recommendations to the Attorney General and other departmental officials with respect to establishing and modifying policies and procedures of the Department; improving management, particularly with respect to the relationships between the Department and United States Attorneys, cooperating with State Attorneys General and other state and local officials for the purpose of improving the quality of justice in the United States; promoting greater consistency in the application of legal standards throughout the nation and at the various levels of government; and aiding the formulation of new programs, for improvement of legislation of court rules.

The Committee has standing subcommittees on allocation of resources and case responsibility, Department of Justice field offices, investigative agencies, legislative and court rules, professional proficiency and communications, and Indian affairs.

One of the most significant accomplishments of the Advisory Committee was to oversee a complete and significant revision of the United States Attorneys Manual at the request of the Deputy Attorney General, in order to improve management and to modify policies and procedures of the Department.

The Committee has been active in Department budget presentations and in proposals and conferences involving the overall improvement of fiscal and litigation management of the Department. Its advice and evaluations are given on a continuing basis in matters involving the conduct of the Attorney General's Advocacy Institute and the development of automated caseload management and legal information systems and other important issues facing the Department.

I know there are other sources of interest to the Committee. My colleagues and I will be happy to discuss those areas with you and to further amplify any of the comments I have just made.

Senator COCHRAN. Our next witness is Mr. Earl Silbert, former U.S. attorney for the District of Columbia. Mr. Silbert, we welcome you to the committee and express our appreciation to you very much for being here. We are very privileged, I think, to have the benefit of the assistance of Mr. Silbert who is currently engaged in the private practice of law here in Washington. Formerly, Mr. Silbert served as U.S. attorney for the District of Columbia. This office is the largest in the country, due primarily to the fact that the U.S. attorney in the District of Columbia is both the Federal prosecutor of the District and also, in effect, the local prosecuting attorney, thus combining both a State and Federal role which is unique among U.S. attorneys offices.

Mr. Silbert has been before the Senate Judiciary Committee from time to time due to his expertise in criminal matters. I wonder if you could describe to us the dual function of the office within the District.

STATEMENT OF EARL SILBERT, FORMER U.S. ATTORNEY, DISTRICT OF COLUMBIA

Mr. SILBERT. I will, Senator. Thank you for the opportunity to appear before you. It is my privilege to do so. As you noted in your introductory remarks, the U.S. attorney's office in the District of Columbia is unique in that it does combine the functions of a local and Federal prosecutor. That gives the office a unique opportunity, I would suggest, to try and provide a coordinated approach to the problem of controlling and even attempting to reduce crime in the District of Columbia, a matter of special concern particularly because of the Federal interest in this city and the small jurisdictional size of the city.

If you were to ask me, based on my experience in criminal law enforcement what the chief problem is from an institutional point of view, I would respond that that is the lack of coordination or the fragmentation of the efforts in the agencies to try and come up with approaches dealing with crime. Part of it is simply institutional. There are so many institutions. Not only various prosecutor offices, but also multiple police or investigative agencies. And I know from my experience as a U.S. attorney in this jurisdiction and my conversations with many of my former fellow colleagues as U.S. attorneys and former colleagues as district attorneys, that this is a problem they continually face. Well, in the District of Columbia it is presently minimized, at least so far as the prosecutor is concerned, by the fact that there is only one.

We do have an office in our local jurisdiction, the superior court, I keep talking in "we" as though I were still there, and in the Federal system. We work closely with the police and the Federal agencies, but that is a continuing problem—the problem of getting the police and the Federal agencies to work together with a prosecutor. We have a division of responsibilities. For example, we have—there is a fraud unit in the office that looks into white collar crime, official corruption, from both a local and Federal point of view. The same with what is called the major crimes unit that looks into organized crime from a Federal and local point of view. And, when I say that it is not as though there are separate units dealing with local organized crime or Federal organized crime, there is one unit that looks at crime; if it is organized crime, whether it is Federal or local, it examines it and deals with it accordingly. The same is true with respect to corruption. The same is true with respect to white collar crime. The office also has a career criminal unit.

This is something dealing primarily with street crime, Senator. A unit that focuses exclusively on recidivist hard-core, felony offenders to try to bring them to trial as rapidly as possible and to try and take some action or induce other units such as the parole board or probation officer to take action with respect to these hard-core offenders. Naturally, there are the regular units, grand jury sections, trial sections, appellate sections, and then in the U.S. Attorneys Office here in the District of Columbia as in many other offices, there is a separate civil division that handles the civil litigation on behalf of the United States.

Getting back to the institutional problem, it is that unique ability that the U.S. Attorneys Office has here to try and bring some coordination to a system that is otherwise really totally fragmented and therefore inefficient, that I think is one of the chief benefits of that dual function and one of the chief reasons why I believe that the proposal that is now pending before the Congress to split up the function of the U.S. Attorneys Office and transfer its local function away from it would, so far as the efficiency of the administration of criminal justice in this city, be a disaster.

Senator COCHRAN. I understand that, in your office, you had a special program, for the training of assistants and did not rely on the program described by the Acting Director of the Executive Office. Could you describe for us what kind of training program you had for your assistants?

Mr. SILBERT. The nonreliance, I suppose, in one sense was initiated because our training program began before the Attorney General's Advocacy Institute was formed. And the primary reason for it was to train the new assistants in the office in the area particulary of fulfilling the local responsibilities of the office. Many come in without extensive litigation experience and the purpose of the training program which has matured and developed over the years was, one, to expose assistants to some of the more experienced personnel in the office and get the benefits of their experience so far as basics in criminal trial procedure were concerned, opening statements, direct examination, cross-examinations, summation, and the like. Then, when the Attorney General's Advocacy Institute started because that was addressed primarily to training assistants to handle Federal criminal litigation and because such a great part of the litigation in the U.S. Attorneys office continued to be of the local nature, we felt that as a whole it was preferable to train the people within our office.

We have developed extensive use of videotaping so that those in the program have an opportunity to see themselves making an opening statement, or conducting an examination. We train about six or seven at one time for a period of 3 weeks, usually in the afternoons, and it has worked out quite well. We also have developed an advanced training program for assistants in the office 1½ to 2 years which is a more sophisticated program coming at a time when assistants are going to begin to try felony cases in either the Federal or the local court. And that is more of the same, but on a more sophisticated advanced level and bringing in some of the matters that would be too advanced for assistants at the early stages.

Senator **Cochran**. What role did you play in the development of the prosecutor management information system and what is your assessment of that in terms of its need and utility in U.S. Attorneys offices?

Mr. **Silbert**. Senator, the U.S. Attorneys Office in the District was the office in which that system, called PROMIS, was first introduced. It was introduced also in the local prosecutorial part of the office because of the enormous volume of cases coming into that part of the office.

It serves as a management and a research tool and in my view, if properly utilized, is an indispensable research and management tool. Without it, when you are dealing with a high volume of cases, Senator, it is virtually impossible to keep track of the cases that are in the office and what is happening with them. Is there a great increase in the number of marihuana prosecutions? What is happening to cases that are indicted so far as the percentage that plead, so far as the percentage that are dismissed, the percentages that go to trial and end up with either a conviction or an acquittal? How long does it take for cases coming into the office to be indicted and to get trial? With respect to individual assistants and how they are performing their responsibility since it has the capability of tracking how an individual assistant is doing? Is he or she keeping up with the cases and making sure that indictments are returned promptly, that cases otherwise lacking merit are dismissed, that kind of thing.

Also, in terms of research just to find out if there are any peculiar or particular problems in crime, increases in burglaries, decreases in robberies, those kinds of matters—without a computer system in a high-volume district they are almost impossible to obtain.

To have such a program, I must say, requires a commitment. A commitment on the part of management and on the part of those providing the resources because the resource requirement is a very heavy one. If the computer has poor information, its results can be worse than having no information at all. If the computer's information is not up to date particularly in a litigating office, with trial schedules and deadlines and all, then its results can be more harmful perhaps than beneficial. So, it definitely requires a commitment of resources that are able to keep up the program so that it will be both prompt or current and accurate.

I think the needs with response to the latter part of your question about needs in the U.S. Attorneys offices—that is probably going to vary. I would not see the need, for example, for a complex computer system in an office with two assistants; that would not seem to make much sense. But certainly, in the larger offices it could be very beneficial. I might say that in the last year with respect to our—in our civil division of the office, not PROMIS, but another word-processing system with capabilities of a computer, a System-6, was installed for some of the very reasons that PROMIS was put in the criminal counterpart. And that other division has been finding and it is finding now, that it is really an invaluable, almost indispensable management tool for dealing with its caseload n the civil area.

I would think that both in criminal and in civil, especially in the larger U.S. Attorneys offices, that serious consideration should be given toward taking advantage of this very, very valuable management tool, recognizing, of course, that it is going to require resources to make it worthwhile.

Senator COCHRAN. In your annual report, you were quite frank in discussing some of the problems that you encountered in the operation of the office. Some are probably shared by all U.S. Attorneys offices around the country. Could you describe your observations as to how an office can alleviate interagency problems such as getting along with law enforcement agencies and the other agencies with whom you have to deal? How do you manage to work in a cooperative and effective way with these agencies?

Mr. SILBERT. Well, you've put your finger on what in my view is a very important problem, Mr. Chairman. As I mentioned, it is the lack of coordination and fragmentation of the institutional responsibility that so far as the efforts to control crime are concerned is a just a terrible factor that prosecutors have to confront.

Candidly, I think a good deal of the effort that should be made is a matter of personality. I think it is the responsibility of the U.S. attorney as the chief law enforcement officer and as the prosecutor to make an effort to go out and to simply meet and deal with the head of the other agencies, such as DEA, such as FBI, such as Alcohol, Tobacco, and Firearms, and to use his persuasive powers to bring them together. Now, a good deal of his success, or her success, will depend on his own, or her own, persuasive abilities, but also on the receptivity of the people who are the heads of the other agencies.

I think in the last few years so far as that is concerned, there has been a major improvement on the part of agencies—the Federal investigative agencies—who recognize their need to work with the U.S. attorneys. It used to be the syndrome—we investigate, you prosecute. That may be all right for the simplest types of Federal offenses, but in a day when the Federal Government particularly is making what I consider to be the correct effort to focus its resources on the more complex forms of crime, such as those that are its priorities of white-collar crime, official corruption, organized crime, and major narcotics, the individual agencies cannot possibly do it alone. There is too much that requires the close cooperation with the prosecutor and the investigative aid of the grand jury. So that if there is going to be a successful effort to investigate these more complex forms of criminal conduct there is going to have to be coordination. In that regard, I might point out something that I referred to in my—one of my more recent annual reports, when I was U.S. attorney and I know a number of other U.S. Attorneys offices did to—and that is the harmful impact on what I was just talking about, the attempt to provide a more coordinated approach to investigate complex crime that was caused by the Tax Reform Act of 1976. Obviously, it was not an intentional result of that legislation but it was something that has occurred since the act went into effect.

The net result of that act and also I might say, the then attitude of the Commissioner of the Internal Revenue Service was to deprive U.S. attorneys to a great degree of the assistance—the invaluable assistance—of the Internal Revenue Service in investigating financial crimes. And, in making the information they had available to the prosecutors that really were trying to focus their efforts in this important area.

The tax act still stands, it is a large obstacle to improved coordination in that regard. As to the attitude of the Internal Revenue Service, I think that a number of U.S. attorneys, while the agents at the working level want to cooperate, are finding sometimes that at the top level they are having problems.

Senator COCHRAN. You would recommend, I presume, that we amend that——

Mr. SILBERT. The act was aimed at what was a very valid grievance. The so-called improper use of Internal Revenue Service information focused on so-called enemies of the administration. That, of course, is indefensible. I do not think—I am not aware of—that there was any record before the Congress that Federal prosecutors, U.S. attorneys, had utilized that kind of information or in any way abused their access to tax return information for purposes of investigating Federal crime. So, while I think there must be legislation to try and prevent the abuse at which it was directed, it should be carefully tailored. I think the amendment that was passed was with too broad a brush so that it swept under its umbrella some areas that I don't think it intended to encompass, or at least in the light of experience, Senator, has proven to be very harmful to Federal investigative efforts, as I am sure my former colleagues will corroborate before you.

Senator COCHRAN. The fact that the U.S. attorneys also have a tremendous responsibility for the civil side, in matters such as lands cases, discrimination cases, and enforcement of environmental laws, creates a resource problem. Would you comment about any suggestions you might have in how you combat, how you deal with, the seemingly ever-increasing civil backlog?

Mr. SILBERT. Well, again, Senator, you have pointed out a factor that has to be of increasing concern, I'm sure, to all U.S. attorneys. For example, just to use the office in the District of Columbia, about 5 years ago, the caseload was around 600 and under 1,000. Today, it is nearly 1,900. That increase without a corresponding increase in resources is enormously hard for the U.S. Attorneys offices to cope with, particularly at a time when the complexity of the cases, and frankly, the skill of counsel filing those cases, has been increasing significantly.

I suspect that what I am about to say is true of other U.S. Attorneys offices; I know it is true in the District of Columbia. The largest increase in the caseload has been attributable to two areas That is, cases brought under the Freedom of Information Act, of which in the District of Columbia there are now more than 250 pending, and cases alleging unlawful discrimination in Government agencies, of which there are more than 175 pending. Again, both of those, the legisla ion on the Freedom of Information Act, and the unlawful discrimination, serve very useful public purposes. However, the way they are—the way in which the statues are drafted, and the way in which they are implemented, presents enormous budgetary and resource problems to the U.S. Attorneys offices.

For example, title VII, alleging unlawful discrimination is one of the few instances in which agency action; that is the person, before they can claim unlawful discrimination in court, must have his or her case reviewed by the agency. Normally, when they are dissatisfied with that and the person goes to court, the test in the court is, is the agency action supported by substantial evidence? That is not the case with respect to title VII cases. They are—the person bringing such a suit—is entitled to what is called a trial de nova. A brandnew trial. Meaning brandnew discovery and a trial. This, in turn, causes horrendous problems for U.S. attorneys simply in terms of commitment. Discovery, depositions, interrogatories are an enormous drain on the time of their persons. Similarly, in the Freedom of Information Act cases, under the most recent amendments that passed, I believe, in 1974, it requires a virtually line-by-line analysis of material for which disclosure is sought to be able to justify nondisclosure. When you are dealing with thousands of documents and, indeed, I understand there is one case now pending in the District that involves 1 million documents, the time requirements are just incredible. It is not something that can be performed by paralegals. First of all, the U.S. Attorneys offices have few, if any, paralegals at all.

Second, some of the judgments that must be made are beyond the capability of paralegals. If you have a prior criminal case in which someone is now seeking Freedom of Information Act disclosure, one of the only persons that may be able to make the judgments to make certain that information that would not disclose the identity of an informant or investigative techniques, is the trial attorney. I suggest that having that person have to make that judgment is an enormous waste of that trial attorney's time. I would rather have that person investigating a new case and perhaps trying it, rather than having to spend his or her time going over an old case to make a judgment as to whether or not certain information may be disclosed.

The net result is that it is so time consuming and so burdensome that there is a tremendous temptation on the part of agencies to say, well, I don't want to be bothered, and give out information that probably should not be given out.

So, those two areas, I think, are areas that are going to be—are presently, and will continue to be—of increasing concern.

They are also interested in two areas in which attorneys fees are now available to plaintiff's attorneys if they prevail. We find that some lawyers have this as their main bulk of their practice, and frankly, it encourages some litigation and, indeed, in the title VII area of unlawful discrimination, my last 2 years in office I found that the principal obstacle to settling a number of those cases was not merits of the case, but was what to do with attorneys fees. In my humble view, that was kind of a preversion of the whole purpose of the statute. I might say on the title VII cases that the experience of the office has been that plaintiff's prevail in under 20 percent. That means all this de novo trial time, all the discovery, and all the trial time is being spent in behalf of a group of cases where the passions run high, very high; there is enormous frustration and temptation to attribute it to an unlawful discriminatory factor when there are other factors that are actually in operation. Yet, such a great deal of time of the U.S. attorneys in the Civil Division is being consumed by these cases. So, I would suggest that some consideration be given, not to abolish the statutes because they serve a legitimate public need and interest, but to tailor them again in such a way that they can meet the legitimate interest, but not constitute such an undue burden on resources of Government attorneys.

Senator Cochran. I think that would be a legitimate point of inquiry and work for a subcommittee of this Senate Judiciary Committee.

Taking a look at the Freedom of Information Act and trying to determine how it can be improved so that we don't have the abuse which we have seen in so many instances, the expense to the Government that is attributable to that piece of legislation would be interesting to calculate. Maybe we could suggest to the President that he could include in his proposal for battling the economic problems of the country some revision of the Freedom of Information Act. Maybe that would be a worthwhile effort for the executive branch to make.

Do you have at this time any suggestion or opinion about how we might change the Freedom of Information Act to accommodate the problems that you have identified?

Mr. Silbert. As I understand it, it was at least a few months ago, a review of that within the Department of Justice to try and come up with some recommendations as to that. I think some of the burdens under the statute on the Government justify exclusions that it would require particularly the line-by-line analysis, virtual line-by-line analysis, and the obligation to provide what is called an index. It is named after a case in this jurisdiction, the Vaughan V. Rosen Index, which again not only has to set forth every document for which disclosure is not being made, but a detailed analysis of why disclosure will not be forthcoming. That's where the time comes in, Senator, particularly when there is a concurrent requirement or opportunity now under case law in the District of Columbia that there can be discovery in those cases. Discovery as to what the documents are, discovery as to some of the reasons, and again this begins to eat up the resources and time of Government attorneys. I really see, except in the most extraordinary instance of what appears to be patent Government abuse, no excuse for that.

Senator Cochran. What about the policies that you had with respect to whether to prosecute or decline prosecution? This has to be the question that is presented daily in any U.S. Attorneys office. I guess that is where you really start earning your keep, when you make decisions like this. Did you have guidelines in your office for your assistants, and how did you go about implementing a policy with respect to declinations?

Mr. Silbert. The nature of the office that we had, and given its location and the small geographic size, I was a believer in guidelines and while in the office, at least so far as policies, initiated an effort which resulted in the production of a policy manual that covered a wide variety of areas both as conduct, No. 1, of assistant U.S. attorneys but also prosecutorial guidelines, and I felt that that was appropriate to give the assistants guidance when faced with any one of innumerable sets of circumstances that come before them. The guidelines had to be somewhat general in nature in most instances. There were exceptions to that when we became fairly specific, as that was primarily in the area of exercising our local prosecutorial responsibility. We had diversion programs, to determine eligibility we had some specific requirements—larceny of certain dollar amounts, drugs—a certain amount of possession.

We had a problem with that under the Freedom of Information Act, because a suit was filed to require us to disclose that and we fought that—that is, the U.S. Attorneys Office fought that—all the way up to the court of appeals en banc and lost. Which meant as a result that the guidelines had to be disclosed and immediately they were terminated because when you have guidelines for amount of theft you cannot publicize that to the community at large to say that if there is a theft under a certain amount of money, there will not be a prosecution, because that is an invitation to people to go out and steal. And, similarly, for other offenses, such as drugs, if you have a certain minimum amount for which a person will be entitled or eligible for the diversion program and that gets publicized, that really undercuts, from a deterrent point of view, your ability to have that kind of program.

So, that was an instance—you want to talk about areas of needed amendment, and this is an area of litigation right now in the Federal courts. Government manuals are increasingly subject to disclosure under the Freedom of Information Act. The more specific you are in trying to provide guidance, there is a danger that it will be disclosed and then the whole purpose of the program will be undercut. The second great danger, Senator, is that insofar as those programs are disclosed, they invite litigation. Any time you have guidelines, regulation, whatever you may call it, if you call it a guideline and not a regulation, someone is going to claim—and more than someone, a lot of people will claim: I am entitled to come under that program and if I don't get it, I'm going to litigate and challenge you in court," and that is again taking time in court and valuable Government resources.

So that is the problem. I believe in guidelines as least for small offices—I mean, an office in a small jurisdictional area to guide the assistants. I also had the opportunity to work with the U.S. attorneys on the revision of the United States Attorneys' Manual. This was an enormous project, took us over 2 years, but I think it was a very valuable effort that was made to try and provide some more continuing guidance for the U.S. Attorneys offices throughout the Nation.

Senator Cochran. Well, does this manual, in effect, contain guidelines on prosecutorial decisionmaking?

Mr. Silbert. Well, not—I don't think of the kind that I suspect you have in mind. I certainly generally would not set forth the detailed guidelines. For example, in the District of Columbia we had guidelines. Persons charged with armed robbery—under what circumstances would we take a plea to straight robbery? There is nothing like that in the United States Attorneys Manual. What the United States Attorneys Manual will set forth is such matters as: When is the Federal Government going to be involved in a Dyer Act, or stolen auto type of case? What are the considerations for that?

In the use of RICO, racketeer influence, corrupt organization, what is the policy there? The policy requires approval by the Department of Justice. These are some of the things that are appropriately and, I think, meaningfully covered in the United States Attorneys Manual. But, I think you have to start defining what you mean by guidelines—you just can't say guidelines. There are obviously a lot of policy considerations set forth in that United States Attorneys Manual for the guidance of the U.S. attorneys and I think it is very valuable in that respect in the system we developed for updating it for each new policy to make sure that it would circulate through that manual. I think that has been very beneficial.

Senator COCHRAN. One could argue, though, that to promote fairness and equal treatment among defendants or prospective defendants in Federal cases, there should be uniformity between U.S. Attorneys offices. Arguably, there shouldn't be any great disparity as to prosecution decisions as between one office and another.

Mr. SILBERT. I think one can certainly make that argument, and I think it is an argument that should be confronted and has to be analyzed. The answer to it I don't think is an easy one. What I may be saying may appear to be somewhat inconsistent to my response to your earlier question about the District of Columbia where I did feel that in the office there should be guidelines for the benefit of the assistants and somewhat more detailed guidelines than are present in the United States Attorneys Manual.

I've thought about that a lot, Mr. Chairman, and obviously had an opportunity to talk with U.S. attorneys from all over the country, and when I weigh the argument that you just suggested against the other considerations, I think I come out on the side of not advocating detailed guidelines for U.S. Attorneys offices, simply because I think that there is too great a diversity, given the enormous size of this country. There are too many variables, both as to size of offices, the kinds of cases that are consuming the interests of that office, the capabilities and resources and interests of the local prosecutors of the State attorneys general offices, to say if it is an embezzlement of a bank teller case we won't take it unless it is $1,000 or more, leaving the rest of those cases $500, $800 to the States. The State may or may not, or the local district attorney may or may not have the capability for dealing with that. The same with bank robberies. Strictly local bank robberies could be conceived to be of little interest to U.S. attorneys. However, what happens if either the local police department or the local district attorney is incapable of handling it? That is why, given the diversity and differing community needs and interests, that I tend to think that any kind of inflexible or rigid guidelines that we attempt to impose nationwide to try and assure uniformity, I think would not be as beneficial as it may be superficially deemed to be.

Senator COCHRAN. Mr. Silbert, thank you very much. We appreciate your being here. I have no other questions for you, and I would just like to express again the appreciation of the Judiciary Committee for your taking the time to be here and help us in the oversight and authorization of U.S. attorneys. Historically, there has not been a great deal of attention by the Congress to the day-to-day problems encountered by our U.S. attorneys. We know how important these functions are. This is where the battle against crime and criminals is being waged in the country, and not necessarily here in the big buildings in Washington. I think we need to pay more attention to these day-to-day problems. They are not going to capture the imagination of the press and get any headlines, but I think the job that we do, if we do it well, can certainly help improve the administration of justice and, in effect, help reduce crime and the effects of crime throughout the country.

Mr. SILBERT. I agree with you, Senator. And I would like to commend both you and the committee for this interest, for I just simply would like to echo and support everything that you just said in your last statement.

Senator COCHRAN. Thank you very much.

Mr. SILBERT. Thank you, Senator.

Senator COCHRAN. Our next witnesses are a panel of U.S. attorneys: Robert Del Tufo, New Jersey, William Gray, Vermont, and James Robinson, Michigan.

They will be accompanied by Mr. William Tyson, the Acting Director of the Executive Office for U.S. Attorneys here in Washington, D.C.

We appreciate your giving us the benefit of your observations as to how your offices are organized and some of the problems that you encounter in carrying out your responsibilities in your respective districts.

I thought at this time that I would let you know that we have a very long list of questions that we prepared that would give us information that we thought would be essential for making this a complete and successful hearing. Looking through the questions, I am convinced that we might all be here till midnight if we went through each of them. So, I would like to reserve the right to send you some questions which I might not ask at this hearing and let you respond to them in writing. We will make that a part of the record and thereby shorten this time that we all have to spend here going through them. If that is all right with you, then that is the way we will handle some of them, like how many people are working in your offices, do you use paralegals, how many, and that kind of information which we do feel is important for us to look at in assessing the problems that you may have.

[The questions of Senator Cochran and the responses of the U.S. Attorneys Office can be found at the conclusion of today's hearing.]

Senator COCHRAN. One question that I asked Mr. Tyson earlier was about hiring of assistants. Tell me how you handle that, for instance. Let's just start here with Mr. Robinson and tell me how you go about choosing assistants and hiring them.

PANEL OF U.S. ATTORNEYS:

STATEMENTS OF ROBERT J. DEL TUFO, DISTRICT OF NEW JERSEY; WILLIAM B. GRAY, DISTRICT OF VERMONT, AND JAMES K. ROBINSON, EASTERN DISTRICT OF MICHIGAN

Mr. ROBINSON. Senator, as I indicated in the written statement that as been filed with the committee, I have had the opportunity to hire a good number of assistants in the 2½ years that I have been U.S. attorney.

We have been fortunate in the Eastern District of Michigan to have had a large number of applications for positions as assistants. Essentially, what we do is receive résumés. We have had no difficulty, as I say, encouraging résumés.

Senator Cochran. A lot of people are looking for jobs, now, aren't they?

Mr. Robinson. A lot of people looking for jobs and I think, particularly, a lot of younger lawyers, looking for the kind of experience and opportunity for public service that can be derived from serving in a U.S. Attorneys office.

We have processes whereby we screen the applicants, conduct interviews of those who, by looking at the résumés, look most promising in terms of their background, academic credentials, and the like, and as I indicated in my statement, basically make an effort to hire the most qualified, experienced trial attorneys as we can for both our civil and criminal divisions. This has resulted in hiring assistants with a wide variety of backgrounds, a number of whom have served as assistant prosecutors in the county prosecutors offices in our State as well as defender offices, both Federal and State defender offices. Some served as law clerks to Federal and State judges, but the academic credentials of the applicants and their prior background and experience are such that we have been able to compete adequately, I think, with the private sector even though our salaries obviously can't compete with the large law firms. The experience and the opportunity for service puts us in a good competitive position.

Senator Cochran. Do you feel as though you have that decisionmaking prerogative?

Mr. Robinson. In terms of hiring?

Senator Cochran. Yes. Do you feel that is one of your responsibilities?

Mr. Robinson. Yes. The way it works, Senator, is that I would make a recommendation to the Attorney General—the appointment is actually made by the Attorney General—after a full field FBI background investigation is conducted of the applicant We do the initial screening and recommendation and, as I say, we will have hired after we get on board the next few people, about 36 assistant U.S. attorneys and have not had a recommendation turned down yet. So, we do have a wide variety of discretion.

Senator Cochran. What is your experience in that area, Mr. Gray? Your office, I'm sure, hasn't had that many opportunities to hire assistant U.S. attorneys, have you?

Mr. Gray. No, we haven't, Senator Cochran. I've hired two assistant U.S. attorneys since I came on board and I inherited two excellent assistant U.S. attorneys from my predecessor with whom I had served as an assistant U.S. attorney and our office is small enough and we are blessed with sufficient applicants so that we feel that we can make the very highest standards, and we can pay well for that caliber of person. The Federal salary levels in our district are highly competitive, in fact, probably at least as good as and maybe better than the private sector.

We have—I do anticipate some vacancies in the near future, and in this instance, it is my intention to actually advertise in the local bar association journal because I wish to encourage applicants that I may not have already heard from. As you are undoubtedly aware, the U.S. attorneys and the Department of Justice as a whole is making strong efforts to hire minorities and women and in the District of Vermont I can best serve that purpose by actually reaching out and encouraging applicants who otherwise might not be inclined to apply to us.

Senator Cochran. Mr. Del Tufo, do those responses pretty well indicate the situation in terms of your prerogatives and your experience in hiring assistants?

Mr. Del Tufo. I would say so, Senator. I would add just a couple of things, I guess.

The requirements for hiring assistants in our office are twofold. One is that we want people who have had some prior experience, either in judicial clerkship or in private practice or public service. The only other qualification is to hire people that are the most qualified, have the best records, and are the most professional.

As Mr. Robinson has experience, I have had a great influx of résumés since I have been a U.S. attorney. We have tried to reach out and contact different sources when we have had particular needs in the appellate division or in the civil division, for example. We also have tried to pursue an affirmative action type of policy and to seek out qualified minorities.

Applications are processed in my office through a hiring committee that I have established. Six or seven assistant U.S. attorneys are members of that committee. All résumés are forwarded to this committee for evaluation and preliminary screening. It does an awful lot of things. It certainly help the administration of hiring. It makes the assistants in my office be part of the hiring process which I think is a very good idea particularly because of the pride that they have in the office as an institution. I think they should be part of the process of deciding who is going to be next to them with their shoulder against the wheel.

This committee will come to preliminary judgments on what applicants should be interviewed. The committee will then undertake to interview the applicants initially. From the group of people so interviewed, the committee will recommend to me people who should be further interviewed. These people are interviewed by myself, by my first assistant and by my executive assistant. When we have a vacancy, a hiring judgment is made

Senator Cochran. Is there any way that you could have different scales in different parts of the country? I think Mr. Gray highlighted a problem, and I know that you probably have in New Jersey. If you can pay a starting attorney, for example, $17,000, in Vermont that might be good, but that may not be competitive in Michigan or New Jersey. What about that, Mr. Tyson?

Mr. Tyson. Yes, sir. I'll be happy to address that. We do have flexibility, Senator, a certain amount of flexibility in that we are not locked into civil service, GS-9, 11, 13, 14 and so forth, pay scale, so that by some civil service regulation these people are forced into these pigeonholes. The salary range is comparable to the civil service scale. For example, our lowest salary, the floor, is roughly the GS-9 level, somewhere around $17,000. Now most of our new hirees are at the

GS–11 equivalent, which is around $20,000, because we seek to get people who are qualified for that level.

Our top entry-level salary is approximately $40,000, which is roughly equivalent to GS–15. Our very top salary is, of course, the Government ceiling of $50,000. Very few people—you know, it takes a lot of experience to bring somebody in from the outside to qualify for that salary to start with. Those decisions are made preliminarily by the U.S. attorney and by myself and we discuss factors such as local conditions in setting those starting salaries.

There is, as I said, a certain amount of flexibility, and of course, the limit on our flexibility is at the upper end of the scale. We have limits on how much we can pay people. Many people come to us and have to take $9,000, $10,000, pay cuts which they do because they are anxious for the experience they can get in our office. We cannot match the salaries of some of the people that we hire from the outside because of the limitations on the Federal scale. That's the limit on our flexibility.

Senator COCHRAN. Do any of you have any observations about that?

Mr. ROBINSON. I might just say, Senator, that although the salaries in the private sector are higher, particularly with large law firms, we have not had difficulty in recruiting and hiring outstanding people, people who have been willing to take pay cuts to come with our office. I don't see that as a particular problem for our district. Obviously, there are some people that we probably can't get because of the salary, but I don't see it as a problem because I think that the kind of motivation that we are looking for in assistants is the same kind of motivation that would prompt them to be willing to make some economic sacrifice for the opportunity to serve.

Mr. DEL TUFO. I agree with that, Senator. I also agree that Mr. Tyson is very cooperative in trying to be as flexible as possible, but we, in a metropolitan area such as the Newark area, the Government simply cannot be competitive with private firms. I don't know that it really should necessarily be. There are a lot of compensations in the public sector which people look to, and that is why they want to join the U.S. Attorneys Office. The financial awards are really not a part of it.

Senator COCHRAN. We had some changes made recently in the passage of the Omnibus Judgeship Act. New judgeships were created, and we have made some changes in the authority of magistrates.

What is your impression, Mr. Robinson, of the increase in magistrates authority in terms of helping you do a better job, helping expedite the handling of matters that your office has responsibility for?

Mr. ROBINSON. I think there is a real potential for that. I'm not sure that it has filtered down yet to the actual practice of law. We have some outstanding magistrates in the Eastern District of Michigan who I think are fully capable of assuming the new responsibilities that are contemplated by the magistrates bill. I am hopeful that our Federal district court will see to it that the magistrates are used effectively. They are already used in a number of capacities and have been used in handling a number of high-volume case areas, particularly this business of handling HEW disability appeals. We seem to be the leader in the country in those cases. In our district, we have many filings of appeals from determinations of administrative law judges, and the magistrates are quite helpful in reviewing the briefs and making reports and recommendations to district judges. I think we have some magistrates who would be fully capable of handling stipulated trials by the consent of the parties as is contemplated by the magistrates bill. I think it may be a little early to tell yet in our district, at least, how much help they are going to provide. I do think that the changes, though, provide an opportunity to be more efficient. I am hopeful that that will be the case.

We certainly in our office would be fully cooperative with the private bar in agreeing to utilizing magistrates to handle these matters and we are being encouraged in that regard by the Department as I recall.

Mr. DEL TUFO. Senator, may I comment on that?

Senator COCHRAN. Certainly.

Mr. DEL TUFO. We have a—over the past years as a matter of fact—we have tried to utilize the U.S. courts in the District of New Jersey to the very fullest extent and so have the district judges. So, I might say that we have a very active, ongoing magistrate program in New Jersey. My only comment would be that it is most helpful. I think we had probably over 200 criminal filings in magistrate's court last year where matters were actually heard. It is a great assistance to us in disposing of cases. It is a great assistance to saving, conserving judicial resources, and it is also a very helpful training area for young assistant U.S. attorneys.

Senator COCHRAN. Mr. Gray, judgment collection is a problem in many U.S. Attorneys offices. I am aware from reading a statistical report that collections in Vermont are up. To what factors do you attribute this? Do you have any special program in effect in your office that has resulted in this change?

Mr. GRAY. I can't claim a new or innovative organization that did it. Frankly, as is often the case, it came down ot the right person at the right time. We have some support staff in our Rutland office who are highly experienced and qualified and through the use of some automated typewriters we send out letters, and use a slightly better method of recordkeeping. We have been able to improve our collections and also to move through the system what are called 24-10's. Acts of liens of a sort in State courts—and mortgage proposers usually initiate it, for example, a bank, or IRS may be a party—we have been able to expedite those.

Some of the collection work, some of the collection statistics you will find, include the value of property recovered. It doesn't always mean cash in hand. It sometimes means some real estate value that has been recovered for the United States. It is simply a question of working at it, focusing on it and letting the staff know that this is how our bread is buttered also, and it is an important part of our work. I can't claim that it is any more than that.

Senator COCHRAN. Mr. Del Tufo, I understand that you are the author of a civil remedies program as an innovative law enforcement tool.

I wonder if you could describe for us how you have found this program to be beneficial. Do we need new legislation to improve the opportunities for civil remedies to be pursued in criminal cases?

Mr. DEL TUFO. I think that there are civil remedies programs operational in a variety of U.S. Attorneys offices around the country that are effective. We have, in New Jersey, sought to put an emphasis upon it, and have tried during the course of the criminal case, for example, to have the criminal attorney thinking throughout that somewhere down the line or even contemporaneously there are some civil remedies that might be available to assist in dealing with that particular case.

We are in the area of the false claims act, unjust enrichment, and those types of statutory and common law authorities.

Now, I think it beneficial from a public standpoint to have the public see a law enforcement agency not only trying to prosecute white-collar criminals but also to see that these people disgorge their ill-gotten gains.

Furthermore, I am convinced that if there is a coordinated program of both criminal remedies and civil remedies and a person feels that he or she might have to face not only the rigors and hazards of criminal prosecution, but also the possibility that financially there is going to have to be substantial restitution, then perhaps the person who would commit a white-collar fraud might think twice about it and perhaps we can try to control this growing cancer a little better by such a deterrent effect.

After all, white-collar crime is the most calculated, premeditated crime that there is, because you really have to sit and think about what you are going to do before you go about doing it.

We also, in the Civil Division, have pursued a program of civil remedies unassociated with criminal remedies. As an example, in the fall or summer of 1979, we started a pilot program in New Jersey to collect on defaulted student loans. Loans for college education that people have not repaid. This has had a dramatic effect over some period of time on voluntary payments to HEW and it is now the Department of Education, Also, our recoveries over the period of time from then to now is well over—judgments are well over $600,000.

Last year, in our civil remedies program, we collected or produced judgments of over $1½ million. I really think that it is a beneficial program and it is beneficial in the sense not only of the collection and not only of the public perception of what we are doing, but also hopefully as a means of trying to control the spread of white-collar offenses.

Senator **Cochran**. Maybe that could be another part of the President's effort to deal with inflation. What do you do with that money? Can we send it in to help reduce the Federal deficit?

Mr. **Del Tufo**. It goes into the Federal coffers.

Senator **Cochran**. This also may be a reason why we need a new chapter in the United States Attorneys Manual. Is this a program that will be implemented nationwide, and is it being considered as a way to improve our effort in dealing with crime?

Mr. **Tyson**. Mr. Chairman, it is being considered. We have—Mr. Del Tufo has been kind enough to allow the assistants of his who have helped develop this program and are administering it to serve as missionaries to a couple of other districts and help them to get some of the programs started. It was a topic at the most recent U.S. attorneys' conference of large offices in San Diego last fall and it is a topic in our national conference scheduled for next month here in Washington. So, it is something that we are trying to develop and have catch on in other offices to be more effective. The Civil Division, I might add, is, of course, quite interested in this program and has some independent efforts underway.

Senator **Cochran**. I want to direct this question to Mr. Robinson. What system, if any, do you have in your office to review cases, to measure work time, and other factors that go into evaluating the efficiency of your individual assistants?

Mr. **Robinson**. Senator, we have no formal kind of a program in terms of a PROMIS-type system that was discussed by Mr. Silbert although we are in the process through the use of System-6 equipment of doing that now.

Largely, the administration of the office occurs through the supervisory hierarchy, which includes a chief assistant, and chiefs of three divisions in our office, civil, criminal, and appellate, the largest being the criminal division which is then broken down into three units each with an assistant chief and those units are the fraud or white-collar crime unit, the controlled substances unit, and the general crimes unit.

Each of these units are small enough, consisting of 8 to 10 attorneys so that the assistant chiefs can monitor on a day-to-day basis the caseload of each assistant U.S. attorney.

We have periodic meetings with each assistant to review his or her caseload and to determine through that system a means of assessing the work product of the assistant. I think that a good deal of promise is held out by the opportunity to develop our own means of casetracking through the equipment that we recently acquired and is being installed in a number of U.S. Attorneys offices. That, I think, will provide us with the capability of being able, on a day-to-day basis, to monitor caseloads in terms of grand jury time, number of cases, number of investigative matters that are open, and the like. In the past, we have had to do that simply by direct personal supervision and I am hopeful that we will be able to have a better handle on it through the systems that are now being put into place.

Senator **Cochran**. Are there any requirements imposed on U.S. Attorneys offices by the Executive Office for keeping up with the number of prosecutions, pleas, or other recordkeeping? Is there a system that you have to follow?

Mr. **Robinson**. There is a system that provides for reporting, on a periodic basis to the Department, hours spent in various activities, hours in district court, hours before the magistrates, hours before the Federal grand jury, hours in appellate court. Each assistant, on a weekly basis, fills out a form indicating how many of his or her hours were spent in those activities.

Senator **Cochran**. Much like timekeeping in a private law firm.

Mr. **Robinson**. It is similar, although we don't keep the kind of ime that those of us who were in private practice were used to, down o the quarter or tenth of an hour.

Senator **Cochran**. You don't fudge like we did in private practice? Laughter.]

Mr. **Robinson**. Well, I'm not sure about that, Senator.

Senator **Cochran**. As the fellow said, I'll work at whatever rate per hour you want me to, as long as you let me keep the time. [Laughter.]

Mr. **Robinson**. We did in our office and a number of other offices participate in a program that is being conducted by the Institute for Law and Social Research for the Department which is making an effort to try to get at some case weighting system. We had our assistants for a period of 3 months keep time down to the 15 minutes, and that data is being pulled together and made available to the Department as it makes an effort to try to provide data that is more responsive to the legitimate concerns of Congress in determining resource allocations, efficiency, and that sort of thing.

I think that study—Mr. Tyson probably knows better than I the current status of it—that was done last summer in our office and a number of other offices in an effort to try to figure out how you allocate the existing U.S. attorneys and how do you figure out the weight in terms of time to give to various matters, both civil and criminal in our office.

Senator **Cochran**. Mr. Gray, do you have any other kinds of systems in place to control, from a managerial standpoint, critical case information like motions, docket dates, and case progress?

Mr. **Gray**. Yes, we do, sir. Our clerical support staff keeps a list, for example, of the appellate dates. A document comes, particularly after the appeals level, there is a clock that starts running, if you will, and we are advised and reminded if we seem to be a little bit late in starting work on that brief. At the district court level, we are not as well organized, partly because we find that district court deadlines are more changeable, more flexible; that there are, for example, local rules for the furnishing of discovery and we find that the judges are quite understanding with us and with defense counsel as long as we are working toward a solution and if we don't miss deadlines by too much.

They really are designed to get us to work together with opposing counsel. We are all concerned, all U.S. attorneys, as to deadlines in the Speedy Trial Act, the fear that we may miss one someday and lose an important case.

In that regard, our district, and I think most districts, work closely with the clerk of the district court to check each other's to see if we all agree as to the starting dates, finishing dates, excludable time. So far we have not had any disasters but I think it is a breathtaking problem.

Senator **Cochran**. I remember in private practice in the law firm I was in, we had an argument with the insurance carrier who provided our malpractice insurance about the efficacy of a tickler system that we were using. They thought it should be more elaborate, and we thought that it was quite elaborate enough. We would spend all of our time just abiding by these requirements of the tickler system rather than practicing law. We would never get anything done. There is always, I think, that problem of keeping up with dates and filing things and reports, complying with survey requests, requests of congressional committees to come and testify, preparing responses to questions from Congressmen and Senators. All of this gets mixed up in your day-to-day operation so that I'm sure that sometimes you have to wonder, are we ever going to get around to trying these cases, or filing these answers to the interrogatories, or whatever you have to do.

I guess that is just one of the burdens that we all have to somehow figure out how to manage. Is there a system used to measure requests for additional resources?

Mr. **Del Tufo**. Yes. There is a budgetary process within the Department itself which requires us to submit budget requests on an nnual basis. It is evaluated in any number of ways. I am sure Mr. yson could tell you about that. How many judges there are in the istrict and other artificial means.

Seriously, though, the Department is moving in a direction which very, very good in terms of making those types of judgments. It is ne thing simply to look at filings and to look at judges and the like. t does not necessarily reflect the accomplishment of departmental riorities. For example, as Mr. Silbert said, the Department priorities re in the areas of white-collar crime, organized crime, and the like. hose cases are very complex and take a great deal of time, so that he number of filings may go down as opposed to filing 100 Dyer Act ases, for example. There has to be some measurement of resources on he basis of what people are doing. The case-weighting study to which m Robinson referred is a step in this particular direction, an effort evaluate the deployment of resources and how they are operating ward departmental goals.

I think it is a very good thing. It is going to take some time to put gether, but it is being done and U.S. attorneys do seek additional esources from the Department on some type of coherent basis, and think it is evaluated then.

Senator COCHRAN. Statistics have indicated that the criminal case ings have declined over the last 5 years by 21 percent. Is that re-ective of your experience in your district? If so, why is that?

Mr. DEL TUFO. Yes.

Senator COCHRAN. Are the U.S. attorneys just not as eager to rosecute cases as they used to be? Or is it because you are now over-helmed with demands on the civil side?

Mr. DEL TUFO. Well, there are a number of things that can con-ibute to it. Certainly, the civil caseload is enormous and growing. r. Silbert's references are very apt this morning. We have last year civil, for example, disposed of about 2,000 cases but the backlog ill went up to over 4,000 cases. So it is a growing problem.

When we get over to the criminal side of things, I think probably o factors have had a substantial influence on the decrease in filings.

One of them, frankly, is the Speedy Trial Act. There is a—you are t in a situation where you can make filings and be confident that e cases will be tried within a reasonable period of time, but not be rced to mark dates, as Mr. Gray referred to. So that before the ship launched, the Government wants to make sure everything is in der and it can be handled in that timeframe. And that has cut wn, I think, on the number of filings.

I think for the same reason, and also because of the priorities of e Department of Justice, the agencies—themselves investigative encies—have reoriented their investigative type-priorities. They are oving into white-collar crime, organized crime context. A more mplicated type of case, as the prosecutorial orientation. When those ses have to be worked over a longer period of time, they are much ore complex and you devote considerable resources to them, your ngs on some of the other matters are going to decrease.

In addition, again with speedy trial, the investigative agencies are t going to anticipate that the case they investigate is going to be rsued until it can be fit in in a timely way.

Senator COCHRAN. What is your reaction to that, Mr. Gray?

Mr. **Gray**. I was chomping to get at that——

Senator **Cochran**. I saw you moving around a little.

Mr. **Gray**. If you will forgive what I might call research by anecdote, I think I could illustrate in at least one district how it has changed.

I was an assistant U.S. attorney in the District of Vermont in 1972, starting in 1972, and we had a very high percentage of cases relating to the border either——

Senator **Cochran**. Relating to what?

Mr. **Gray**. Our international border, the boundary with Canada.

Senator **Cochran**. Oh, the border.

Mr. **Gray**. They were either cases involving immigration violations, or customs violations, or both. We are still interested in those cases and we still take them, but they have fallen off considerably and to the extent that we can we defer small seizures of contraband to local prosecutors. But I do recall a period when we would get five to eight filings a week from the border, and in a small district that is a lot. At that time, there were not any what I would call major cases going in the office.

By contrast today, we are working on an investigation that has been in the grand jury for 15 months. I am not at liberty to discuss the content of it, but it is one that has required an assistant full time for that period of time. I have had to take him off virtually everything else that he is working on, so our numbers are going to be down; there is no question that I think that our workload, measured in time that it takes to do it, is up.

You asked earlier concerning a way to measure time. I think many U.S. attorneys feel that although it is an inconvenience to have to account for segments of your time, that in many ways it might be worth it to be able to demonstrate what we are doing, how much time a complicated white-collar case takes, for example. I am a firm believer that number of filings does not reflect workload and it reflects the changing nature of our case in part because investigative agencies also now are working on higher quality cases and bringing them to us. It takes a great deal more time. We hope that the results justify that additional time and resources.

Senator **Cochran**. Mr. Robinson, what is your reaction?

Mr. **Robinson**. Well, Senator, I think that the largest single reason for the decline is the changing priorities as Mr. Del Tufo and Mr. Gray have indicated.

I know that in the time that I have been U.S. attorney, the number of cases has declined—the raw number of cases has declined. That is because a number of case categories that were traditionally handled in the State system because of concurrent jurisdiction—we are encouraging the State to prosecute bank robbery cases, prosecute welfare fraud cases where you have a State-administered program like the ADC program. When I first became a U.S. attorney, we were running hundreds of those cases through the Federal court. We are no longer doing that. That doesn't mean that the cases aren't going to be prosecuted. They are going to be handled on a State level rather than a Federal level. We have made increased use of our pretrial diversion program for appropriate cases.

All of this largely to make room to concentrate in areas that, I think, traditionally did not receive the kind of attention they should be receiving. Major white-collar crime, public corruption, organized crime and major narcotics trafficking. What we are seeing as the norm in our district is rather than many, many of the smaller cases making you look good in terms of numbers, we are seeing fewer numbers of cases but many of these cases take a full 18 months of grand jury investigation and many, many witnesses, and documents. The trials that occur—and there are more trials in many of these cases because the stakes are higher, the defendants can afford expensive and very talented counsel—many of the trials are taking a couple of months or more and obviously the assistant U.S. attorneys cannot handle as many of those cases. So I see this, although it may at the surface look as if there has been a decline in crminal law enforcement activity, I don't think that is really the case. I think the shift in priorities has been good for the country. It has been good in our district. It has reordered the priorities in terms of Federal-State in a more sensible way.

There was a time when FBI concentration on bank robberies made sense, and it still does make sense in those difficult cases that need the grand jury to investigate and the cases where there are several jurisdictions involved, but if you have a situation in which a bank robber is apprehended relatively shortly after the offense, often by the local police departments, there is no reason why those cases can't be adequately prosecuted at the State level and the sentences that are being meted out by the State courts in our State, at least, are pretty tough. We had initial concerns, I think, from financial institutions about some of these shifting priorities, but the things seems to be working well now.

Senator **Cochran**. Well, I think it is just a matter of commonsense that when we see these numbers that I cited, a 21-percent decline in criminal cases over the last 5 years, we ought not to become unduly alarmed. I think your explanations for that are quite satisfactory. When you are dealing with complicated, complex, involved matters that are before the courts in litigation on the criminal side, it is just going to take longer and our allocation of resources is simply going to be different.

I remember that in the private practice you sometimes refer to a law student as a career law student; one person just worked on that one darn case forever, it seemed. I remember hearing a lawyer talk about being in a case one time, "Well," he said, "this is going to educate my children and if I'm lucky, my grandchildren." Some of them are just going to be long, drawn-out episodes and it is not going to look good on the yearend report that these three lawyers worked on this one case all year. That may be an exaggeration, but we are going to have to realize that changing priorities are going to change those numbers, and that is not necessarily bad. There are some other complications, I know, that arise in respect to the relationship between the U.S. Attorneys offices and the legal divisions in the big city in the sky, Washington, and with people in the field who are working in those divisions.

How do you decide or who decides some of the questions that arise? For instance, Mr. Gray, do you run into situations where your decisions can be overturned by people in the legal divisions in Washington, and if so, what kind of situations are those which do arise?

Mr. **Gray.** Senator Cochran, you will find some U.S. attorneys who are frustrated dealing with the bureaucracy, if you will. I might note initially without particularizing that there is a difference in our relationship from division to division. In, for example, the Criminal Division, we work very closely with them. They are in the role of assistance, not so much in the role of supervision, with a few exceptions for a few statutes. Basically, however, it isn't the bureaucracy that is impossible or even that difficult to deal with from my perspective.

If the issue is one of legal expertise with respect to a given statute, you might find a young attorney in the division who is extremely helpful because he or she has lived with that statute for 2 or 3 years and knows all the cases in the country, and they might, in a sense, overrule a decision you make, and you will be perfectly willing to accept it, because they have greater expertise. On the other hand, when it comes to an issue involving local judgments, whether this case is worth it in our environment, there is a great deference to U.S. attorneys judgment, and no U.S. attorney need feel bound by a decision certainly at the lower staff level of the legal division.

I think most U.S. attorneys would feel perfectly free to challenge a decision they disagreed with at least up to the Assistant Attorney General level, that is to say, up to the head of the division, and if one felt it was important, he would certainly take it to the Deputy Attorney General or even to the Attorney General if he felt it was important enough.

Obviously, you don't appeal every decision you disagree with because some of them simply aren't that important. Frankly, I do not find it difficult to deal with the various divisions and I think that a person who is reasonably flexible with the bureaucracy wouldn't mind it either. That is a problem——

Senator **Cochran.** I know that in some cases trials are handled by attorneys from the divisions, and they come to your district and actually try the cases and you just sort of watch.

How often does this occur, and is it more prevalent within one division than another? What is your experience with that, Mr. Del Tufo?

Mr. **Del Tufo.** It is not very prevalent at all, really. Perhaps that depends on the size of our district and the resources that we have available as opposed to some smaller districts. We have had, I think, some people from the Criminal Division, who were interested in a particular case, come to our district and try a case, but before the indictment was handed up the matter was early reviewed in my office so that we were satisfied with what was happening.

I understand the Civil Rights Division sends attorneys into the field to try cases. I have not had one in our——

Senator **Cochran.** Does the Tax Division do that very often?

Mr. **Del Tufo.** The Tax Division, I believe, does that in certain areas. The Tax Division is one of the divisions that has control over prosecutorial judgments. A U.S. attorney is not going to pursue a tax prosecution unless it is approved by the Tax Division in the first instance. It is my understanding that there are locations around the country where the Tax Division does send people into the field. They do send them into the field in some civil contexts. I have not had any problem at all in dealing with the Tax Division or any other legal division. But, when you do have this type of situation where people go into the field, I imagine one could encounter some friction along the line.

Senator Cochran. What about your experiences, Mr. Robinson?

Mr. Robinson. Well, Senator, when I was first appointed, the size of my office was considerably smaller than it is now, and there were a number of vacancies. That meant that the district had to call upon attorneys from the Department in a number of areas. I found that there was some difficulty when you had attorneys coming into your district trying cases from the Department, but not universally the case, obviously because they are not familiar with your local procedures and the nuances of your Federal judges and the like.

I find the current situation to be quite workable. As Mr. Gray indicates, there are, with various divisions, more or less control over matters and in the criminal area, U.S. attorneys have very wide discretion where to allocate resources, what to prosecute, what not to prosecute, and the like. The Tax Division has more control, as Mr. Del Tufo indicated, over tax prosecution decisions. The Civil Rights Division has authority over filing of certain civil rights matters both civil and criminal, but my experience has been in those few instances in which I have had disagreements and there have been some with Department of Justice legal division personnel, the Assistant Attorneys General have been more than willing to meet, give me a full hearing, and I have been satisfied that it is possible to work through the structure. That isn't to say that it doesn't get frustrating from time to time; it does, but we have found in my situation, at least, that the Department personnel are very accessible to U.S. attorneys calling and coming down, meeting on important matters and it has worked out well.

Senator Cochran. The context in which we have been discussing this has drifted into the criminal area only. Are there civil matters where the Department attorneys come in and actually handle the case? Mr. Gray?

Mr. Gray. I was going to say that I think I will repeat what Mr. Robinson said. That is, that on the civil side, the control of the division is likely to be greater and the area where the divisions exercise the tightest control over the cases, I believe, is on the civil tax cases. There is an historical reason for this.

There have been problems in the 1950's with the integrity within the Internal Revenue Service, and perhaps elsewhere. The Internal Revenue Service and the Tax Division are, of course, extremely worried about precedents that develop in the interpretation of the Revenue Code, so that that reason, or at least that is the reason that is given for exercising very close control over civil tax litigation, I believe that it is true that civil tax cases are the most likely to be tried by division attorneys in the field, either by somebody from Washington or in some instances there are a few Tax Division field offices where they have some people out in the field. And, I think, I personally don't feel that control is quite that necessary and that in the days of increasing restrictions on travel, expensive travel, perhaps it would make more sense to let some of that control go out to the field with the understanding that when you delegate there are some risks. However, properly delegated, the benefits might be greater than the risks involved.

Mr. **Robinson.** I might say that within the last year, I believe, there has been an increase in the grant to U.S. attorneys of settlement authority by the Civil Division. I believe that it is now up to $60,000 that we have authority to settle the civil matters. It had been considerably less than that before.

It is necessary in order to settle a civil matter for an amount in excess of that to get the approval of various persons in the Civil Division, but that has worked out, I think, fairly well.

I think the other area that you get Department attorneys going out is in highly technical, specialized areas where there is tort litigation, for example, and there are a few very experienced people in the Department, experienced in certain kinds of airplane crashes and other kinds of traumatic litigation that doesn't occur on a regular basis in some districts. We find that that kind of help, of course, is appreciated and is of great assistance in those instances——

Senator **Cochran.** Is there involvement at the Department level in relationships with other agencies, or would you feel free to work on your own in relationships with other Federal agencies, like DEA or BATF folks?

Mr. **Robinson.** Well, you obviously have to work that out on a district-by-district basis having a personal relationship with each of the special agents in charge of the various Federal investigative agencies, and also the heads of the civil agencies on the civil side. But there is coordination through the Department. In fact, today and tomorrow, there are being held meetings by a subcommittee of the Attorney General's Advisory Committee of the U.S. Attorneys with heads of all of the Federal criminal investigative agencies here. A group of U.S. attorneys are meeting with the heads of FBI, DEA, EPA, Postal, Secret Service, Immigration, Customs, and the other agencies in an effort to provide a forum to work out matters of mutual concern, and that has been done for the past several years to, I think, good advantage. The results of those meetings are then shared with all U.S. attorneys throughout the country in the form of the minutes of the Attorney General's Advisory Committee and we found that those meetings are very helpful in smoothing out problems between U.S. attorneys and the various Federal investigative agencies, in particular.

Senator **Cochran.** Mr. Del Tufo, I understand that 90 percent of all Federal criminal cases are concurrent jurisdiction crimes. I realize it may be difficult to be specific because so much depends on the specifics of each case, but generally what factors in your experience go into your determination that a prosecution will be declined in favor of a State prosecution? Do you use guidelines? What kind of tests, what sort of factors do you consider?

Mr. **Del Tufo.** Well, let me start this way. We have some guidelines in our office which I will get to. In terms of exercising any type of prosecutorial discretion, there are any number of factors which go into judgments which must be reached. For example, the nature of the offense, the scope of it, the strength of the evidence, do we have a reasonable basis to obtain a conviction, the victim. These types of standards are set out in many places including the American Bar

Association papers on the prosecution function. It is not an exact science but there are outlines of things which should be considered.

Now, in an office such as the office in New Jersey—the U.S. Attorneys Office in New Jersey—I think really experience over a period of time has dictated that certain categories of cases in different areas—thefts from interstate shipment, bank robberies, check cases, and the like, would ordinarily not be federally pursued because there was only a minimal Federal interest and there was a concomitant State violation for which a violator might be prosecuted. This has led to declination standards usually based upon the amount of money involved in a particular case. This would indicate in advance that ordinarily this case would not be prosecuted by my office but referred to the State. I think we have in New Jersey, we are very fortunate to have in New Jersey a very comprehensive, coordinated, coherent law enforcement system which is supervised entirely by the attorney general. So that we have a vehicle in New Jersey for discussing issues of concurrent jurisdiction and for discussing issues of referral. If there has been, as I see it, a deficiency in the past, it is not necessarily the declination of a Federal prosecution. It is trying to keep track of what happens to that particular matter when it is referred for State prosecution.

We are involved in a project in New Jersey right now with the attorney general and with the county prosecutors which will try to create a structure for keeping track of referrals from one jurisdiction and trying to come to some statistical conclusion as to exactly what happens to these particular cases. I think that is very important from a law enforcement standpoint, from a public standpoint, and I think, certainly I know, that the Congress has been interested in that subject matter.

I might say that we are one of the pilot offices in the country to have a PROMIS system installed. The State prosecutors' offices are on or are going to be on a like system so our tracking of matters is going to be made much easier in the near future.

Senator COCHRAN. I noticed in your recent annual report, that you created a Federal-State law enforcement committee and council to try to deal with the questions of concurrent jurisdiction prosecutions, and it seems that, based on what you have said, and the excerpts I have read from the report, that what you are really doing is trying to determine whether there is substantial Federal interest involved. Is it fair to say that?

Mr. DEL TUFO. I think that is what it comes down to.

Let me explain the committee and the council that you have just alluded to. One is the Federal-State Law Enforcement Committee that brings together Federal and State law enforcement officials formally to discuss issues of the type that we just addressed.

This is a supplement to day-to-day informal contact between Federal prosecutors and State prosecutors. Working with the division of criminal justice in the State has been very rewarding. Very close relationships have developed and we maximize use of law enforcement resources. Because there are 100 lawyers on the State side who are doing the same type of white-collar work that we are, we are all to supplement each other and move into other areas.

The State, for example, under H R. 3 has 50 or 60 people doing medicaid investigations. There is therefore, no reason why we have to maintain that level of commitment and we can move into another area of fraud.

The other body to which you referred, Senator, is the Federal Law Enforcement Council. What I did, essentially, was to bring together all of the Federal investigative agencies in one group and schedule periodic meetings to try to discuss things of mutual Federal interest and also to discuss with this group the position that the Federal Government would consider taking in its dealings with the State through the Federal-State Law Enforcement Committee. The latter permits all investigative agencies to have their opinions known if we are going to deal with a policy matter that would affect them.

Senator **Cochran**. Mr. Gray, do you have the benefit of written guidelines, instructions from the Executive Office or Department with respect to how you should go about determining concurrent jurisdiction questions?

Mr. **Gray**. In some areas, yes. Mr. Silbert described what I think can be called a Department policy on, for example, dire acts; stolen motor vehicle cases. The policy is a one-car case is not prosecuted in Federal court, absent some very good reason to do so.

As you slide away from a few particular statutes for which there is a particular, recent—maybe a recent precedent in court or a certain court appealed it—causes the Department to take a position on the statute. But as you slide away from those areas, then the guidance we get is more general. It is in the nature of the Attorney General's policies as articulated either in the district's manual—each is to our annual conference of U.S. attorneys which these things are discussed.

I believe that the guidance we get is adequate to assist is in exercising our discretion and that the dangers of more explicit direction exceed the benefits we gain from that.

One of the things that I know Mr. Silbert referred to briefly this morning, but which worries all of us is that as guidelines, either at the Department level or at the office level are more and more explicit, it increases the likelihood of pretrial litigation. It increases the likelihood that someone will come in and challenge an indictment and say, this grand jury never should have been asked to consider this because it doesn't fit the Department's guidelines.

We all want to make as uniform as is wise and improve the quality of our decisionmaking. But we in the meantime have to be concerned about the least likelihood of pretrial litigation; challenging the indictment, challenging the Department to define a guideline.

In our local office, in the District of Vermont, we do not have written guidelines because of a conscious decision made by me that they are unnecessary. We are small enough; the FBI office is right down the hall, I see all my assistants every week, some from out of the district, and we just don't need them in writing.

Obviously, when this is not possible, some guidelines are necessary and I, for one, do not encourage specific guidelines from Washington unless there is a particular reason for it. That might be for example that that particular case that raises a question about a statute to use in a circumstance, then of course the Department has to take the position to make sure that the law which develops under the statute is OK.

Senator **Cochran**. Mr. Robinson, have you had the experience of the judges actually imposing a policy of their own in this situation?

Mr. **Robinson**. Well, not directly. You get the drift from time to time from sentencing and comments of the kinds of cases the judges like to see and don't like to see.

Senator **Cochran**. Well, you know I was just thinking while you all were answering these questions about declining to prosecute and they're playing like this is a big decision that the attorneys make, or the Attorney General makes—but when you really get down to do it, though, in some cases, the judge makes that decision; he just throws you out. He says, I don't want this case in my court; this is not a justice of the peace court, this is not a small claims court. Don't you all have something else you can do today? Or remarks of that character which I've heard myself.

Mr. **Robinson**. I have, too. [Laughter.]

I just wanted to say that I think one of the healthy developments in the last couple of years in the area of determining where these cases ought to be prosecuted—the Federal level or the State level—has been that the Attorney General, and the last couple of Attorneys General have sent the message out, not only to U.S. attorneys but to the heads of Federal investigative agencies that the principal responsibility in this country has always been and will continue to be in the area of criminal law enforcement with State and local government. It's as it should be.

And the role of the Federal Government ought to be to come into those very difficult areas where Federal resources are such that only the Federal Government can do the job, or where there's a peculiar Federal interest to be protected as is the case in the area of counterfeiting and a number of other areas; the immigration laws, customs, and the like.

Now this has meant that what we've done is taken a hard look in our offices at cases that can be prosecuted at the State level. Bank robberies is one example, although I think the point that I'd like to make that even in that area, a nationwide uniformity would not in my opinion be wise because in some districts—central California, southern New York—bank robberies are at an epidemic level, as I understand.

We happen to be very fortunate in the Eastern District of Michigan to have had a rather dramatic decline in the number of bank robberies. And therefore, it isn't necessary to concentrate our efforts. So what we do in deciding whether a case should be prosecuted at the Federal or State level is keep an eye on what the Federal—what the State people can do, what they're willing to do.

Mr. Del Tufo indicated that in his district in and many other districts, there are Federal-State law enforcement committees that are being encouraged by the Department. I have a committee of that type in Michigan; the two U.S. attorneys from Michigan, the attorney general of our State, the prosecutors from the major counties, and the president of the Michigan Prosecuting Attorneys' Association meet periodically.

We share our guidelines with them, although they are not made public for the reasons that Mr. Silbert indicated. We have written guidelines. The guidelines are flexible, however; they are designed to give guidance to the assistant U.S. attorneys. There are a good number

of those in my district now, and I don't have the luxury that
Gray does, to see each of them on a daily basis.

And it's important that they understand where we're going
important that the office have a memory. We have some turnove
our office and to give direction to the investigative agencies is im
tant because we don't want them wasting time investigating c
that are not going to be prosecuted at the Federal level.

I think that the whole development of shifting priorities and u
resources like pretrial diversion and the like and concentrating
the high priority cases has been a healthy development and I h
that it will continue.

Senator COCHRAN. Well, I hope we can have that reflected in
Criminal Code that we are taking up, maybe within the next mon
I'm suggesting that we write into the Criminal Code that kind
philosophy and spell out that a substantial Federal interest needs
be shown before there would be a basis for Federal prosecution
don't know whether it will be adopted or not, but you make a ve
fine statement, I think, in support of that kind of philosophy.

Mr. DEL TUFO. I'm not sure that I agree with that being in a
legislation.

Senator COCHRAN. You don't? Well, you don't get to vote on
[Laughter.] You've got to——

Mr. DEL TUFO. I will make a request for a transfer to the Maria
Islands. [Laughter.]

Mr. GRAY. I think, Senator Cochran, our concern would be th
that again becomes a litigable right. It depends on who makes th
judgment and what the scope of review of that judgment should b
As a statement of intent and purpose, we certainly don't have an
quarrel with it, but our problem is, what do we do when we retur
an indictment and somebody comes up and says, yes, I think you
judgment as to whether there was bench interest in this case——

Senator COCHRAN. But we said that it was a nonlitigable righ
That ends that, doesn't it? [Laughter.]

Mr. DEL TUFO. Eventually it will. I think initially that will b
litigated. Whether you can do that will be litigated. I don't mean tha
that will last forever; I would suspect that we would win ultimatel
on that, but I have no doubt that your statement to that effect and th
efficacy of it would be litigated initially.

Senator COCHRAN. Well, I appreciate the benefit of your observa
tions, not that I'm interested. [Laughter.]

We have other questions. We have another witness, and we'r
running out of time. I want to thank you for being here and for taking
the time to help the committee, and I may very well send you some
of the questions on this subject that we didn't have a chance to cover.
I hope it won't burden you all too much to write up responses to
those.

Mr. DEL TUFO. Thank you very much for having us.

PREPARED STATEMENT OF ROBERT J. DEL TUFO

The U.S. Attorneys Office for the District of New Jersey represents the Federal
government in the entire State of New Jersey. It is the fifth largest United States
Attorneys Office in the country. There are 62 Assistant United States Attorneys in
the office assigned to five separate divisions—Appeals, Civil, Criminal, Fraud and
Public Protection, and Special Prosecutions. In addition, there are ten special

Justice Department attorneys assigned to the Federal Organized Crime Strike Force. The operations of the Strike Force are well integrated with the operation of the other divisions.

The priorities of the Office are those of the Attorney General with special emphasis upon dealing with white collar crime, corruption, organized crime and major drug conspiracies.

The Criminal Division has primary responsibility for all federal criminal prosecutions in the District of New Jersey. In addition to handling the more routine cases of the Federal investigative agencies, it devotes a not inconsiderable portion of its time to white collar offenses (such as tax frauds, corruption, stolen securities, narcotics violations, and receipt and distribution of stolen goods.)

In addition to the Criminal Division, and consistent with the stated priorities, a significant complement of attorneys works in three specialized units charged with the specific responsibility of investigating and prosecuting white collar and organized crime. The most diversified unit is the Fraud and Public Protection Division. Created in August of 1978, the Division constitutes an amalgamation of the former Frauds Division, the Bank Fraud Unit, and the Environmental Protection Division. Composed of the Economic Crime, Governmental Program Frauds and Public Policy Enforcement Sections, the Division is charged with the investigation and prosecution of a broad spectrum of criminal activity including: economic crimes (bank fraud, mail and wire frauds, business frauds, bankruptcy fraud, securities fraud and fraud in interstate land sales); fraud in governmental social programs (particularly those sponsored by the Department of Health, Education and Welfare, the Department of Housing and Urban Development, the Department of Labor and the Department of Agriculture); and regulatory offenses in matters affecting the public welfare (such as environmentl violations and food and drug offenses). The efforts of the Fraud and Public Protection Division are complemented in two more specifically focused areas. The Special Prosecutions Division concentrates on political and official corruption. The Federal Organized Crime Strike Force focuses upon organized crime and labor racketeering.

The Appeals Division is charged with the responsibility of representing the office in all matters occurring before the Court of Appeals for the Third Circuit. And the Civil Division, of course, handles virtually every civil case involving the Federal government within the State of New Jersey.

The office also has identified and moved forward in other priority areas which include close Federal-State working relationships, pursuit of criminal and civil remedies in the environmental area as well as in other public protection, regulatory contexts such as enforcement of the Food and Drug laws, and pursuit of other affirmative civil remedies as an adjunct to criminal prosecution and implementation of a pilot program to government monies due from students who have defaulted upon government guaranteed loans.

The present United States Attorney is Robert J. Del Tufo who has held office since December 2, 1977. He is a graduate of Newark Academy, Princeton University and Yale Law School. Prior government service includes law secretary to Chief Justice Joseph Weintraub of the New Jersey Supreme Court, Assistant and First Assistant Prosecutor of Morris County, member of the New Jersey State Board of Bar Examiners, First Assistant Attorney General of the State of New Jersey, and Director of the Division of Criminal Justice of the State of New Jersey. Mr. Del Tufo was also in private practice for some thirteen years in a ten-member firm which engaged in a general practice with particular emphasis upon business, tax, regulatory, trial, appellate and local government agency practice. He is a Fellow of the American Bar Foundation, a member of the Criminal Law Drafting Committee of the National Conference of Bar Examiners, Multi-State Bar Exam and a member of various professional associations including the American Bar Association and the National District Attorneys Association.

PREPARED STATEMENT OF WILLIAM B. GRAY

Mr. Chairman and Members of the Committee: I am very pleased to have the opportunity to appear before you to testify regarding Department of Justice authorization and oversight with particular emphasis on the role and function of United States Attorney's Offices. My perspective on the Justice Department and the function and role of United States Attorney's Offices comes from several distinctly different view points. Currently, I am United States Attorney for District of Vermont, one of the smallest U.S. Attorney's offices in the entire federal system. From 1975 to 1977, I served as Director of the Executive Office for United States Attorneys and as an Associate Deputy Attorney General. From 1972 to 1975, I was an Assistant United States Attorney in the District of Vermont and from 1968 to 1972 I served as an Assistant United States Attorney in the Southern District of New York, one of the largest offices in the federal system. Since late 1977, I have served as a member of the Attorney General's Advisory Committee of United States Attorneys, and I chaired that organization during 1979.

The United States Attorney's Office for the District of Vermont is one of the smallest in the federal system and currently employs four Assistant United States Attorneys and six support staff in addition to the United States Attorney. We represent United States Government in virtually all litigation in the state and Federal courts within the State of Vermont. Criminal investigations and prosecutions constitute more than half of our workload, and a significant portion of our criminal work relates to customs or immigration matters arising from the international boundary we share with Canada. It is difficult to characterize our remaining criminal caseload. It ranges from relatively routine criminal cases (postal theft, bank embezzlement) to moderately serious cases (bank robbery, mail fraud, income tax evasion) to extremely serious cases (civil rights-murder and major drug and smuggling cases).

Our civil work also encompasses a wide range of actions ranging from routine collection work and student loan cases to major law suits raising statutory and constitutional challenges to major Federal programs.

Although Federal court is authorized to be held in six locations (28 U.S.C. S. 126), the principal seats of court are Burlington and Rutland. Until recently, the United States Attorney's Office in Rutland was the only staffed office, but both Rutland and Burlington are staffed in order to reduce the time and expense required for travel.

Our legal staff consists of four highly qualified Assistant U.S. Attorneys, three men and one woman. All have distinguished academic and professional backgrounds, three are former law clerks to federal District or Circuit Judges and one came to the office from the Departments Honor's Program in which he was employed in the Civil Rights Division.

A member of the committee staff has advised me of some of your concerns and I am prepared to respond orally to questions on those and other issues.

PREPARED STATEMENT OF JAMES K. ROBINSON

I appreciate the opportunity to appear before you today to discuss the important work of the United States Attorney's office for the Eastern District of Michigan.

I was sworn in as United States Attorney for the Eastern District of Michigan on August 15, 1977. Prior to my appointment I was a senior partner of Honigman Miller Schwartz & Cohn, a large law firm in Detroit, where my speciality was trial practice. In addition to my law practice, I had taught law school on a part-time basis since 1970. Since my appointment as U.S. Attorney, I have continued to teach a course in civil and criminal evidence at Wayne State University Law School in Detroit. In addition, I continue to serve on a five person committee of the National Conference of Bar Examiners which drafts the evidence questions for the Multistate Bar Examination.

I am 36 years old. I was graduated from Michigan State University with a B.A. degree with honors in 1965 and from Wayne State University in 1968 with a J.D. degree magna cum laude. At Wayne Law School I served as editor-in-chief of the Wayne Law Review. Subsequent to law school, I served for one year (1968–1969) as a law clerk to the Honorable George C. Edwards, Jr., now Chief Judge of the United States Court of Appeals for the Sixth Circuit (Michigan, Ohio, Kentucky and Tennessee). After my clerkship, I became an associate of Miller, Canfield, Paddock & Stone, a large Detroit law firm, where my work was primarily trial practice. I was associated with that firm from 1969 to 1971 when I joined Honigman Miller Schwartz & Cohn.

Prior to accepting the appointment as U.S. Attorney, I was active in numerous legal and civic activities, including: service as chairperson of the Michigan Supreme Court Committee on Rules of Evidence which produced the evidence rules now in effect in Michigan state courts; service as a director of the Detroit Bar Association; service as director of the Legal Aid and Defender Association of Detroit; service as a Hearing Referee for the Michigan Civil Rights Commission; service as a Hearing Panel Member for the Michigan State Bar Attorney Grievance Board; service as a director of the Metropolitan Detroit Branch—American Civil Liberties Union. In addition to the foregoing, I published law review articles on civil rights, evidence and attorney contempt of court. I also participated as a lecturer in numerous continuing legal education programs for judges and lawyers on evidence and trial practice. Since my appointment, I have conducted training sessions on evidence and trial practice for lawyers in my office and for the Attorney General's Advocacy Institute.

The office of United States Attorney is in my view one of the most interesting and challenging positions in which a lawyer can serve in the public sector. While often referred to as the "federal prosecutor," the U.S. Attorney does much more than handle criminal cases.

There are 95 judicial districts in the United States and 94 United States Attorneys appointed by the President with the advice and consent of the Senate. These districts vary greatly in geographic size, population, number of Federal judges and number of Assistant United States Attorneys.

The Eastern District of Michigan covers 34 Michigan counties and 21,235 square miles. The district roughly covers the eastern half of the lower peninsula of Michigan. Over 70 percent of the population of Michigan resides in the District.

Currently there are thirteen active Federal judges allocated to the district. In addition, there are two senior judges, both of whom have active caseloads. Eleven of our judges sit in Detroit. One judge sits in Flint and the other divides his time between Bay City and Port Huron.

There are 47 Assistant United States Attorneys allocated to the Eastern District of Michigan, making it the ninth largest U.S. Attorney office in the United States. These Assistants are appointed by the Attorney General upon recommendation by the United States Attorney. Of the 47 Assistants who will be on duty within the next few months, I will have recommended the appointment of 36 of them.

The duties of the United States Attorney are outlined by statute. The U.S. Attorney is directed, among other things, to:

"(1) prosecute for all offenses against the United States; [and]

(2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned . . ."

The United States Attorney is the principal official in his or her district for the execution of Department of Justice litigation policy in both civil and criminal cases. The general policies of the Department are communicated to U.S. Attorneys through meetings with key department personnel, including the Attorney General, and through various written directives. United States Attorneys have considerable autonomy and discretion to carry out the Department's work in his or her district.

Former U.S. Attorney Whitney North Seymour of the Southern District of New York, answering the question "What does the United States Attorney do?" once said:

"He is administrator, troubleshooter, enforcement planner, interviewer, litigator, statesman, paper-pusher, back-slapper, adviser, writer, researcher, negotiator, interviewee, and a dozen other things as well."

This former U.S. Attorney also correctly observed that: "Although a U.S. Attorney is frequently selected because of his trial experience, his job tends to involve more administration than litigation.

In my case, the administrative duties consist of directing and supervising the activities of 47 attorneys and 47 support persons. We have two attorneys and one secretary in our Flint office and one attorney and one secretary in our Bay City office. The remaining lawyers, secretaries and other support staff work in Detroit. In addition, I have major responsibility for supervision of the Detroit Organized Crime Strike Force which has 9 attorneys.

The supervisory staff of our office consists of a Chief Assistant, Chief of the Criminal Division (with 28 lawyers), Chief of the Civil Division (with 11 lawyers) and Chief of the Appellate Division (with 4 lawyers and supervision of all appeals in the office). In addition, the Attorney-in-Charge of the Detroit Organized Crime Strike Force (with 9 attorneys) works under the supervision of the U.S. Attorney as does a Department of Justice Economic Crime Specialist. This brings the total number of Department of Justice attorneys in the Eastern District of Michigan to 58, including the United States Attorney.

When I was appointed in 1977 the authorized size of the attorney staff was 31 lawyers. There were 6 vacancies. The Department authorized an increase of 6 lawyer positions in 1977, bringing the total to 37. After three new judges were added to the district under the Omnibus Judges Bill our attorney staff was increased to 47 Assistants. We expect to fill all of these positions in the next few months.

I believe that the United States is entitled to the best legal representation possible. I am proud of the high caliber and dedication of the attorneys on the staff. The attorneys hired as Assistants since my appointment have come with a variety of previous experience. Many had prior experience as state prosecutors; a number had experience with federal and state defender programs, some came from private law practice or from other Federal agency law offices; some were law clerks to Federal and State judges. These persons were selected on a merit basis from hundreds of applications. Many of these attorneys took salary cuts to join the office and most could earn more money in private practice. They are motivated in large part by a desire to engage in significant public service work.

At the time of my appointment in August 1977, 1 Assistant was black (3 percent) and 5 were women (16 percent). After our current vacancies are filled, 19 percent of the attorneys will be black and 21 percent will be women.

Department of Justice policy is communicated to United States Attorneys through a multi-volume United States Attorney's Manual. In addition, Department policy is communicated through specific written directives and periodic meetings.

The views of the various United States Attorneys are communicated to Main Justice individually and through a group called the Attorney General's Advisory Committee of United States Attorneys. This group meets regularly with key persons from Main Justice and serves as the vehicle through which U.S. Attorneys' views are made known to the Attorney General and key Main Justice policy makers.

The manner in which U.S. Attorney offices are organized and managed varies depending upon size and the personality of the incumbent U.S. Attorney.

Running the office occupies a substantial amount of time. The U.S. Attorney handles hiring, firing, evaluation and promotion of attorney and non-attorney employees. The U.S. Attorney establishes office policy on criminal prosecutions and procedures concerning civil and criminal cases generally. Usually the U.S. Attorney exercises more detailed supervision of major civil and criminal litigation, appearing in court and writing briefs as time permits.

Handling "external" relations also consumes much time. This involves dealing with the various litigating divisions at Main Justice, working with Federal criminal investigative agencies, working with civil client agencies, dealing with the courts and court agencies (*eg.*, Probation and Pretrial Services) concerning administrative matters, liasion with state and local agencies (*eg.*, State Attorney General, state prosecutors and state and local police agencies) and dealing with press representatives.

There are 28 attorneys in the Criminal Division of our office. The division has three units: The Fraud Unit with 10 Assistants, the Drug Unit with 9 Assistants, and the General Crimes Unit with 8 Assistants. In addition, 9 attorneys in the Strike Force handle organized crime cases.

The criminal workload of the United States Attorney's office covers a broad range of matters of federal interest. Forty-four Federal investigative agencies submit criminal investigation reports to U.S. Attorneys. The agencies having most frequent contact with our office in criminal cases are the Federal Bureau of Investigation; the Drug Enforcement Administration; the U.S. Postal Inspection Service; the Secret Service; the Bureau of Alcohol, Tobacco and Firearms; U.S. Customs; the Immigration and Naturalization Service; and the Internal Revenue Service.

The primary responsibility for criminal law enforcement in the United States has always rested, and must continue to rest, with state and local governments.

In determining the appropriate role of for the Federal government in the country's criminal justice system, the Attorney General has concluded that our highest priority must be placed on development of cases in those areas in which state and local investigative and prosecutorial agencies have been unable to work effectively because of resource, manpower or jurisdictional limitations. These areas are major drug trafficking, corruption of public officials, organized crime, white collar crime. Unique tools are available to Federal prosecutors which are not generally available to state law enforcement personnel. These tools include the investigative powers of the Federal grand jury which can compel production of documents and compel testimony from reluctant witnesses, the avilability of court authorized electronic surveilance, the resources of skilled, nationwide investigative agencies such as the

FBI, and innovative federal statutes such as the Racketeer Influenced and Corrupt Organizations (RICO) statute.

In addition to the Department's high priority areas, a significant portion of our law enforcement activity continues to be devoted to investigating and prosecuting offenses of exclusive Federal jurisdiction which directly affect government operations. These offenses include counterfeiting, mail theft, customs and immigration offenses and Federal income tax cases.

We have limited resources with which to accomplish our criminal law enforcement goals. Our District has a limited number of federal judges and Assistant United States Attorneys. These available resources must be used wisely and efficiently to obtain the maximum possible benefit.

Former U.S. Attorney Whitney North Seymour made this perceptive comment about the criminal law enforcement role of the United States Attorney in today's complex society:

"The traditional concept of the prosecutor as a public lawyer who merely presents evidence, questions witnesses, and seeks prison sentences is out of date. The prosecutor's primary obligation should be creative use of all available law enforcement resources to protect the public against antisocial conduct; to protect the individual citizen's constitutional rights; to ensure that the laws providing new government benefits are properly implemented; and to contribute affirmatively to integrity in government and constructive moral leadership for the community."

To this end we have been carefully examining the priorities of our office and the law enforcement agencies with whom we deal. We have been working with state and local prosecutors in making an appropriate allocation of responsibility for offenses which can be prosecuted in either State or Federal court. We have an effective Federal-State law enforcement committee which has improved relations between the Federal and State law enforcement communities.

In managing our responsibilities within the resources available, we have been making effective use of pre-trial diversion as an alternative to the traditional criminal justice process disposition for certain offenders who we believe can profit from such treatment. Rather than proceeding to trial participants in the program receive close, regular supervision. They also are eligible to receive a broad range of services, including employment counseling, education and job training. Upon successful completion of the program, participants have their charges dismissed—unsuccessful paritcipants are returned for prosecution.

A combination of reordering priorities, shifting some cases to the state, and using pretrial diversion, together with increased attorney manpower, has enabled us to concentrate effectively on the Department's major law enforcement priorities. While we concede that much remains to be done in all priority areas, we believe that we are making significant progress.

The civil workload of the United States Attorney's office is often overlooked. Ninety-nine Federal agencies submit civil actions to United States Attorneys for disposition. Our office represents the United States in civil cases brought by various parties against the government. These cases include prisoner petitions, tort claims, claims under the Social Security laws, and a variety of other litigation arising from the implementiation of Federal programs.

The departments and agencies of the government engage in numerious activities similar to those of a modern corporation. The government owns property, manages buildings, runs hospitals, etc. The litigation arising from such activities encompasses the complete spectrum of legal problems encountered by private business enterprises.

The torts area has seen a major increase in recent years with persons suing the United States claiming damages for conduct of varous government programs Former Assistant Attorney General Barbara Babcock of the Department's Civil Division in previous congressional testimony said:

"Today, hardly a bank fails, a mine collapses, a plane crashes, that the United States is not joined as a defendant because of its wide-ranging regulatory role. Agency programs likewise are enduring escalating legal challenges: the Government is sued for issuing regulations, for failing to issue regulations, for issuing allegedly incorrect regulations."

In addition to representing the United States as a defendant our office also represents the United States as the plaintiff in numerous cases. The number of civil cases in which the United States is the plaintiff is approximately one-half the number of cases which the United States is the defendant. These cases include land acquisitions, suits for recovery of money (such as the proceeds of a fraud perpetrated on the Government), suits for injunctive relief against violators of Federal civil programs and a host of other actions.

Many of these civil cases involve highly significant policy issues associated with governmental activities. Cases involving civil enforcement of civil rights statutes, environmental protection laws and consumer protection laws are examples of the types of civil cases which have broad implications for society.

There can also be a direct financial benefit for the Government in the civil area by reducing the level of monetary liability in cases in which the United States is subject to suit and by prosecuting vigorously government claims against private parties.

I believe that the current civil and criminal legal representation of the United States is in excellent condition in the Eastern District of Michigan. This is due to the fact that highly capable men and women are serving in the professional and support positions in our office. The outstanding work of these individuals has produced a record of accomplishment and a reputation for excellence of which I am proud.

Senator COCHRAN. The last witness is William Lockhart. Professor Lockhart is from the University of Utah, and we appreciate very much your being with us, Professor Lockhart.

Professor Lockhart has written articles on the subject of discretionary clemency and has studied the exercise of discretion in prosecution of violations of Federal laws.

We appreciate your taking the time to be with us and help us in our review of the job of U.S. attorney.

In addition, Professor Lockhart has been a U.S. attorney. As a part of your experience, what did you find to be some of the problem areas, particularly in relation to the question of prosecution and whether or not to exercise your declination prerogative?

STATEMENT OF PROF. WILLIAM LOCKHART, UNIVERSITY OF UTAH SCHOOL OF LAW

Mr. LOCKHART. Thank you, Mr. Chairman, for permitting me the opportunity to address your interesting subject. I have submitted a written statement, and I have a few additions to that statement that I would like to make. I think I'd prefer simply to respond to your questions rather than reiterating anything in my written material.

Senator COCHRAN. We do have a copy of it and thank you for it. We'll make it a part of the record.

Mr. LOCKHART. Thank you.

In responding to your question, I want to emphasize a couple of things. First of all, my interest in this subject tends to be somewhat specialized. I am primarily concerned about the subject matter you were discussing a moment ago with the U.S. attorneys, that is the control and guidance of their exercise of discretion.

And in saying that, I want also to emphasize that I do not demean at all the burden of work that they face. I was particularly pleased to see your concern about the increased burden of civil litigation and its impact on the U.S. Attorneys offices, because it's quite clear to me that they need more support from you in order to hope to address the kinds of problems I'm concerned about.

It is not possible for a small office, for example, such as the U.S. Attorneys office in the State of Utah from whence I came to deal with the problem of control of discretion in any halfway sophisticated way while it is overburdened with civil litigation, lands litigation of immense proportions dealing with energy problems and mining problems, and that whole range of effort seriously compromises their ability to do other important jobs.

So probably the primary plea that ought to be made is for resources. But having said that, I do have some concerns and criticisms of the Department's approach to these problems.

My experience was short; probably therefore uncharacteristic; I did not have the burden of continuing administration of an office over several years to face, but in that 6 months in which I was U.S. attorney, perhaps because I was looking for it in part, I found a tremendous lack of direction, guidance, policy control on issues that seemed to me to be of national importance and required national policy guidance and not merely the local judgment of a local U.S. attorney.

Now the predominant experience was with the clemency program initiated by President Ford. And in that setting I found it very troubling that where the U.S. attorney was set up essentially to act as a judge because he had to review the cases of draft evaders and determine whether or not, under the Department's view of the case, there was something called "prosecutive merit" in the case, and if there was that something, he was then to determine whether or not a period of alternative service should be served as a condition of obtaining the clemency granted by the President.

Well, the guidelines provided by the Department, I thought, were wholly inadequate, terribly vague; and that prevailed in a setting where there was an immense variation from district to district, and even as my article notes, apparently a lack of awareness on the part of the Department of what was happening in its own backyard. The District of Columbia statistics apparently were not being considered as a basis for decision; the lack of those guidelines for decision made it almost impossible to determine whether any particular course of decision would be consistent with national policy.

We had specialized problems in my backyard; the district judge there, to reflect your comments earlier, had made rather clear his view of selective service prosecution because of a very specific situation in the State of Utah.

And as a result there had been very few successful prosecutions over the period of several years prior to the clemency program, and it is my view that that, along with some other considerations, called for a decision not to prosecute those cases; that is, not to treat them as having prosecutive merit and therefore not requiring alternative service of anyone.

Senator Cochran. You were a U.S. attorney at the time?

Mr. Lockhart. Yes, sir.

Senator Cochran. Trying to deal with those guidelines——

Mr. Lockhart. I was, yes. And they are rather fully summarized in the articles, and I will refer that to counsel.

As a result of the efforts to deal with that problem, having set up what I considered to be appropriate reasons for declining to require alternative service, I called the Criminal Division; I was, I think, perhaps a little naive expecting that those reasons would be thought radical and probably would be immediately countermanded, or at least aggressively questioned and challenged.

There were some questions, and it was clear that the supervising attorney in the Criminal Division who was responsible for coordinating these things disagreed with the position. But that's all; there wasn't any apparent effort to oversee that decisionmaking, no attempt to determinine whether the policy that I was following would be consistent with the national policy or would reflect existing national policy, nor was there an attempt to integrate the reasons I offered into any body of consistent policy; indeed, very little inquiry.

Nevertheless, I submitted a written explanation of the grounds for decision, feeling that that was an obligation ahead. At no point was there any countermand or anything like that offered to me. Now, perhaps it was because I was right—that's a conceivable but unlikely possibility.

It seemed to me more likely that what was going on was that this reflected the earmarks of the program of supervision or nonsupervision that is characteristic of the Department's relation with the U.S. attorneys. And I think I heard essentially that in the testimony this morning, although you were not getting into detail.

I think that's a reason for concern. I'm not suggesting that we want a system which monolithically imposes one single accepted body of policy to the exclusion of local considerations.

I think the questions are much more complicated than is implied by the discussion briefly of that subject this morning. For example, I didn't hear any discussion of the question of enforcement of regulatory cases by the U.S. attorney.

Those cases come in as a relatively minor part of the day-to-day burden of the U.S. attorneys, but they are crucial to the enforcement policy of the agencies. A relatively few cases are mounted with great huffing and puffing by the agencies putting together a complicated set of facts often under a detailed statute—comes into the U.S. Attorneys Office, particularly in the case of criminal prosecution, and again perhaps partly because of the attitude of Federal district judges in some cases, those cases look somewhat minuscule compared to some grandiose white-collar scheme or some bank robbery case, perhaps, in which weapons were used.

In any event, too often the U.S. attorney has his own views of the policies that ought to prevail in enforcing those statutes, and they may conflict seriously with the policies under which the agency developed the prosecution, of if it's not a prosecution, the same thing holds true with respect to civil enforcement. And if the U.S. attorney substitutes his perception of appropriate national policy with respect to the application of the statute, I think we're inviting serious trouble. There are problems of great inconsistency that arise from that kind of performance out of the prosecutor's office.

My experience was not only in the area of the U.S. Attorneys Office, brief as that was, but also I made a rather lengthy and detailed examination of one area of prosecution; food and drug prosecutions, as coordinated through the Chief Counsel's Office at the Food and Drug Administration; the Consumer Affairs section of the Antitrust Division of the Department and the U.S. Attorneys Office.

There are some differences of opinion between me and particularly the former chief counsel at Food and Drug about the merits of my criticism, partly because he felt that a new and different standard was implied in assessing the quality of judgment that was going on at that point.

But there is no apparent dispute, or at least he's offered no contest of the facts, so I feel somewhat free to talk about that. I believe your counsel has obtained a copy of this report. It goes into detail in the performance of that prosecuting function.

Senator COCHRAN. Well the question then I guess can be condensed to: Who should decide; the agency or the U.S. attorney, or someone at the Department level in Washington?

Mr. LOCKHART. Or the last person to see the case? The U.S. attorney—which is often the practical consequence of these exercises of discretion.

The thing that concerns me is the wide disparity of standards that are applied not to the kind of judgment that Mr. Del Tufo was talking about where the question is, do you have a witness, is the evidence fully developed, questions which are basically nuts and bolts pretrial preparation questions. Obviously discretion has to be exercised in that area, and substantial discretion, if you're going to go before a jury.

But what we are talking about are other kinds of standards or the lack of standards which permit a focus on inappropriate decisions or inconsistent decisions. For example the Department, with respect to these Food and Drug prosecutions, has a policy of insuring that there's an individual defendant in every instance where there's any substantial basis offered by the agency and the agency uniformly makes the effort to prepare the case which includes individual defendants.

Well, in the face of a clear statement of policy, one of the few, I would say, in the United States Attorneys Manual, that there shall be individual prosecutions, essentially wherever possible, one U.S. attorney stated unequivocally to me that it was his policy always to accept a plea bargain to relieve the individual defendants in return for a plea by the corporation. Utterly inconsistent with the Department policy.

No process for integrating that decision into the general body application of policy in the Department and no focus on that kind of decision by way of attempting to bring about any sort of mandated conformance to the Department's policy.

It seems to me there's a line to be drawn. If we don't want monolithic performance, it seems to me clear we want to preserve some independence in the U.S. attorneys in order to avoid the danger that some future Attorney General grasps the reigns too firmly.

But between the feared consequence at one end and the ability of a local U.S. attorney to disregard rather clear and rather clearly appropriate statements of policy on the other, we need some supervision and oversight, and a process for assuring this.

I could illustrate even out of my own office where, for example, we had a case pending, in which it was on appeal when I came into that office. It involved a local tax protestor who had been found with IRS ruling statements which he proposed to go around slapping on all the cars downtown in order to draw attention to his protests of IRS policies.

He was prosecuted under a provision which essentially says that——

Senator COCHRAN. Littering.

Mr. **Lockhart** [laughing]. Yes, littering. He was littering with badges or insignias of the United States, was essentially the charge.

At the same time, we had a kid picked up who was—by local police—who was using a replica of a U.S. marshal's badge to impress the girls, apparently, as he drove around his high school. Well, we advised, unknowingly in the latter case that there was no violation of Federal law while in the former case we were prosecuting through to appeal for possession of a badge or insignia of the United States. And that conviction, incidentally, was upheld in the tenth circuit.

It seems to me that that kind of policy inconsistency is at a gross level and that the process ought to assure those kinds of inconsistent policies are not applied in the decisionmaking, in the discretion of the U.S. attorney.

Senator **Cochran**. Would the knowledge that you have about the Wounded Knee incident also serve as an illustration of the point that you are making?

Mr. **Lockhart**. Well, yes; my concern there, of course suggests that there is a limit to the appropriate control of U.S. attorneys. And I think the U.S. attorney in the district I have in mind was entirely within bounds and appropriate when he expressed his concern about what apparently was an order from the Department to prosecute as accessories all persons who were supplying any goods or foodstuffs or whatever to the Indians under siege, or who were conducting the siege, depending on your viewpoint, at Wounded Knee.

His proposition was that—he could understand the Department's concern, but he was not about to prosecute the pillars of his community, who were local churchmen primarily, for supplying blankets and canned goods to the Indians.

That I think was an appropriate judgment, or at least it was a judgment. If you want to take this question seriously, the process should have assured him a regularized opportunity for contest about the appropriateness of that instruction.

Generally speaking now, of course, he has no problem in simply disregarding, and perhaps he shouldn't be able to disregard it without stating his grounds and without being required in some fashion to hold his grounds.

But at the same time, the Department ought to have more control over those kinds of discretionary judgments in order to try to assure some consistency and effectiveness of enforcement.

Senator **Cochran**. Well, you're coming close to recommending national guidelines?

Mr. **Lockhart**. I am, sure. In some areas I think it is utterly essential, and the Department says——

Senator **Cochran**. What about the argument that was brought up that they may be discoverable and used as a means of avoiding indictment or prosecution.

Mr. **Lockhart**. Well, of course the kind of guidelines——

Senator **Cochran**. Wouldn't that be just like writing a new Federal law without approval of the Congress?

Mr. **Lockhart**. Those are obviously two crucially separate questions. Taking the last one first, it seems to me pretty clear that the only difference between that and what we're now doing is we're allowing local U.S. attorneys to rewrite those laws; if you want to put it in that fashion. And to do it without notice to anyone, and to do it with inconsistency. I don't think there would be any difference.

With respect to the more general question, it seems to me that you can distinguish between the dollar amount type of guideline; the guideline which would be a key to protecting one's self from prosecution, and guidelines which may encourage compliance. For example, the guideline which requires that you always include an individual defendant wherever there's a regulatory change of the sort I was talking about before.

In posing that guideline and requiring adherence to it would not encourage violations; it would have exactly the contrary effect and it may be subject to some limited contest. I suppose that it's possible that an equal protection claim might be urged in a setting where for some appropriate reason an individual defendant was unavailable, and claimed—after two or three such cases came along, and an individual defendant was then prosecuted, I suppose he may come in and say, I'm being treated inequitably.

I think there are a lot of things that could be done short of imposing these guidelines as law. First of all, we need to be talking about process and not just substance. There should be some assurance that the Department's processes for review of the standards applied in these decisions scrutinizes them, with care. Obviously that can't be done across the board with every single decision. But there can be probes; there can be process for identifying marked diversion from established policy; for requiring explanation, particularly where there is marked diversion from established policy.

I would assume that a lot of what is being planned by the Department looks in that direction. But it is not at all clear to me that it is going far enough; that there is a disposition to require guidelines of any kind, whether or not they would provide notice to the defendants, potential defendants, and whether or not they would be susceptible to relatively easy administration.

I think the tendency remains in the Department to hold back from requiring guidelines, requiring answerability, accountability, from the U.S. attorneys for these local discretionary decisions. And it seems to me that the whole problem is much more complicated than is implied by suggesting that a $500 limit should not be made public. Of course it should not be made public.

And I think the statute should address perhaps an amendment to the Information Act to assure that that kind of information is not made accessible. Or perhaps a modification of judicial review provisions to assure that challenges grounded upon inconsistent application of standards may be made only in certain limited circumstances.

I don't think you'd want to close the door to that altogether, judicial supervision of standards is probably essential at some point. And you are going to get that as the case law is developed whether you pass a statute or not. It's just a question of time and extension of existing precedent.

But it is possible for the Congress to discipline that process, and I think without trying to go into more detail at this point, the committee should take an interest in it.

Senator COCHRAN. Well, we certainly are. And I want to thank you for the contribution that you have made in your testimony to that effort of the committee. As I said earlier at today's hearing, we have seen very little evidence of interest by committees of the Congress in the day-to-day problems of U.S. attorneys. I think this is incredible. By and through these hearings we are trying to change that.

There may be other questions that will arise after a review of your prepared statement, and I would like to be able to submit questions to you in writing, if you would be good enough to respond to me when I do that.

Mr. Lockhart. Mr. Chairman, I very much appreciate the opportunity to do that.

Senator Cochran. Well, thank you and thank you for being here.

[The prepared statement of Professor Lockhart follows:]

PREPARED STATEMENT OF PROF. WILLIAM LOCKHART

My purpose in testifying today is to argue that in spite of substantial recent steps forward by the Department of Justice in seeking understanding and control of prosecutorial discretion, much remains to be done and many questions should be asked. I believe it is essential that Congress scrutinize the operation of all parts of the process by which decisions are made to enforce or to decline enforcement—both in the Department of Justice and in the investigative and regulatory agencies. I believe you will find that all of the old excuses for exempting enforcement decisions from close scrutiny do not stand the light of day, and that the interests of both fundamental fairness and of effective law enforcement demand reform—internal and administrative where feasible, but structural and imposed by statute or budget mandates where necessary.

Professor Kenneth Culp Davis, whose provocative book "Discretionary Justice: A Preliminary Inquiry" prompted much recent reexamination of our assumptions about prosecutorial discretion, has suggested that if we were to enact a statute prescribing the main features of present legal controls over the discretion exercised by prosecutors, the statute would read as follows:

(a) The principle of equal protection need not apply to the exercise of discretion to enforce or not to enforce; the administrator may enforce against one party when the reasons for enforcement are weak, and he may refuse to enforce against another party when the reasons for enforcement are strong. (b) In the exercise of discretion concerning enforcement, the administrator shall be subject to neither the law nor the ethical standards that apply to judges concerning influence by parties or their representatives. Those who do favors for the administrator, including donors of campaign contributions and political support, may be more leniently treated than others. (c) Because discrimination or favoritism is allowed, the administrator who exercises discretionary power concerning enforcement need not act openly, need not make findings or prepare reasoned opinions, need not consider his own precedents, and need not make an effort to be consistent from one case to another. (d) The administrator need not formulate policies about enforcement, and even if he has clarified his policies, he need not state them publicly and he need not follow them in particular cases. (e) No court shall review any decision to enforce or not to enforce. No such decision shall be reviewed for denial of substantive or procedural due process, for deliberate denial of equal justice, for discrimination or favoritism, or for abuse of discretion.

While some recent case law might permit quibbles about some of those propositions, there is no doubt that they accurately reflect the main features of the present system. The question to this Committee and to the Congress is—should such a system be perpetuated? Would you tolerate the thought for a moment if you were speaking of OSHA rather than the federal prosecutors?

Let me add some important corollaries to Professor Davis' statute:

(1) Because the prosecutor/administrator has no obligation to develop or state policies or standards for decision, or to promote consistency by adhering to precedents in his exercise of prosecutorial discretion—

(a) The investigative and regulatory agencies may expend time and resources developing their cases on the basis of the one set of policy assumptions, and the prosecutor can decline the proposed prosecutions because of his ad hoc, after-the-fact decision to prefer or emphasize another set of policies;

(b) The prosecutor can prescribe one set of broad policies for general application, but decline prosecution on the basis of a policy or theory fundamentally inconsistent with the general policies without explanation, without responding to any process for resolution of the inconsistency, and without significant oversight from his superiors;

(c) Despite a prosecutor's conscientious effort to think through the policy and evidentiary problems presented by a given decision, there need be no obligation to incorporate that judgment and mature thinking in any system of precedents or policies. Rather, when a similar question next arises for decision, all of the participants may reconsider the problem as if it were a matter of first impression requiring original thought and investigation, particularly if the original prosecutor in the meantime has departed the prosecuting offices;

(d) The top-level prosecutor/administrators with technical legal authority to oversee the prosecutors are not required, and are not specifically empowered or encouraged to exercise effective supervision over divergent policies and standards reflected in prosecutorial decisions, even where prosecutors openly reject or disregard formally-stated policies or standards.

(2) Because the prosecutor/administrator bears no legal obligation of reasoned or equitable decision or decisional process—

(a) He may base his prosecutorial decision on skimpy facts, unreliable sources of fact, facts provided by a vindictive enemy of the accused or by an interested or politically powerful friend, facts provided by the suspect himself without corroboration, or even no facts at all;

(b) He has no obligation to follow consistent or defined procedures in reaching decision. He may allow one favored defendant an extensive opportunity to show favorable facts and to present detailed argument prior to filing charges and, in similar circumstances, may deny other defendants the opportunity even to know that changes are being considered until they read notice of their charges in the newspaper.

These corollaries, and any number of others that might be drawn, come from my experience not only in considering these matters as a law teacher, but also from two other areas of practical experience. First, under appointment by the Chief Judge of the District of Utah while the Republicans were in disarray, I replaced the deceased United States Attorney for the District of Utah and served in that office in an "acting" capacity for six months from November 1974 through May 1975. During that time, in addition to confronting many issues of the usual nature that raised questions about the control of prosecutorial discretion, I also initiated and completed the administration of President Ford's Clemency Program.

Secondly, the experience as United States Attorney followed a period in which I had been actively investigating practical problems of control of administrative discretion as a consultant to the Administrative Conference of the United States. Immediately prior to my appointment as United States Attorney I had been working on an extensive study of the exercise of discretion by each of the primary enforcement offices involved in prosecution of violations of the food, drug and cosmetic act. The main burden of that study consisted of an analysis of all of the problems bearing on the fairness and effectiveness of enforcement disclosed by detailed inquiry into the entire decisional process in a selected group of cases. While there are disputes with some of the principals responsible for the enforcement decisions in question in the resulting report, I am confident that my analysis fairly and fully reflects the serious problems in those prosecutions at the time they were studied.

From that experience, I believe that the central failure of our legal system with respect to the structuring and control of prosecutorial discretion is the failure to be guided by the underlying premise of our common law tradition—that every decision with legal consequence is a policy decision.

My suggestion here, then, is that prosecutors are policy makers in the same sense that other administrative decision makers are also policy makers, and that Congress should take appropriate steps to assure that the legal system holds them accountable for the development and consistent application of policy.

The consequences of the present lack of accountability and system have been effectively summarized in the conclusions of two important studies which recently considered the role of the United States Attorneys and the Department of Justice. The ABA Special Committee To Study Federal Law Enforcement Agencies, in its report entitled "Preventing Improper Influence On Federal Law Enforcement Agencies" (1976), concluded at page 51:

The policies and practices of U.S. Attorneys represent a key aspect of resource allocation because they conduct most litigation in the Department. In the exercise of their prosecutorial discretion they make innumerable decisions which collectively allocate key resources. But on the available evidence there has been little coordination between them and the Department.

There is enormous uneveness in the role different U.S. Attorneys offices play, what crimes they emphasize, their input into policy, and their effectiveness generally.

The Justice Department's own study, "Justice Litigation Management Phase II" (January 1977) was at least as critical:

In the course of assessing the level of agreement on (litigation) goals, the most important finding was that a distinct disharmony exists both among the goals of the U.S. Attorneys and between their goals and those of the legal divisions. Only about one-half of the U.S. Attorneys perceived their criminal and civil goals as synchronised with those of other litigation organizations . . . . The legal divisions perceived even greater differences, with 86 percent of their responses indicating a "moderate" to "great deal" of difference between their criminal litigation goals and those of U.S. Attorneys.

Examination of Departmental priorities and directives reveals little evidence of a prioritization of case types which sets as policy the Department's intention that specific case types receive greater or less attention from Government litigators. . . . To date no concensus on priorities exists among Department litigation managers, nor is there evidence of Department-level priorities agianst which to critique this lack of consensus.

Department policies on the use of these powers [to effect various types of dispositions in the exercise of prosecutorial discretion] are surprisingly lacking in specificity. The U.S. Attorneys Manual, intra-office guidelines, and Department-sponsored training do not set forth detailed guidance and, therefore, foster ad hoc, case-by-case strategy decisions within parameters which are vague, inconsistent and of wide latitude.

The nature of policy coordination in the Department of Justice is haphazard.[1]

Analysis of two of the major conclusions of the Department's internal study further suggests a high probability of inconsistent, ad hoc decisions unguided by significant policy controls. In analysing U.S. Attorneys explanations of the types of cases given priority for prosecution, the study found an extremely wide divergence, with no significant consistency among their priorities.** At the same time, however, it was apparent that the U.S. Attorneys' perceptions of those priorities were crucial to the policies actually applied in exercising discretion to prosecute or decline prosecution, for the primary consideration emphasizee as the basis for decisions declining prosecution was the "triviality of the charge.*** Obviously, if the Department is to assure any consistency in its declination and prosecution policies, it must at least assure that judgments about "triviality" reflect reasonably consistent priorities and policies.

It is more for this Committee or another politically responsible body than for me to assess the political considerations that have for so long supported our toleration of this lack of basic policy direction and the resulting ad hoc and inconsistent decision making. Whatever the political reasons, the crucial failures of the system are the lack of an effective and systematic process for reviewing and testing the policy implications of specific prosecutorial decisions and the related lack of procedures or practices which can assure reasonable consistency in adhering to established policies or rational evolution of policies and prosecution standards.

The consequences of these failures are that the usual course of ad hoc decision making too often—

(1) Lacks rigorous thought and analysis, with the result that decisions too often overlook or disregard important or potentially-important policy implications of the decisions;

(2) Fails to focus on available or discoverable facts that are crucial to those policy implications;

(3) Fails to draw from specific decisions any basis for evolution of policies of general application or for assimilation of the decisional policies in the body of established policies;

(4) Fails to identify or focus upon aspects of the decisions which produce or are likely to produce unfairness or ineffectiveness in enforcement; and

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[1] U.S. Department of Justice Office of Management and Finance, "Justice Litigation Management Phase II," (Jan. 1977), pages 1–6, 27 and 43.

(5) Provides no firm basis for effective supervision and policy control, even if the political will were present.

My own experience in administering President Ford's Clemency Program provided what was for me the most impressive illustration of the relative autonomy of United States Attorneys, of lack of policy guidance from the Department of Justice, and seeming lack of concern for integrating the policies reflected in the prosecution decisions of particular United States Attorneys. I have discussed that experience in an article which essentially restated the substance of a letter I sent to the Department explaining my decision to release all potential selective service defendants from any obligation of "alternative service" under the Clemency Program.

As you will recall, under the Clemency Program the United States Attorneys were required to administer that portion of the program that dealt with prosecutable draft evaders. My basic difficulty with the program began with the legal standard the United States Attorneys were to apply in determining which defendants or potential defendants would be required to undertake "alternative service" in order to gain clemency. The Department's instructions advised that the program should be applicable to all potential defendants whose draft evasion cases were "not lacking in prosecutive merit." Naively, I initially assumed that the concept of "prosecutive merit" had reference to an ascertainable set of policies or standards by which I could appraise the forty open draft evasion files in the District of Utah. Analysis of previous guidelines and current instructions, however, soon demonstrated that the only policy guidance was so vague as to be of no use at all, as suggested by the attached excerpts from my article. Thus, along with ninety-four other United States Attorneys, I was left at large to exercise my discretion under my own sense of the considerations that should affect "prosecutive metit."

After extensive personal review of the individual files, I determined that all but a handful of the evaders should be relived of the prospect of further prosecution and should not have to engage in alternative service. Because that decision was potentially controversial and was based upon several factors that might have raised significant questions of prosecution policy, I felt obligated to first test my reasons with the attorney coordinating clemency matters in the Criminal Division and give him an opportunity to question or countermand my decisions. The factors which prompted my decision included a pattern or delayed prosecution or non-prosecution in Utah (partly resulting from the attitude of a controversial federal judge), the inconsistent patterns of prosecution nationwide, the lack of guidelines for determining "prosecutive merit," and the failure of the prior United States Attorney to comply with the Department's earlier policy of proffering potential defendants the opportunity to "purge" their delinquency by subsequent submission to service in the armed forces.

After setting forth my reasons for decision, I was amazed to find that the criminal division attorney supervising the clemency program made no effort to countermand the decision nor even to urge very aggressively that a different standard be applied—though he obviously disagreed with the merits of the position. On the other hand, he apparently also did not consider the grounds for decision to be of enough consequence to request a written submission or explanation—or, so far as I could tell, to do anything to integrate the reasons offered into the general standards applicable to the program.

Obviously, any conclusions drawn from this experience should be heavily qualified by recognizing that the Clemency Program was conducted at the conclusion of volatile political reactions to the Viet Nam War and to the draft. Further, the program was necessarily ad hoc, and concerns about political timing unquestionably imposed some urgency which was inherently in conflict with reflective consideration of decisional standards or systematic assimilation of the standards applied by the various United States Attorneys—particularly those of some maverick from Utah.

With those concessions, it must also be said that most of those considerations are not unlike the political and timing problems that characterise many other prosecution programs; and the Department's basic approach to the Clemency Program seems characteristic of the approach to many similar problems of prosecutorial discretion:

(1) The few available guidelines for decision were so vague and incomplete as to impose virtually no discernible channel for decision. And this condition prevailed despite substantial reason to believe that the decision making on a nationwide basis had been widely variant. No program was developed to set workable or even understandable criteria for application of the central legal and

policy standard of "prosecutive merit"—despite unusually active efforts to guide the United States Attorneys' decisions with respect to other aspects of the program.

(2) The lack of vigorous challenge to declination decisions based on disputable policies inconsistent with other dominant policies reflected a substantial toleration for variant and potentially inconsistent policies or standards for determining "prosecutive merit"—an approach which had all the earmarks of a practiced accommodation to the political and policy-making independence of United States Attorneys.

The above observations from my experience as United States Attorney in administering the Clemency Program strongly confirmed my impressions and conclusions drawn from my detailed investigation of food and drug prosecutions. It is my understanding that the Committee has obtained a copy of my report on those investigations, and rather than prolong this recitation further, I refer you to that study and particularly to its conclusions and recommendations.

[Additional submissions of Mr. Lockhart can be found in the appendix.]

[The food and drug material referred to is on file with the committee.]

Senator COCHRAN. The hearing will be adjourned, and we will have another day of hearings on this subject on April 21. Thank you.

[Whereupon, at 12:09 p.m., the hearing was adjourned.]

APPENDIX

QUESTIONS OF SENATOR COCHRAN AND RESPONSES OF MR. JAMES K. ROBINSON

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

April 11, 1980

Mr. James K. Robinson
U.S. Attorney
817 Federal Building
231 W. Lafayette
Detroit, Michigan 48226

Dear Mr. Robinson:

On behalf of the Senate Judiciary Committee, we would like to thank you for testifying at the Department of Justice Authorization and Oversight hearing on March 12, 1980. Your testimony has assisted us in understanding the role of U.S. Attorneys in the Federal justice system. For the first time we have established a record that outlines in a most effective manner the operations of our judicial system.

We enclose written questions for you to answer and request that the answers be returned as soon as your schedule permits.

Sincerely,

Thad Cochran

EDWARD M. KENNEDY
United States Senator

THAD COCHRAN
United States Senator

SUPPLEMENTAL STATEMENT OF
UNITED STATES ATTORNEY JAMES K. ROBINSON
SENATE JUDICIARY COMMITTEE

1. (a) How many attorneys are in your office? Of these, please break them down by experience (i.e. less than 2 years, 2-5 years, more than 5 years) and G-S levels?

> There are 47 Assistant United States Attorneys (AUSA) positions allocated to our office. At the present time there are 44 on duty. Due to a freeze on hiring, we are unable to fill the remaining vacancies. The experience of these Assistants is as follows: 1 AUSA has less then 2 years of experience; and 35 AUSA's have more than 5 years experience.

(b) How many paralegals? How many other staff?

> There are 5 paralegal positions allocated to our office. At the present time 2 are on duty. In addition, 2 temporary J.J. appointment paralegals are on duty. The freeze prevents us from filling the remaining vacancy. The remainder of our support staff consists of 45 authorized positions, of which 42 are filled. The freeze prevents us from filling the 3 vacancies.

(c) How many federal investigators are in your district?

> Approximately 44 federal law enforcement agencies work in our district including: Federal Bureau of Investigation (235 agents); Postal Service (65 agents); Secret Service (34 agents); Alcohol, Tobacco & Firearms (41 agents); U.S. Customs Service (21 agents); Drug Enforcement Administration (58 agents); Internal Revenue Service (20 agents) and U.S. Labor Department (15 agents).

(d) What is your usual turnover rate among attorneys? Do you consider it a problem? What would you propose as ways to retain talented attorneys?

> Most of our attorneys stay at least 2 years and leave after 5 years. I do not consider turnover to be a serious problem. We have succeeded in attracting attorneys with several years of prior experience. I do not believe that it is possible to compete with the private sector as to salaries and fringe benefits. We should, of course, be as competitive as possible simply as a matter of equity. The major attractions of the United States Attorney's office are the unique opportunity for public service and the high quality of the trial experience available to young lawyers.

(e) How many of your attorneys are in supervisory positions -- spending a significant amount of time reviewing the day-to-day legal work of other lawyers?

> The supervisory staff of the office consists of the following: United States Attorney, Chief Assistant United States Attorney, Chief of Criminal Division, Chief of Civil Division and Chief of Appellate Division. In addition, the Criminal Division has three Assistant Chiefs supervising three units -- Controlled Substances, Fraud and General Crimes. The Civil Division has one Assistant Chief.

(f) What percentage of your office staff is minority employees? Do you have an affirmative action program? Does the Department give you any instructions or guidelines in this area?

> When I became United States Attorney in August 1977, 3% of the attorneys were black and 16% were women. At the present time 20% of the staff are black and 22% are women.
>
> We have an affirmative action program which has been designed to increase the number of minorities and women in the office. The Department of Justice,

> through its Employment Review Committee, screens all nominations for attorney positions to insure that efforts are being made to increase the numbers of minorities and women.

2. How many copies of the U.S. Attorney's Manual do you have in your office? Is it used? Is it useful? Have you ever raised questions about its content? If so, what happened?

> We have 49 copies of the U.S. Attorney's Manual in our office. The mannual is used frequently and is very useful.

3. Is there a representative of the E.O.U.S.A. that visits your office on some sort of regular basis to discuss your operations? How often does this person visit? Does he or she discuss policy matters or perform a management analysis or what?

> During my three years as U.S. Attorney we have had several visits from representatives of the Executive Office for U.S. Attorneys; however, only one such visit was a general review of our operations. We prepared a written response to a detailed questionnaire submitted by the Executive Office. (Copy attached)

4. What is the relationship between U.S. Attorneys and the strike force chiefs, economic crime unit and controlled substances units? Have the problems relating to "turf" been resolved? Has there been a formal agreement/arrangement worked out regarding indictment/prosecutions in the various districts?

> In this district we have an excellent relationship with the Organized Crime Strike Force. The Strike Force Chief operates much like one of the division chiefs in our office. We often have Strike Force attorneys and AUSAs working jointly on cases. I am kept advised of all Strike Force investigations and I approve all witness immunities and indictments. All press contacts are coordinated through our office. We have not experienced problems of "turf." The Controlled Substances Unit and the Economic Crime (Fraud) Unit operate in the same way as the other unit of our Criminal Division--General Crimes. The attorneys in these units report to the Assistant Chief in charge of the unit and the Assistant Chiefs report to the Criminal Division Chief.

5. What is the time frame for turn-arounds of Title III's, Immunity Authorizations, Rico indictments and criminal tax prosecutions? Have these time frames adversely affected investigations or prosecutions? What is the cause for the delay and what can be done to expedite the process?

> The turnaround time for title III's, immunity authorization, RICO indictment and tax prosecutions varies. In those cases where time has been of the essence we have generally succeeded in securing expedited treatment from the department.

6. Give an estimate of the percentage of cases where concurrent jurisdiction existed in your district last fiscal year?

> A rough estimate would be that 50% of our cases could also have been prosecuted under some state statute.

(a) What are the major concurrent jurisdiction cases you most routinely handle and why?

> Bank robberies and bank embezzlement are the concurrent jurisdiction crimes we most routinely handle; however, the number of these cases has declined substantially in recent years because we have a policy of deferring such prosecution to the state whenever possible. We continue to prosecute these crimes in parts of the district where local law enforcement is unable or unwilling to do so and in cases where solution of the crime requires the resources of federal law enforcement.

(b) What are the major concurrent jurisdiction crimes you routinely decline for federal prosecution and why?

> We routinely decline appropriate bank robbery and bank embezzlement cases because most of these cases can be handled by local law enforcement. We also decline most recipient ADC welfare fraud cases because they can be prosecuted successfully by local officials.

(c) What types of cases might be handled on a joint federal-state basis and why?

> Most cases in which there is concurrent jurisdiction will be handled at both the federal and state levels, depending upon

the complexity of the case and available resources. Cases involving lengthy investigations, multijurisdiction crimes, the need for witness immunity, witness protection, electronic surveillance, etc. will be better handled at the federal level. More routine cases will be handled at the state and local level.

(d) Estimate what percentage of cases you investigate and refer to the states for prosecution.

Since our prosecution guidelines give direction to the investigative agencies concerning what we will prosecute, the agencies avoid investigating concurrent jurisdiction cases which are likely to be deferred for state prosecution. This makes the number of actual referals few. The policies, however, have resulted in a significant reduction in the number of cases which were previously prosecuted at the federal as opposed to the state level.

(e) What factors bear on your decision to refer the matter to state prosecution?

The factors used to decide whether to refer a matter to the state for prosecution include: the capacity and willingness of local law enforcement successfully to investigate and prosecute the case, the state as opposed to federal interest in the crime, the availability of federal investigative and prosecutive resources.

7. Should efforts to achieve national consistency in enforcement be undertaken in subject-matter areas of predominantly national interest?

No.

(a) How would it affect answer to that question if the subject-matter areas of "national interest" were limited to:

(1) Criminal and civil enforcement of national regulatory programs? (FDA, ICC, SEC, FHA, etc.)

(2) Criminal and civil enforcement in areas of solely federal interest not duplicated by state enforcement?

It would certainly make more sense to achieve national consistency in these areas, i.e. (1) and (2) above, than in other cases where there is concurrent jurisdiction. Nevertheless, rigid consistency would, in my view, be unhealthy even in the two areas mentioned.

(b) Have you made any use of the guidelines for the exercise of prosecutorial discretion suggested by former Attorney General Edward H. Levi on January 18, 1972? How?

Former Attorney General Levi's prosecutorial discretion memorandum was made available to all AUSAs. It is helpful to new AUSAs in focusing their attention on the proper general criteria for the exercise of prosecutorial discretion. The Department recently issued a new publication entitled "Principles of Federal Prosecution" which we expect to be very helpful.

(c) Attorney General Levi's memorandum transmitting the suggested guidelines was extremely careful to make clear that they imposed no requirements or obligations on U.S. Attorneys. In what circumstances do you believe that it would be appropriate for the Attorney General to impose more authoritative policies or guidelines?

I believe that the current authoritative guidelines regarding: the Petite policy, DOJ review of RICO prosecutions, DOJ review of criminal tax cases, etc. are the only areas where quasi binding guidelines are appropriate.

8. (a) What percentage of your criminal cases are plea bargained?

Approximately 70 percent of all criminal cases in this district are disposed of by plea bargain. (See attached chart).

(b) Do you have certain types of cases you've instructed your assistants that cannot be plea bargained? Do you strive for uniformity in plea bargains? Why? Why not?

There are no types of cases as to which we have prohibited plea bargaining; however, supervisory approval is required for all plea bargains. We do, through supervision, strive for uniformity in plea bargains. We believe that similarly situated persons accused of crimes in this district should receive equal treatment.

9. I have two hypotheticals I'd like to have you answer in reference to this plea bargaining issue:

> HYPOTHETICAL ONE: Defendant is a 25-year old male with and unknown juvenile record. Defendant was arrested for possession of marijuana at age 18 and the charge was dismissed. He was also arrested for a gun offense at age 20 and the charge was dismissed. Defendant's current record includes one prior assault and shoplifting conviction. He is a get-a-way driver in a bank robbery where a teller is wounded and is caught at the scene of the crime.
>
> (a) What sentence would you allocute in your district?
>
> None. We only allocute in the sentencing process in the few most important cases in the district. When we do allocute, we do so by filing a sentencing memorandum with the court which will point out areas which we feel should be considered by the sentencing judge. We generally do not urge a specific sentence.
>
> (b) What plea bargain would you offer?
>
> It would be difficult to say in a hypothetical, but it is likely that we would agree to a plea which would carry a substantially reduced maximum to that permitted by the bank robbery statute (20 years).
>
> HYPOTHETICAL TWO: Defendant is a 32-year old male doctor with no prior conviction or arrest. He is a family man and a community leader. He is charged with 4 counts of mail fraud amounting to $150,000 for filing false insurance claims as part of a ring.
>
> (a) What sentence would you allocute in your district?
>
> We would likely file a sentencing memorandum urging that a sentence of incarceration and fine be imposed of sufficient severity to impress upon the defendant and others the seriousness of such a white collar crime.
>
> (b) What plea bargain would you offer?
>
> One which would enable the court to exercise sufficient discretion to meet the goals of our answers in (a).

10. Do you have a set allocution policy or is it done on a case by case basis? How do you promote uniform treatment of defendants? What guidance do you give your assistants?

> Prior to my appointment as U.S. Attorney it was the policy of this office to take no position on sentencing other than the position implicitly taken in a Rule 11 plea agreement which limits the defendant's exposure. However, we have adopted a policy which permits filing of a written sentencing memorandum stressing the need, in a proper case, for a custodial sentence. Sentencing memos must be approved by a supervisor before filing.

11. Do you have a set indictment charging policy in your district and does it include all lesser included offenses or only the highest offense? Do you routinely include state offenses? What guidelines to do you give your assistants?

> We do not have the type of charging policy contemplated by this question. We rely on the sound discretion of our assistants in these areas subject to the review of our supervisors. The Department's newly published "Principles of Protection" provides some guidance in this area.

12. Now that the Investigative Agencies Subcommittee has been merged with the Prosecutorial Priorities Subcommittee, has the Advisory Committee been in a better position to assist in liaison with investigative agencies? How is this being accomplished? What other projects has the Subcommittee undertaken? I understand that you have just met with your Subcommittee recently. What are the plans for the upcoming year of Committee work?

> The merger of these two committees was sensible and I believe it has assisted the Advisory Committee in developing liaison with the investigative agencies. Our committee recently meet with the heads of all major investigative agencies to discuss mutual problems. These meetings have resulted in better communications in the field between U.S. Attorneys and the heads of the investigative agencies in the field.

13. I also understand you have served on the Professional Proficiency and Communications Subcommittee. What does this Subcommittee do?

> This committee reviews communications between Main Justice and the field - i.e. U.S. Attorney Bulletin, U.S. Attorney Manual etc. The committee also reviews Department training programs.

MEMORANDUM RE EXECUTIVE OFFICE EVALUATION OF UNITED STATES ATTORNEY'S OFFICE EASTERN DISTRICT OF MICHIGAN

DECEMBER 1978

Prepared By: JAMES K. ROBINSON
United States Attorney
Eastern District of Michigan
817 Federal Building
Detroit, Michigan 48226

LEGAL OPERATIONS

Two-Year Plan

Has Plan been submitted? progress reports?

Does Plan show emphasis on Attorney General's priority programs, i.e. White Collar Crime, Organized Crime, Public Corruption, and Controlled Substances Violations?

Does Plan reflect goal of establishing or improving Federal-State law enforcement coordination?

Does Plan show office's affirmative action program?

Does U.S. Attorney have adequate system for monitoring and reporting on progress in meeting objectives? revising Plan as necessary?

Quality Legal Representation

Does U.S. Attorney have effective system for recruiting top quality attorneys to fill vacancies? Does system reflect true affirmative action?

What systems are used for supervising legal work of office? Are systems effective?

Does U.S. Attorney have effective system for evaluating individual attorney performance? Is appropriate use made of DOJ Awards Program?

What system does U.S. Attorney have for obtaining comments of judges, investigative agencies, and client agencies regarding quality of legal services and advocacy provided by AUSAs?

What system does U.S. Attorney have for ensuring that attorneys receive all needed training? Does system provide for evaluating effectiveness of training?

Does office have system for review of attorney work product before completion? after completion?

Does office have paralegal personnel? What is system for ensuring best use?

Does office make good use of available research facilities? Are all attorneys aware of, and using, available JURIS assistance?

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Does office have Special AUSAs on duty? Are they used for intended purposes?

Does office need additional/fewer attorneys? paralegals?

Organization of Office

What is supervisory structure of Office? (provide organization chart). Does structure reflect actual system of supervision?

What system does U.S. Attorney have for allocation of personnel resources? Review of allocation?

Does office have Economic Crime Unit, or which large office assists? Does this system appear to be effective?

Does this office have Controlled Substances Unit? Other specialized Units? Are "dedicated" positions used as intended?

Managing Criminal Caseload

Does U.S. Attorney have effective system for case assignment and review? Does system provide for periodic adjustment?

Does office have written prosecutive guidelines? system for review of declinations? of indictments? (Provide any written guidelines)

Does office have system for assuring compliance with provisions of Speedy Trial Act?

Does district have Organized Crime Strike Force? Is there an effective system for coordination?

Has U.S. Attorney established FSLE Committee? If not, what is system of coordination with State and local law enforcement? Does U.S. Attorney participate in Pretrial Diversion program?

What policies does office have for plea bargaining negotiations? how supervised?

Does office have effective system for coordination of efforts of investigative agencies?

Does U.S. Attorney have effective system for liaison with client agencies?

Does U.S. Attorney have effective liaison with court? with clerk? with USMS?

Managing Civil Caseload

Does U.S. Attorney have effective system for case assignment and review? Does system provide for periodic adjustment?

Does U.S. Attorney have effective system for liaison with client agencies?

Does office have guidelines for settlement negotiations?

Does office have effective collections system? Do procedures comport with Department guidelines?

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ADMINISTRATIVE OPERATIONS

Personnel Management

What is supervisory structure of administrative operations? (Provide organization chart) Does structure reflect actual system of supervision?

What system does office use for filling vacancies? Does system reflect true affirmative action? Does Office make good use of available supplemental employee programs?

What system does office have for allocation of personnel resources? review of allocation? assignment of duties?

What are office policies regarding promotions? Do policies adhere to CSC and Department regulations and policies?

Does office have system of leave management? any written policy?

What are office working hours? How does office ensure adherence? any written policy? Does office policy comply with Fair Labor Standards Act?

Does office have system for positive use of annual performance evaluations? Is appropriate use made of DOJ Awards Program?

Do office disciplinary policies and actions comply with CSC and Department regulations and policies?

Does office have effective system for dealing with grievances, in compliance with CSC regulations and Department guidelines and policies?

What system does office have for ensuring that administrative personnel receive all needed training? Does system provide for evaluating effectiveness of training?

Physical Plant Management

Does office make best use of available space? Is the office layout functional? Is there evidence of consideration of appearance and other environmental factors in relation to the work performed in specific areas? (Provide floor plan).

Are there effective systems for determining equipment needs? utilization? maintenance? replacement?

Does office maintain current inventory of all capital equipment? system for accountability of individually-assigned property?

What external communications systems does office have? Are they used most effectively?

What internal communications systems does the office have? (Mechanical/written; formal/informal)

Does U.S. Attorney have effective security systems for building? offices? files? documents? evidence? personnel? any written policy?

Does office have effective system for maintaining files? for records storage and disposal?

Does office have adequate library facilities? effective system for maintenance? any written policy?

Records Management

Does office have effective system for maintenance of personnel records? fiscal records? general administrative records? United States Attorneys' Manual?

Does office have effective system for ensuring accuracy and currency of Docketing and Reporting System and related documents?

How are open criminal and civil files maintained? How long are closed files retained? Does office have effective system for disposal?

Does office have effective system for storage and disposal of D & R Cards? of Index Cards?

Does office have systematic, centralized Collections operation, with procedures in compliance with Department guidelines? adequate reference materials?

Does office have system for pursuing appearance bond forfeitures?

Does office have effective system for handling payments and receipts?

Does office have system for ensuring accuracy and currency of collections information contained in D & R System?

Has most recent report of Criminal Collections Unit been reviewed and have deficiencies been corrected? Explain.

What systems does office have for management of budgetary responsibility for travel? overtime? training?

[illegible]
UNITED STATES GOVERNMENT

Memorandum

TO : Executive Office for United States Attorneys DATE: December 11, 1978

FROM : James K. Robinson
United States Attorney

SUBJECT: MEMORANDUM RE EXECUTIVE OFFICE
EVALUATION OF UNITED STATES ATTORNEY'S OFFICE
EASTERN DISTRICT OF MICHIGAN
DECEMBER 1978

This memorandum is in response to the questions forwarded by the Executive Office for United States Attorneys outlining the EOUSA's areas of major interest in connection with the evaluation to be performed in December 1978.

A. LEGAL OPERATIONS

I. Two-Year Plan

Our two-year plan was submitted to the Attorney General on January 24, 1978. Consistent with the Attorney General's criminal law enforcement priorities, we adopted his priorities for our Criminal Division, i.e., white collar crime, public corruption, major narcotics trafficking, and organized crime. For our Civil Division, we adopted three major priority areas: (1) government program fraud, (2) environmental enforcement actions, and (3) improved collections activity. A copy of our complete two-year plan with accompanying memos and individual plans for divisions within the office is attached.

We are pleased with our progress to date. Among our accomplishments in meeting the goals set forth in our two-year plan, we would list the following:

(1) Effective training programs have been established for all attorney personnel. A six week program (two hours per session) on the Federal Rules of Evidence was held and video-taped for future use. Each Monday an experienced AUSA makes a presentation to the staff on a particular subject at an informal luncheon meeting in our conference room. All AUSAs and Strike Force attorneys are urged to attend these sessions to keep abreast of current developments. An outline of each presentation is prepared and inserted in an office

procedures manual, a copy of which is maintained by all AUSAs. (A copy of the manual is provided herewith.)

(2) Our two-year plan calls for the achievement of greater cooperation and coordination in federal-state relations. The U.S. Attorneys for the Eastern and Western Districts of Michigan have met with the Attorney General for the State of Michigan on this subject and the initial meeting of the Michigan Federal-State Law Enforcement Committee is scheduled for December 18, 1978. In addition to the U.S. Attorneys for the Eastern and Western districts of Michigan and the Michigan Attorney General, the Committee will include the prosecuting attorneys from the major counties in Michigan and the President of the Michigan Prosecuting Attorneys Association. Effective liason and cooperation has already been established in many areas of federal-state relations, including cooperative efforts between our office and the Michigan Attorney General's Office in the area of health care fraud and environmental protection enforcement, the development of prosecution guidelines with local prosecuting officials in the area of welfare fraud, and joint investigations into public corruption in local police agencies. We have also established effective working relationships with major county prosecutors in Southeastern Michigan to facilitate referring appropriate cases (*e.g.*, some bank robberies) for local prosecution. This cooperation is facilitated by the fact that the Chief of our Criminal Division previously served as a prosecutor in the two major county prosecutors offices in the district (Wayne County and Oakland County).

(3) We have developed an effective Criminal Fraud Unit currently staffed with nine AUSAs. When I became the United States Attorney in August, 1977 there were only two AUSAs devoting significant time to the area of white collar crime. Several major Medicare-Medicaid investigations were backed up at the investigative level and no major indictments had been returned. A major emphasis during the past year has been placed on the investigation and prosecution of Medicaid-Medicare fraud within the district. Four major priority, multi-defendant cases have been brought to indictment, along with several others. Four AUSAs in the Fraud Unit are devoting substantial portions of their time to this important area. We are beginning to develop a capacity to deal more proactively in the area of program fraud. Fraud Unit attorneys have been assigned to specific federal programs with instructions to become more familiar with the details of these various programs. These AUSAs have been directed to develop better liason between the administrating agency, the appropriate investigative agency and this office. Although a great deal

more needs to be done, we believe we are developing an effective nucleus of experienced AUSAs with a heightened awareness of how to investigate and prosecute white-collar crime effectively. The offices of the FBI and the Postal Inspection Service in the district are also increasing their efforts in this important area.

(4) In the area of major narcotics trafficking, our emphasis has been on the investigation and prosecution of major conspiracies and continuing criminal enterprises. When I first took office, the Controlled Substance Unit was woefully under-staffed. Only four AUSAs were assigned to the unit and it was necessary for the Department to assign four attorneys from the Narcotics and Dangerous Drugs Section to supplement our staff. Several important investigations were backlogged at DEA, some as long as two years. We added four experienced criminal trial attorneys to our staff as AUSAs in the Controlled Substance Unit. The backlog has been reduced and numerous major indictments have been returned. The Unit has been responsible for two continuing criminal enterprise convictions during the past year. There are currently no Department Criminal Division attorneys working on drug cases in our district.

(5) Public corruption has become an important priority in our district. A joint federal-state investigation has led to the return of an indictment, resulting from the joint efforts of the Detroit Strike Force and our office, against several high ranking local police officials for accepting bribes. This case will be tried by the Chief of our Criminal Division. Recently, a significant grand jury investigation resulted in the indictment of four officials of the Internal Revenue Service for accepting bribes to write off taxpayer obligations to the United States. Another important public corruption investigation concerning an elected public official is being coordinated by my Chief Assistant.

(6) Relations between the Detroit Organized Crime Strike Force and this office had not always been the best in prior administrations. The current Detroit Strike Force Attorney-in-Charge, Paul E. Coffey, came to Detroit about the time I was appointed U.S. Attorney. We view our two offices as one and coordinate all of our efforts. We are in daily contact. The Strike Force has been seriously understaffed and we have worked out an arrangement to loan them two of our experienced AUSAs. The salaries of these AUSAs are being reimbursed by the Criminal Division, enabling us to replace them with two new AUSAs. In addition, several of our AUSAs are handling investigations and trials of significant organized crime cases in cooperation with Strike Force attorneys.

(7) In the Civil Division, a more effective liason has been established with the Fraud Unit of the Criminal Division, in that there is an earlier awareness of instances of program fraud. Frequent contact is made with the Branch Manager having frauds responsibility in the Commercial Litigation Section of the Civil Division at the Department. In conjunction with the Department, efforts have been made to have investigative agencies consider the particular needs of the civil action when investigating program fraud cases.

Efforts have been expanded with respect to the enforcement of environmental protection laws. Four attorneys, including the Division Chief, are actively involved in environmental cases. Frequent contact is made with EPA Region V enforcement personnel, and with attorneys in the Land and Natural Resources Division, and there is active participation by attorneys in conferences on the enforcement of environmental laws. A sub-unit has been formed within the office, which consists of attorneys from both the Civil and Criminal Divisions and headed by the Chief of the Civil Division, which has the responsibility for reviewing and taking appropriate action on all environmental-related cases.

Activities in the Collections Unit of the Civil Division are described hereafter. (See Section V.)

(8) When I first took office, I learned that the reputation of this office in the Sixth Circuit Court of Appeals needed improvement. A major internal problem was the lack of coordination of the substantial appellate work of the office. I created an appellate division with the goal of upgrading the appellate practice and reputation of the office. The Chief of the Appellate Division has established an internal monitoring system to review all briefs. A concentrated effort has been made to upgrade the quality of our written product and our oral advocacy. I am pleased to report that I have been advised by the Chief Judge of the Sixth Circuit and other judges of that court that substantial progress has been observed and the Court is impressed with the noticeable improvement in our performance.

(9) Although our affirmative action program is not specifically mentioned in the two-year plan, we consider it a high priority to recruit and hire more minority and women attorney personnel. We have received approximately 350 applications for AUSA positions during my term of office. All minority applicants are offered a personal interview. In addition, we have contacted minority leaders of the various local bar organizations in an effort to encourage minority applications.

(10) The administrative staff has made an effort to monitor the progress of our office in meeting the objectives of our two-year plan. Regular meetings of the administrators are held to discuss such progress. Resources have been shifted when required to better meet these ends.

II. Quality Legal Representation

We have had very little difficulty in recruiting top quality attorneys to fill AUSA vacancies. If anything, we have been disappointed at losing some outstanding prospects due to the lack of available positions. Approximately 350 attorneys have applied for AUSA positions on our staff. Although, in part, these numbers are indicative of the difficulty young attorneys are having in finding positions, we believe the quantity and quality of applicants is also reflective of the current excellent reputation which our office enjoys in the legal community.

As previously stated, we have made a sincere effort to seek minority applicants; however, we have been somewhat disappointed with the results. We have not had large numbers of minority applicants, a fact which is particularly discouraging in a district with a large minority population. We have had even a smaller number of high quality minority applicants. Perhaps the difficulty relates to the intense competition locally for such candidates. We are unable to offer the financial rewards available from the leading local law firms and corporate legal departments. Nevertheless, we have made progress. When I was appointed there was one black AUSA; at the present time we have five black AUSAs on the staff. In addition, one of the two persons who will be joining our staff in the next few months is black. We fully intend to continue our efforts to attract and hire minority applicants. We are also conscious of the need to recruit and hire more women attorneys. Currently we have six female AUSAs on our staff. We will be submitting the names of at least two additional women to fill anticipated AUSA vacancies in the near future.

An effective system for evaluating individual attorney performance has been established. A copy of our evaluation form is attached. All new AUSAs are evaluated after six months. A meeting is held with each AUSA, his or her immediate supervisor, the Division Chief and the Chief Assistant. The United States Attorney handles the annual evaluation of each AUSA, together with the AUSA's supervisors. During these evaluation sessions the AUSA's progress is discussed candidly and the AUSA is given an opportunity to express concerns regarding his or her supervisors, caseload, work assignments, etc. After an AUSA completes a trial or major motion a supervisor seeks input from the trial judge on the AUSA's performance. Judges of the Court of Appeals are also asked for helpful comments. Periodic contact is also maintained with client agencies to secure information on AUSA performance which can be shared with the AUSA. AUSAs are encouraged to seek suggestions and constructive criticism from judges.

The DOJ Awards Program was not used last year as I felt I had not been in the office a sufficient period of time to make an objective assessment. We do intend to use the awards program this year, where appropriate.

Regular feedback on the quality of our work is sought from trial and appellate judges, investigative agencies, client agencies, and members of the bar generally. This is done on a regular basis and also as part of our AUSA evaluation process discussed above.

In addition to the in-house training discussed earlier, we have made every effort to send AUSAs to Department programs such as those sponsored by the Attorney General's Advocacy Institute. Due to the high quality of the Department's training programs, we have felt only minimal need to send AUSAs to non-Departmental programs.

All appellate work product is reviewed by the Appellate Division before and after completion. Most other AUSA work product is reviewed by supervisors. We are seeking methods to improve quality control in this regard.

We have established a paralegal position in collections and have hired an evening law student on a full-time basis to fill the position. He is under the supervision of an AUSA. We have created and are in the process of filling a legal technician position to coordinate social security disability matters in the Civil Division. We have the need to fill an already approved position for a legal technician in the Criminal Division.

Research facilities are coordinated by our Appellate Division. Periodic *Juris* training is made available to our attorneys, and law clerks, and considerable use is made of the system. Our Appellate Division also publishes a digest of recent Sixth Circuit Slip opinions which is distributed not only within the office but also to the other U.S. Attorneys in the circuit and to appropriate sections of the Department.

Rotating AUSAs are assigned for one week periods to handle the daily Magistrates call for arraignments, bond reviews, etc. We have recently established a weekend and holiday duty program with the aid of a "beeper" call system to facilitate weekend arraignments, etc. AUSAs are assigned to these responsibilities on a rotating basis. All AUSAs participate, including supervisors and the United States Attorney.

We are in need of at least eight additional AUSAs. If these positions were allocated, the AUSAs would be assigned as follows:

-1 for the Appellate Division

-2 for the Civil Division

-1 for the General Crimes Unit-Criminal Division

-4 for the Fraud Unit-Criminal Division

8 total

This does not take into account the three new judges allocated to our district by the Omnibus Judgeship legislation. We believe that we will need three new AUSAs per judge (a total of nine new AUSAs) to handle our existing work after the new judges are appointed. The FBI background investigations are currently being conducted as to the three new judicial candidates. It is expected that they will take office in March 1979.

III. Organization of Office

(1) An office organization chart is attached.

(2) We have an Economic Crime Unit (Fraud Unit) and a Controlled Substance Unit. In addition, we have a General Crimes Unit.

IV. Managing Criminal Caseload

Case assignments are made by the Division Chief in consultation with Assistant Chiefs, with periodic review by these supervisors. In the General Crimes Unit, case assignments are generally handled by assigning case categories to specific AUSAs. (See attached assignment sheet.) We are currently examining alternative methods of making assignments in an effort to improve upon case management.

We have adopted written prosecutive guidelines in many areas and have submitted proposed guidelines in other areas to law enforcement agencies for their comments prior to implementation. A copy of our proposed guidelines are attached.

The Chief of the Appellate Division has been designated as the person responsible for Speedy Trial compliance. He works closely with the Speedy Trial Coordinator for the district court to monitor compliance. On a day-to-day basis compliance is monitored by the Chief of the Criminal Division.

We do have an Organized Crime Strike Force and have developed effective coordination (described elsewhere).

We have established a Federal-State Law Enforcement Committee (described elsewhere).

We have established a Rule 11 form to be used for all plea bargains (copy attached). All such pleas must receive supervisor approval.

We have made an effort to coordinate the efforts of investigative agencies in several areas. We have learned, however, that this area is not without its difficulties as some agencies show a reluctance, on occasion, to cooperate with other agencies.

We do not have a formal "system" for liason with client agencies, the court, the clerk and Magistrate; however, we believe we have effective and friendly relations. The United States Attorney meets regularly with the Chief Judge of the Eastern District of Michigan and close contact is also maintained with the others mentioned.

V. Managing Civil Caseload

All new cases and matters are reviewed by the Division Chief and discussed with the Assistant Division Chief. Routine cases are assigned on a rotating basis. A more complex case may be assigned to an attorney having expertise in a particular area, or to two or more attorneys if the case requires. Efforts are made to build up expertise in various types of cases by assigning less complex cases at first, and then cases of increasing complexity as an attorney becomes familiar with a particular area of the law. The entire caseload of each attorney is reviewed and discussed individually on a semi-annual basis, and adjustments to caseloads are made as a result of such review.

The Division Chief has frequent contact with the legal departments of all client agencies on a routine basis. Additionally, at least once a year a meeting is held at which the heads of all the legal departments are present. Agencies are consulted on a continuing basis during the course of litigation by the attorneys and, if a particular problem or issue arises, by the Division Chief.

While the variety of cases handled by the Civil Division does not permit the development of specific guidelines for settlement, all cases are discussed with the Division Chief prior to settlement negotiations taking place. Additionally, the expertise of the Department of Justice and the client agency is routinely solicited. Contact is also be made with members of the local defense bar, if appropriate. Settlement of cases within the delegated authority is made through a detailed memorandum, and is reviewed and approved by the Division Chief and the United States Attorney. Memoranda relating to settlement of cases in excess of delegated authority are received by the Division Chief and the United States Attorney prior to submission to the Department of Justice. A file of all such memoranda is maintained for reference purposes.

Collection efforts have been hampered in the past few years by a chronic lack of personnel. This has been rectified to a degree by the hiring of a para-legal assistant who has primary responsibility for the collection effort, and who reports, through the collections attorney, to the Division Chief. Efforts are continuing to obtain the services of additional, part-time personnel in the collections unit. A few variancies from Department guidelines were noted in an audit conducted by the Criminal Collections Unit earlier this year; these have been corrected.

B. ADMINISTRATIVE OPERATIONS

I. Personnel management

The Administrative Officer has overall supervisory responsibility for the support staff. All clerk-stenos and secretaries assigned to work for particular AUSAs are directly supervised by them in the daily performance of their duties.

The legal clerks in the docketing and reporting area are supervised by a supervisory legal clerk.

While the Word Processing Unit does not have a supervisor at this time, it is our intention with the expansion of that Unit to establish a supervisory position. At this time the senior operator provides guidance to the new employees and establishes priorities in completion of work directed to the Unit.

Ultimate responsibility for supervision of the clerical staff rests with the Administrative Officer.

The structure reflected in the organization chart is accurate.

All support staff positions are filled in conformance with the procedures designated by the Area Civil Service Office and the Merit Promotion Plan.

Our recruiting gives significant weight to affirmative action considerations. We have made a concerted effort to recruit and hire minority applicants and have been successful in this regard. We maintain a work-study contract with a predominately black business school and interview all interested graduates, explaining employment under Civil Service and referring interested applicants to the Civil Service Commission for testing. We have placed a number of these applicants in our office.

We employ eligible students under the Youth Opportunity Program and we are investigating the employing of persons under the CETA program. The officials at Manpower for the City of Detroit have advised that it will be January 1979 before any additional funds are available under this program to enable us to participate.

We negotiate work-study contracts with universities and law schools and have entered into an extensive work-for-credit program with law schools in this area.

Personnel resources are reviewed as dictated by the changing caseload and the volume of work. New requirements dictated by Department programs and Congressional legislation which has an impact on our caseload, and internal operations bring about requests for new allocation of personnel and often result in changing duty assignments. These are accomplished as the need demands.

It is the policy of this office to promote all employees whose performance warrants as quickly as possible. A register of all support personnel with pertinent information is maintained indicating the eligibility dates for promotion. (See attached register.) Employee performance is reviewed prior to the submission of papers for promotion.

In all instances the Merit Promotion Plan is adhered to relative to the positions governed by such procedure. Both Civil Service Commission and Department of Justice regulations are strictly adhered to in our personnel administration.

A copy of our written leave policy is attached. Also attached is a schedule used in our leave management. The rule of thumb adhered to is that no more than 20% of the entire staff may be on leave at one time.

The office working hours are 8:30 A.M., to 5:00 P.M. All clerical personnel sign in and out each day. Secretaries are instructed to notify the time and attendance clerk each day of any leave on the part of the attorneys. The office complies with the Fair Labor Standards Act and all communications or advisories from the Department of Justice relative to this Act have been distributed to all personnel promptly upon receipt.

The new system of annual performance review was utilized this year and we feel effectively. These reviews are a tool utilized by management in the preparation of requests for promotions. We have continued to utilize the Quality Within Grade awards for our clerical staff.

This office has no formal disciplinary action policy. When several exceptions were filed to the annual performance review by clerical persons, we did establish a review system consistent with Department of Justice policy. Our intent is to exert every effort to prevent the necessity for disciplinary action.

We have not had a grievance filed since my appointment and our policy is to strive to avoid such occurance. However, should the necessity arise we would utilize all the guidelines and policies of the Department to insure proper handling for formal grievance.

Training has been afforded to members of the clerical staff where it was felt most needed. All training circulars from the Civil Service Commission are reviewed by the Administrative Officer and appropriate requests are submitted to the United States Attorney for approval.

In fiscal 1978 our training consisted of the following:

- One week training seminar for senior word processing operator at IBM training center in Dallas.
- Five clerk-stenos and secretaries attended three day training programs on Secretarial Techniques.

- One week training program attended by supervisory clerk in the docketing room on "Supervision and Group Performance."

- Two week Department of Justice Management seminar for Administrative Officers attended.

II. Physical Plant Management

This office makes effective use of all available space. While we would prefer a more functional and attractive layout, we have been hampered by the lack of available space in our building. We have been modifying and renovating space to meet our needs. Every consideration is given to both the appearance of the office and factors such as proper lighting and ventilation, foot traffic and work flow within the office. The attached floor plans reflect current conditions and planned modifications. At this time we have a request with GSA for additional space for our Civil Division as well as for revisions of our Criminal Division space.

The Administrative Officer discusses new equipment with vendors and reviews all material received by the office for equipment which will enhance the work performance and provide all services which will enable the office to operate in a professional atmosphere. Utilization of all equipment is monitored by way of quantity and quality. We maintain logs and paper counts for equipment. The Department schedule of property designating purchase dates is reviewed in order to schedule replacements.

New emphasis on workload also directs our attention to utilization of new equipment and the necessity for such new equipment to maintain a current work program within the office.

We do maintain a current inventory of all capital equipment. We have a card index indicating books and property assigned to the staff of the office.

The office has the following external communications systems: teletype machine, a communicating mag card data phone, which is being removed due to lack of use, and the Juris terminal.

Our internal communications system is normally via written memos. In addition, the supervisory staff meets bi-monthly and we hold monthly staff meetings for all AUSAs. Perodic Division and Unit meetings are also held when called by Supervisors.

Our security system has been adequate in the past; however, with the expansion of the office to the 9th floor and the Controlled Substance Unit outside the enclosed corridors of and office, we do not feel that our security is fully adequate. We have provided file cabinets with locks for storage of files within the individuals offices. We maintain an evidence room with limited access to the same.

The office has an effective system for maintaining current and closed files and systematically sends records to storage at the Federal Record Center.

Our Detroit library facilities are adequate at this time. However, our branch offices do not have adequate facilities. We have no formal written policy for library maintenance. The law student clerks have the duty each day to re-shelve the books and file the pocket parts, etc. We have been attempting to obtain the services of a library science student under the work-study program to compile and set up a new index system for the library.

III. Records Management

The office has an effective system for the maintenance of personnel records. All files are maintained by the Administrative Officer in a locked cabinet. The folder with personnel record cards is maintained in a current fashion indicating the more recent status of all positions.

The fiscal records and general administrative records for each fiscal year are maintained by the Administrative Officer. At the close of the fiscal year these records are moved to the general records center and new fiscal year files are created. The closed records are maintained in the main record room for a period of time to provide a reference.

The issuances for the U.S. Attorney's manual are distributed promptly to the attorneys. The clerical employees are instructed to file such issuances promptly in the manuals of the attorneys for whom they work.

We are ensuring accuracy and currency in the Docketing & Reporting System. All new matters/cases, civil and criminal, are routed for indexing and docketing to our Central Docket Room, plus pertinent changes of status are entered on the docket cards and submitted to the Department of Justice on activity cards, twice weekly. Entries which do not appear complete and/or accurate are questioned. Any doubts on coding the information are reviewed by the supervisor, and/or attorney handling the particular matter. The docket clerks initial all entries, and enter the codes on the jacket proper. If the AUSA is not in agreement with the coding he or she may correct it. In order to determine the accuracy of the reporting system we are utilizing the verification reports submitted by the Department. Consequently, when errors do appear they are corrected as quickly as possible.

"No Proseuction" reports for which there have been no active files are sent to the Central Docket Room for counting on the monthly USA Form 114.

In order to compile the totals for the USA 5, Monthly Statistical Report of U.S. Attorney, we have the collection section plus our field offices submit to the Central Docket Room their totals for the month, which are then combined into the final total submitted to the Department. To arrive at the monthly man hours, we request each attorney to submit time sheets on a weekly basis noting the hours spent in the different type of court appearances. These are totalled at the end of the month for the USA 5. The Administrative Officer submits the clerical hours and, in pay status, attorney hours.

All pending matters and cases, civil and criminal, are retained in each AUSA's office with the exception of fugitive cases/matters and cases referred to the Probation Department for pre-sentence reports. The latter are maintained in the Central Docket Room. All closed matters and cases are retained in the Central Docket Room and from there are shipped to Federal Records Center for storage. We retain files from one to one-and-a-half years after closing.

Docket and reporting cards, pending and closed, are stored in the Central Docket Room. They are sent to the Federal Records Center for storage or eventual destruction. However, we do keep them in the office for longer periods of time after closing, as they are an easy way to research proceedings of cases without requesting the file from the Record Center.

Index cards are stored in the Central Docket Room, pending and closed. However, we do not have any instructions as to the time limit for retention. As a result, our Kardvever is bulging.

The office does have a systematic, centeralized collections operation; however, as previous Department reports indicate, collections, over the course of previous administrations, has suffered varying degrees of neglect. Efforts are currently being made to rectify the effects of this neglect. While the negative effects are not insurmountable, they are difficult to overcome, particularly in light of the recent influx of pre-judgment matters submitted to this office for policing by various administrative agencies, specifically matters recently referred by the Veterans Administration. As of September 30, 1978 this office was policing the following collection matters:

Criminal (bond forfietures, fines).........	1439 cases
Civil post-judgment........................	232 cases
Civil pre-judgment.........................	577 cases
Total	2248 cases

(NOTE: Civil pre-judgment has doubled since 9/30/78)

At present collection matters are handled by: one AUSA (part time), one para-legal, and two collection clerks.

At a minimum the collections effort should be supplemented by one additional clerk-typist and at least one full time law clerk.

Reference materials for collections are sufficient. A system exists for pursuing appearance bond forfeitures; however, information relative to locating and identifying defendants is lacking. It would help if defendants were required to submit pertinent information to the court upon application for bond. For example, it would help if the defendant's Michigan driver's license number could be secured upon application for bond. Such information would greatly facilitate disposal of bond matters now and in the future. We plan to explore the possibility of securing this information with the District Court and the Pre-trial Services Agency.

While the system for handling payments and receipts is effective, this aspect of the collection process is difficult to keep current with existing manpower. With the current influx of prejudgment collection matters, it has become necessary for the civil collections clerk to devote one-half of each day to the posting of payments and the issuance of receipts. This phenomenon is directly attributable to the recent massive influx of Veterans Administration overpayment cases. It would help if the Veterans Administation would monitor installment payments once this office has made arrangements with the veteran to make such installments.

We do have a system for ensuring the accuracy and currency of collection information contained in the Docket and Reporting System. We enter all pertinent information on Docket and/or Debtor cards. Files are initialed by the Clerk and proper code noted. Debtor cards on new criminal impositions are typed by the criminal docket clerk, and one copy sent to collections and the duplicate to the Department twice weekly. This is also true of new civil judgments. All changed statuses are submitted on collection activity and/or civil activity cards. The Department submits verification sheets which are compared with the debtor and/or docket cards for accuracy.

The most recent Department report of the Criminal Collections Unit has been reviewed and reported deficiencies noted. This office is currently in a stage of total and thorough review of the criminal matters in the collection stage of proceedings. At present our Criminal Inventory Printout has been reviewed and it is accurate. Further, our Criminal Collection Tickler system has been reviewed and updated. Our present efforts toward criminal collections reflect an infancy stage in our goal of achieving an efficient and clear procedure for criminal collections.

A request for overtime is submitted by an AUSA requesting the overtime services. (See attached form). This request is placed in the overtime section of our ledger and the actual cost of the overtime is deducted from our allocation. The balance is reviewed regularly.

All training requests are entered in the ledger with estimated costs, and a copy of the training request is filed in the book. Upon submission of expense vouchers, adjustments are made indicating the variance between the estimate and actual expense, leaving the balance available.

CONCLUSION

We feel that considerable progress has been made in our office since August 1977 when I was appointed. At that time the authorized AUSA strength was 31 and there were six vacancies. The conditions existing as of that time are reflected in my October 1977 memorandum seeking allocation of additional AUSA positions, a copy of which is attached.

At the present time there are 37 AUSA positions allocated to the District. All positions have been filled and several applicants are being processed to fill anticipated vacancies. Twenty of the 37 AUSAs were hired since the date of my appointment. These new AUSAs have brought strong credentials which, when combined with high quality AUSAs previously on the staff, have resulted in an extremely capable group of attorneys. Comments on the quality of the staff from the judges, client agencies, Department attorneys and the bar generally have been very good.

The supervisory staff is also excellent and works well together. Each member brings important experience and expertise from which we all profit. The United States Attorney was primarily a civil trial lawyer prior to his appointment, with some federal and state criminal experience. The Chief Assistant was primarily a federal criminal defense lawyer prior to his appointment, with some civil experience. The Chief of the Criminal Division was a career state prosecutor, having served in the two major county prosecutor's offices in the District prior to his appointment. The Chief of the Civil Division was a civil trial lawyer prior to his appointment as an AUSA in 1975; he served as Chief of the Civil Division under my predecessor and provides valuable management continuity. The Chief of the Appellate Division served as Special Counsel and Director of Research for the Detroit City Council prior to his appointment. The Attorney-in-Charge of the Strike Force has been a criminal prosecutor with the Department of Justice for over ten years. The Administrative Officer has been employed by the office for over 35 years; she is an invaluable resource in managing the office.

We believe that in a relatively short time we have built a solid foundation for achieving the broad goals set forth in our two-year plan.

TABLE D-7 DEFENDANTS, U.S. DISTRICT COURTS
DISPOSITION OF ALL DEFENDANTS SHOWING TYPE OF SENTENCE BY DISTRICT DURING THE TWELVE MONTH PERIOD ENDED JUNE 30, 1978

CIRCUIT AND DISTRICT	TOTAL DEFENDANTS	NOT CONVICTED				CONVICTED AND SENTENCED				TYPE SENTENCE	
		TOTAL	DISMISSED	ACQUITTED BY		TOTAL	PLEA OF GUILTY OR NOLO CONTENDERE	CONVICTED BY		FINE ONLY	OTHER
				COURT	JURY			COURT	JURY		
TOTAL ALL DISTRICTS..	41,175	8,262	6,791	303	1,168	32,913	27,295	2,006	3,612	4,368	556
DISTRICT OF COLUMBIA.	882	92	73	3	16	790	696	30	64	31	4
FIRST CIRCUIT......	1,296	204	154	1	49	1,092	943	28	121	51	2
MAINE..............	140	19	17	-	2	121	110	-	11	4	1
MASSACHUSETTS........	678	102	73	1	28	576	489	21	65	23	-
NEW HAMPSHIRE........	56	5	5	-	-	51	41	1	9	4	1
RHODE ISLAND.........	85	15	10	-	5	70	55	2	13	-	-
PUERTO RICO..........	337	63	49	-	14	274	248	4	22	20	-
SECOND CIRCUIT.....	3,389	539	441	4	94	2,850	2,456	35	359	103	34
CONNECTICUT..........	211	21	16	-	5	190	174	-	16	3	-
NEW YORK NORTHERN....	195	27	22	1	4	168	161	1	6	14	8
NEW YORK EASTERN.....	1,094	181	143	2	36	913	762	9	142	37	7
NEW YORK SOUTHERN....	1,421	252	211	-	41	1,169	995	23	151	31	9
NEW YORK WESTERN.....	401	44	38	1	5	357	318	4	35	18	2
VERMONT..............	67	14	11	-	3	53	44	-	9	-	-
THIRD CIRCUIT......	2,433	447	327	45	75	1,986	1,659	55	272	116	11
DELAWARE.............	123	44	24	20	-	79	72	1	6	1	2
NEW JERSEY...........	775	101	71	10	20	674	615	11	48	48	2
PENNSYLVANIA EASTERN.	561	69	42	7	20	492	385	15	92	27	-
PENNSYLVANIA MIDDLE..	113	10	8	-	2	103	93	1	9	17	-
PENNSYLVANIA WESTERN.	447	88	67	1	20	359	284	4	71	15	-
VIRGIN ISLANDS.......	414	135	115	7	13	279	210	23	46	8	7
FOURTH CIRCUIT.....	4,178	1,128	990	54	84	3,050	2,534	233	283	500	26
MARYLAND.............	1,073	408	363	20	25	665	568	41	56	48	4
NO. CAROLINA EASTERN.	290	51	44	2	5	239	166	41	32	-	1
NO. CAROLINA MIDDLE..	228	23	17	5	1	205	172	10	23	-	-
NO. CAROLINA WESTERN.	326	58	45	1	12	268	229	11	28	15	-
SOUTH CAROLINA.......	448	95	77	-	18	353	306	4	43	7	-
VIRGINIA EASTERN.....	1,358	403	369	25	9	955	781	116	58	372	19
VIRGINIA WESTERN.....	170	32	29	1	2	138	121	5	12	17	-
W. VIRGINIA NORTHERN.	86	24	19	-	5	62	48	-	14	2	-
W. VIRGINIA SOUTHERN.	199	34	31	-	3	166	143	3	20	39	2
FIFTH CIRCUIT......	10,291	1,874	1,425	120	329	8,417	6,664	846	907	1,804	359
ALABAMA NORTHERN.....	621	77	61	5	11	544	487	18	39	122	2
ALABAMA MIDDLE.......	266	51	29	5	17	215	163	17	35	75	-
ALABAMA SOUTHERN.....	141	23	18	-	5	118	97	1	20	8	-
FLORIDA NORTHERN.....	153	43	39	-	4	110	82	2	26	11	-
FLORIDA MIDDLE.......	672	135	84	3	48	537	385	11	141	22	2
FLORIDA SOUTHERN.....	801	198	141	16	41	603	465	24	114	14	2
GEORGIA NORTHERN.....	448	116	84	4	27	333	285	21	27	5	4
GEORGIA MIDDLE.......	1,131	68	25	24	19	1,063	[illegible]	64	21	959	2
GEORGIA SOUTHERN.....	1,028	141	66	45	27	887	[illegible]	[illegible]	49	338	-
LOUISIANA EASTERN....	394	68	47	7	19	326	278	-	48	12	334
LOUISIANA MIDDLE.....	52	4	3	1	1	48	44	-	4	-	1
LOUISIANA WESTERN....	180	35	30	1	4	145	129	5	11	15	-
MISSISSIPPI NORTHERN.	85	14	9	-	5	71	56	1	14	-	-
MISSISSIPPI SOUTHERN.	86	15	11	-	4	71	63	-	8	1	-
TEXAS NORTHERN.......	621	85	72	1	12	536	483	8	45	119	-
TEXAS EASTERN........	193	33	29	-	4	160	128	2	12	8	-
TEXAS SOUTHERN.......	1,974	334	283	5	80	1,640	1,479	35	125	76	7
TEXAS WESTERN........	1,174	381	356	4	21	793	622	46	103	62	3
CANAL ZONE...........	281	83	45	4	7	198	168	8	22	22	1

TABLE D-[illegible] DEFENDANTS, U.S. DISTRICT COURTS
DISPOSITION OF ALL DEFENDANTS SHOWING TYPE OF SENTENCE BY DISTRICT DURING THE TWELVE MONTH PERIOD ENDED JUNE 30, [illegible]

CIRCUIT AND DISTRICT	TOTAL DEFENDANTS	NOT CONVICTED				CONVICTED AND SENTENCED				TYPE SENTENCE	
		TOTAL	DISMISSED	ACQUITTED BY		TOTAL	PLEA OF GUILTY OR NOLO CONTENDERE	CONVICTED BY		[illegible] ONLY	OTHER
				COURT	JURY			COURT	JURY		
SIXTH CIRCUIT	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
KENTUCKY EASTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
KENTUCKY WESTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MICHIGAN EASTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MICHIGAN WESTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
OHIO NORTHERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
OHIO SOUTHERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
TENNESSEE EASTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
TENNESSEE MIDDLE	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
TENNESSEE WESTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
SEVENTH CIRCUIT	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
ILLINOIS NORTHERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
ILLINOIS CENTRAL	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
ILLINOIS SOUTHERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
INDIANA NORTHERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
INDIANA SOUTHERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WISCONSIN EASTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WISCONSIN WESTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
EIGHTH CIRCUIT	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
ARKANSAS EASTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
ARKANSAS WESTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
IOWA NORTHERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
IOWA SOUTHERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MINNESOTA	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MISSOURI EASTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MISSOURI WESTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NEBRASKA	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NORTH DAKOTA	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
SOUTH DAKOTA	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NINTH CIRCUIT	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
ALASKA	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
ARIZONA	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
CALIFORNIA NORTHERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
CALIFORNIA EASTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
CALIFORNIA CENTRAL	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
CALIFORNIA SOUTHERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
HAWAII	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
IDAHO	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MONTANA	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NEVADA	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
OREGON	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WASHINGTON EASTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WASHINGTON WESTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
GUAM	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NORTHERN MARIANAS	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
TENTH CIRCUIT	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
COLORADO	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
KANSAS	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NEW MEXICO	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
OKLAHOMA NORTHERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
OKLAHOMA EASTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
OKLAHOMA WESTERN	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
UTAH	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WYOMING	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

QUESTIONS OF SENATOR COCHRAN AND REPONSES OF MR. WILLIAM B. GRAY

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

April 11, 1980

Mr. William B. Gray
U.S. Attorney
Post Office Box 587
Federal Building
Burlington, Vermont 05402

Dear Mr. Gray:

On behalf of the Senate Judiciary Committee, we would like to thank you for testifying at the Department of Justice Authorization and Oversight hearing on March 12, 1980. Your testimony has assisted us in understanding the role of U.S. Attorneys in the Federal justice system. For the first time we have established a record that outlines in a most effective manner the operations of our judicial system.

We enclose written questions for you to answer and request that the answers be returned as soon as your schedule permits.

Sincerely,

Edward M. Kennedy
EDWARD M. KENNEDY
United States Senator

Thad Cochran
THAD COCHRAN
United States Senator

QUESTIONS OF SENATOR COCHRAN

1. (a) How many attorneys are in your office? Of these please break them down by experience (i.e. less than 2 years, 2-5 years, more than 5 years) and G-5 levels?

(b) How many paralegals? How many other staff?

(c) How many federal investigators are in your district?

(d) What is your usual turnover rate among attorneys? Do you consider it a problem? What would you propose as ways to retain talented attorneys?

(e) How many of your attorneys are in supervisory positions--spending a significant amount of time reviewing the day-to-day legal work of other lawyers?

(f) What percentage of your office staff is minority employees? Do you have an affirmative action program? Does the Department give you any instructions or guidelines in this area?

2. How many copies of the U.S. Attorney's Manual do you have in your office? Is it used? Is it useful? Have you ever raised questions about its content? If so, what happened?

3. Is there a representative of the E.O.U.S.A. that visits your office on some sort of regular basis to discuss your operations? How often does this person visit? Does he or she discuss policy matters or perform a management analysis or what?

4. What is the relationship between U.S. Attorneys and the strike force chiefs, economic crime unit and controlled substances units? Have the problems relating to "turf" been resolved? Has there been a formal agreement/arrangement worked out regarding indictment/prosecutions in the various districts?

5. What is the time frame for turn-arounds of Title III's, Immunity Authorizations, Rico indictments and criminal tax prosecutions? Have these time frames adversely affected investigations or prosecutions? What is the cause for the delay and what can be done to expedite the process?

6. Give an estimate of the percentage of cases where concurrent jurisdiction existed in your district last fiscal year?

(a) What are the major concurrent jurisdiction cases you most routinely handle and why?

(b) What are the major concurrent jurisdiction crimes you routinely decline for federal prosecution and why?

(c) What types of cases might be handled on a joint federal-state basis and why?

(d) Estimate what percentage of cases you investigate and refer to the states for prosecution.

(e) What factors bear on your decision to refer the matter to state prosecution?

7. Should efforts to achieve national consistency in enforcement be undertaken in subject-matter areas of predominantly national interest?

(a) How would it affect answer to that question if the subject-matter areas of "national interest" were limited to:

(1) Criminal and civil enforcemnt of national regulatory programs? (FDA, ICC, SEC, FHA, etc.)

(2) Criminal and civil enforcement in areas of solely federal interest not duplicated by state enforcement?

(b) Have you made any use of the guidelines for the exercise of prosecutorial discretion suggested by former Attorney General Edward H. Levi on Jan. 18, 1972? How?

(c) Attorney General Levi's memorandum transmitting the suggested guidelines was extremely careful to make clear that they imposed no requirements or obligations on U.S. Attorneys. In what circumstances do you believe that it would be appropriate for the Attorney General to impose more authoritative policies or guidelines?

8. (a) What percentage of your criminal cases are plea bargained?

(b) Do you have certain types of cases you've instructed your assistants that cannot be plea bargained? Do you strive for uniformity in plea bargains? Why? Why not?

9. I have two hypotheticals I'd like to have you answer in reference to this plea bargaining issue:

Hypothetical One: Defendant is a 25-year old male with and unknown juvenile record. Defendant was arrested for possession of marijuana at age 18 and the charge was dismissed. He was also arrested for a gun offense at age 20 and the charge was dismissed. Defendant's current record inclused one prior assault and shoplifting conviction. He is a get-a-way driver in a bank robbery where a teller is wounded and is caught at the scene of the crime.

(a) What sentence would you allocute in your district?

(b) What plea bargain would you offer?

Hypothetical Two: Defendant is a 32-year old male doctor with no prior conviction or arrest. He is a family man and a community leader. He is charged with 4 counts of mail fraud amounting to $150,000 for filing false insurance claims as part of a ring.

(a) What sentence would you allocute in your district?

(b) What plea bargain would you offcer?

10. Do you have a set allocution policy or is it done on a case by case basis? How do you promote uniform treatment of defendants? What guidance do you give your assistants?

11. Do you have a set indictment charging policy in your district and does it include all lesser included offenses or only the highest offense? Do you routinely include state offenses? What guidelines do you give your assistants?

12. Now that the Investigative Agencies Subcommittee has been merged with the Prosecutorial Priorities Subcommittee, has the Advisory Committee been in a better position to assist in liaison with investigative agencies? How is this being accomplished? What other projects has the Subcommittee undertaken? I understand that you have just met with your Subcommittee recently. What are the plans for the upcoming year of Committee work?

13. I also understand you have served on the Professional Proficiency and Communications Subcommittee. What does this Subcommittee do?

Responses of
William B. Gray
United States Attorney
District of Vermont

RESPONSES TO QUESTIONNAIRE OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

1.(a) Currently, there are five attorneys in the office, the United States Attorney and four Assistant U.S. Attorneys. Three Assistant United States Attorneys have more than five years experience, one has two years experience. Two more Assistant United States Attorney positions have been assigned to this office recently, but the new lawyers are not yet on duty.

(b) No paralegals; six support staff.

(c) There are approximately 30 investigators assigned to cover the District; some are located in adjacent states.

(d) There has been no turnover in the office since 1977, shortly after I became United States Attorney.

(e) The United States Attorney is the only attorney spending significant amounts of time supervising other attorneys.

(f) We have no full time minority employees, but have had minority work-study employees. We make efforts to recruit minority employees but recognized minorities constitute less than 1% of the District's population. When all employees are on duty this fall, 33% of the Assistant United States Attorneys, and over 60% of the entire staff, will be women. The Department gives substantial guidance with respect to hiring of minorities and women.

2. We have six copies of the United States Attorneys' Manual in the office. It is very useful, particularly now that a good index is available. As a member of the Attorney General's Advisory Committee of U.S. Attorneys (AGAC), I participate in the process of revising the Manual. That process is responsive to appropriate suggestions for revision.

3. A representative of the EOUSA visits the office approximately every two years. The emphasis of the "inspection" tends to be more a management review than a policy discussion but departures from DOJ policy undoubtedly would be addressed.

4. We have no problems in our small district with the strike forces or with other DOJ field offices. The U.S. Attorney signs indictments.

5. DOJ response time on Title III's, Immunity Authorizations, RICO, and other specialized indictments is adequate and generally does not jeopardize cases. The DOJ is almost always responsive to emergency requests. Criminal tax cases take too long from investigation to referral to our offices, but not primarily because of DOJ Tax Division review. The age of the case adversely affects both the quality of the proof and the severity of the sentence. Eliminating either IRS District Counsel or DOJ Tax Division review probably would save at lease six months.

6. Concurrent Jurisdiction Cases.

(a) We still find it necessary to prosecute many of the bank robberies, particularly those committed in rural counties with little investigative and weak prosecutorial resources. We usually handle the larger fraud cases and anything with significant out-of-state aspects to be investigated.

(b) We routinely decline smaller drug cases, checks and bank larcenies when the county prosecutors will take them.

(c) The only investigations where I recommend a joint effort are those in which one sovereign has conducted an investigation which reveals primary violations prosecutable solely by the other sovereign. Otherwise, the logistical problems, in my judgment, outweigh the benefits of joint investigations.

(d) 5% - Our referrals to state prosecutors almost always take place before significant investigation has been conducted.

(e) Before investigation, the primary factor is conservation of resources. After investigation, the primary factors would be legal: a better statste, rules of evidence, etc.

7. To achieve the balance between the desirability of general uniformity and the "hobgoblin" of "foolish consistency" is one of the most difficult tasks the Department of Justice faces. In my judgment, it should not be of concern to the Department of Justice or to the Congress that, for example, a bank embezzlement of $500 would be prosecuted in the District of Vermont but in the Southern District of New York it would be declined in favor of state prosecution. There are so many variables that apparent consistency may in fact result in an unfairness. For example, I submit that it is more important to achieve uniformity of treatment of all embezzlements within the District of Vermont then it is to achieve uniformity between bank embezzlements in Vermont and in New York City. There are cases, however, in which consistency seems important. The question correctly identifies some of those including the enforcement of national regulatory programs and exclusive federal crimes such as illegal entry and tax evasion.

Assuming then that some consistency is desirable, the question remains how that consistency best may be achieved. It is my view that hard and fast guidelines are a mistake. They simply invite pretrial litigation of issues not germane to guilt or innocence. With firm guidelines, challenges to indictments on the ground that the Department failed to observe them are inevitable and time consuming. In addition, once guidelines are known to the public, that knowledge invites violations of the kind not generally prosecutable under the guidelines. For all of these reasons, I believe that the best method of achieving uniformity is through a process of education both within United States Attorney's Offices and among all United States Attorneys. The Levi guidelines released on January 18, 1977, are an example of the process. Those guidelines have been used within this office to educate Assistants to appropriate considerations and as a starting point for office discussions of prosecutorial priorities.

Finally, with the possible exception of statutes whose constitutionality is being questioned. I strongly recommend that the Attorney General not impose more authoritative policies or guidelines. The disadvantages arising from such inflexible guidelines outweigh, in my judgment, the benefits they would create.

8.(a) With very few exceptions based upon special circumstances, this office does not engage in "sentence bargaining" which is what is usually considered plea bargaining. In any case in which there are several counts in the indictment, we will consider accepting a plea of guilty to fewer than all the counts in the indictment. Our goal in negotiating a plea is to provide the sentencing judge with a sufficient maximum penalty to cover any expected sentence and to ensure that the crime to which the plea is accepted accurately describes the offensive conduct.

Under these procedures, pleas of guilty terminate approximately 90% of our cases. As we have improved the quality of the cases, pursuant to the DOJ's priorities, the likelihood of guilty pleas seems to be decreasing. I expect that statistics over the next few years will substantiate that perception.

9. HYPOTHETICAL ONE. It is highly unlikely we would recommend any sentence to the judge in that case. If the defendant cooperated fully and testified at trial, it is possible we would permit him to plead guilty to 18 U.S.C. § 2113(a) instead of § 2113(d) and thus reduce maximum exposure from 25 to 20 years.

HYPOTHETICAL TWO. It is unlikely we would recommend a sentence with respect to the defendant. It is unlikely we would accept a plea of guilty to two of the four mail fraud counts.

10. Our office is small enough to permit virtually all pleas of guilty to be brought to the attention of the United States Attorney, or in his absence, the First Assistant United States Attorney. Although we do not have a written policy, the office procedures are well known to every Assistant. These policies and procedures are addressed periodically, either on a personal basis or at staff meetings.

11. The United States Attorney signs almost all indictments within the District. The number of counts included varies considerably with the nature of the case and the proof. The primary consideration in determining the number of counts to be included is the nature of proof and possible defenses. We treat every case and indictment as though it were certain to go to trial and draft the indictment to anticipate legal and factual challenges.

12. The Attorney General's Advisory Committee of United States Attorneys (AGAC) was founded by former United States Attorney General Elliott Richardson. It consists of 15 United States Attorneys representing various circuits, geographical areas, and office sizes. The best formal statement concerning the committee may be found at 28 C.F.R. § 0.10.

13. The variety of issues raised by United States Attorneys is too numerous to include in this questionnaire. The principal concerns, however, include administrative problems, Department policy which directly affects our work (e.g. prosecutorial discretion guidelines) and the Department's response to and handling of legislative matters which have a direct impact on the work of United States Attorneys (e.g. the Criminal Code, revisions in the Federal Rules of Criminal Procedures, etc.).

14. The Field Offices subcommittee was instrumental in preparing those portions of the *United States Attorneys' Manual* which eventually were adopted to regulate the relationship between the Criminal Division and the United States Attorneys. The relationship between the United States Attorneys and other Department field offices (e.g. Tax Division, White Collar Crime Specialists) has been a major consideration for the subcommittee. The subcommittee is able to anticipate the kinds of disputes which are likely to arise and provide mechanisms for resolution of those disputes.

15. The AGAC has worked on virtually every draft of proposed policy changes emanating from the Department. In addition, minutes of every AGAC meeting are circulated throughout the U.S. Attorneys. The AGAC also helps plan and carry out every annual conference of United States Attorneys and schedules programs to continue the educational process used to promote greater consistency in the application of legal standards throughout the nation.

16. The Professional Proficiency and Communications Subcommittee deals primarily with training both of attorneys and support staff through the Executive Office, particularly the Attorney General's Advocacy Institute. It also reviews proposed case control systems designed for the Department. It also picks up a number of assignments which don't fit neatly into any of the other subcommittees.

QUESTIONS OF SENATOR COCHRAN AND RESPONSES OF MR. ROBERT DEL TUFO

EDWARD M. KENNEDY, MASS., CHAIRMAN
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ROBERT DOLE, KANS.
THAD COCHRAN, MISS.
ALAN K. SIMPSON, WYO.
STEPHEN BREYER, CHIEF COUNSEL

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

April 11, 1980

Mr. Robert Del Tufo
U.S. Attorney
Post Office Box 330
Newark, New Jersey 07102

Dear Mr. Del Tufo:

On behalf of the Senate Judiciary Committee, we would like to thank you for testifying at the Department of Justice Authorization and Oversight hearing on March 12, 1980. Your testimony has assisted us in understanding the role of U.S. Attorneys in the Federal justice system. For the first time we have established a record that outlines in a most effective manner the operations of our judicial system.

We enclose written questions for you to answer and request that the answers be returned as soon as your schedule permits.

Sincerely,

Edward M. Kennedy
EDWARD M. KENNEDY
United States Senator

Thad Cochran
THAD COCHRAN
United States Senator

QUESTIONS OF SENATOR COCHRAN

1. (a) How many attorneys are in your office? Of these please break them down by experience (i.e. less than 2 years, 2-5 years, more than 5 years) and G-S levels?

(b) How many paralegals? How many other staff?

(c) How many federal investigators are in your district?

(d) What is your usual turnover rate among attorneys? Do you consider it a problem? What would you propose as ways to retain talented attorneys?

(e) How many of your attorneys are in supervisory positions--spending a significant amount of time reviewing the day-to-day legal work of other lawyers?

(f) What percentage of your office staff is minority employees? Do you have an affirmative action program? Does the Department give you any instructions or guidelines in this area?

2. How many copies of the U.S. Attorney's Manual do you have in your office? Is it used? Is it useful? Have you ever raised questions about its content? If so, what happened?

3. Is there a representative of the E.O.U.S.A. that visits your office on some sort of regular basis to discuss your operations? How often does this person visit? Does he or she discuss policy matters or perform a management analysis or what?

4. What is the relationship between U.S. Attorneys and the strike force chiefs, economic crime unit and controlled substances units? Have the problems relating to "turf" been resolved? Has there been a formal agreement/arrangement worked out regarding indictment/prosecutions in the various districts?

5. What is the time frame for turn-arounds of Title III's, Immunity Authorizations, Rico indictments and criminal tax prosecutions? Have these time frames adversely affected investigations or prosecutions? What is the cause for the delay and what can be done to expedite the process?

6. Give an estimate of the percentage of cases where concurrent jurisdiction existed in your district last fiscal year?

(a) What are the major concurrent jurisdiction cases you most routinely handle and why?

(b) What are the major concurrent jurisdiction crimes you routinely decline for federal prosecution and why?

(c) What types of cases might be handled on a joint federal-state basis and why?

(d) Estimate what percentage of cases you investigate and refer to the states for prosecution.

(e) What factors bear on your decision to refer the matter to state prosecution?

7. Should efforts to achieve national consistency in enforcement be undertaken in subject-matter areas of predominantly national interest?

(a) How would it affect answer to that question if the subject-matter areas of "national interest" were limited to:

(1) Criminal and civil enforcemnt of national regulatory programs? (FDA, ICC, SEC, FHA, etc.)

(2) Criminal and civil enforcement in areas of solely federal interest not duplicated by state enforcement?

(b) Have you made any use of the guidelines for the exercise of prosecutorial discretion suggested by former Attorney General Edward H. Levi on Jan. 18, 1972? How?

(c) Attorney General Levi's memorandum transmitting the suggested guidelines was extremely careful to make clear that they imposed no requirements or obligations on U.S. Attorneys. In what circumstances do you believe that it would be appropriate for the Attorney General to impose more authoritative policies or guidelines?

8. (a) What percentage of your criminal cases are plea bargained?

(b) Do you have certain types of cases you've instructed your assistants that cannot be plea bargained? Do you strive for uniformity in plea bargains? Why? Why not?

9. I have two hypotheticals I'd like to have you answer in reference to this plea bargaining issue:

Hypothetical One: Defendant is a 25-year old male with and unknown juvenile record. Defendant was arrested for possession of marijuana at age 18 and the charge was dismissed. He was also arrested for a gun offense at age 20 and the charge was dismissed. Defendant's current record inclused one prior assault and shoplifting conviction. He is a get-a-way driver in a bank robbery where a teller is wounded and is caught at the scene of the crime.

(a) What sentence would you allocute in your district?

(b) What plea bargain would you offer?

Hypothetical Two: Defendant is a 32-year old male doctor with no prior conviction or arrest. He is a family man and a community leader. He is charged with 4 counts of mail fraud amounting to $150,000 for filing false insurance claims as part of a ring.

(a) What sentence would you allocute in your district?

(b) What plea bargain would you offcer?

10. Do you have a set allocution policy or is it done on a case by case basis? How do you promote uniform treatment of defendants? What guidance do you give your assistants?

11. Do you have a set indictment charging policy in your district and does it include all lesser included offenses or only the highest offense? Do you routinely include state offenses? What guidelines do you give your assistants?

12. Now that the Investigative Agencies Subcommittee has been merged with the Prosecutorial Priorities Subcommittee, has the Advisory Committee been in a better position to assist in liaison with investigative agencies? How is this being accomplished? What other projects has the Subcommittee undertaken? I understand that you have just met with your Subcommittee recently. What are the plans for the upcoming year of Committee work?

13. I also understand you have served on the Professional Proficiency and Communications Subcommittee. What does this Subcommittee do?

Responses of Mr. Robert Del Tufo

1. (a) 62 total Assistant United States Attorneys (not including 10 Special Attorneys in the Newark Federal Organized Crime Strike Force).

Experience:

0 - 2 years	2 - 5 years	over 5 years
0	12	50

(Assistant United States Attorney positions are excepted appointments and do not have GS levels).

1. (b) 5 Paralegal
67 Support

1. (c) 700

1. (d) 10% annually. It is not a problem to attract and to retain highly qualified attorneys. More competitive salary increments in higher ranges would be helpful in retaining experienced personnel.

1. (e) 11

1. (f) 75/132 = 57% (Professional 28%; Support 90%).

The Department encourages and is supportive of efforts to engage qualified minority personnel.

2. 67

The Manual is very useful.

Its content is under continuous review and evaluation by the Department and by the Advisory Committee of United States Attorneys. As such, the Manual remains a dynamic vehicle abreast of various legal and policy developments.

3. No one person from E.O.U.S.A. visits the office on the regular type of basis referred to in the question, though some program along those lines is, I believe, being considered by E.O.U.S.A.,provided adequate funding is available.

We are visited often by E.O.U.S.A. specialists to assist us in dealing with various issues and problems, including personnel and space matters, computerized case management proposals and modern word usage and other equipment.

4. Relationships with the Strike Force are excellent. In New Jersey, the Strike Force Chief and Deputy Chief positions may be filled by Assistant United States Attorneys. The Strike Force in effect operates as a Division of the office with a cooperative interchange of information and personnel.

In accordance with Departmental standards and directives, the United States Attorney is ultimately responsible for indictments and other Strike Force matters.

There is not as yet a Justice Department sponsored Economic Crime Unit in this District. New Jersey has, however, focused for many years upon white collar crime. The Fraud and Public Protection Division is composed of three units, one primarily concerned with government program fraud, one primarily concerned with economic crime, and one primarily concerned with environmental, food and drug, consumer safety and other regulatory matters.

The controlled substances unit, headed by an Assistant United States Attorney is part of the Criminal Division and operates smoothly.

5. With one exception, all of the cited authorizations are received in timely fashion and even more expedited treatment will be extended if emergency conditions exist. The exception deals with various requests required by the Tax Reform Act of 1976 - such as requests for "open-ended" Title 26 and Title 18 grand juries. The delays have resulted from bureaucratic and institutional red tape and resistance in IRS, not the Justice Department.

6. With the understanding that the term "concurrent jurisdiction" is applied as the opportunity of both federal and state authorities to prosecute on the basis of the same factual pattern though perhaps for different violations, we can fairly state that in close to 80% of our cases last year concurrent jurisdiction was present.

6.(a) The major concurrent jurisdiction crimes for which this office assumes responsibility are narcotics importation, manufacturing and distribution conspiracies, multiple and armed bank robberies, major theft rings involving automobiles, checks, securities or other stolen property, significant bank teller misapplications, hijackings, and counterfeiting cases. There are a number of reasons for our involvement in these areas though the reasons may vary with respect to each area. But the principle basis lies in the unique ability of the federal agencies covering these areas to handle complex and frequently expensive investigations which often involve a series of crimes spreading over a number of counties and states. Federal agencies are usually better equipped through more established communication networks, access to national resources and use of nationwide subpoena power to deal with the sophisticated interstate and international crime. Additionally, the national impact of a crime, even though committed locally, may justify our prosecuting the matter. Though this posture may seem obvious in such areas as narcotics importation and manufacturing or stolen auto rings, it applies in other areas as well. For example, truck hijackings are often referred for local prosecution in other sections of the country while in this District they are given federal attention. This is in large measure due to New Jersey's unique position as a center in the interstate trucking industry. Major criminal matters, if allowed to develop here, could have severe effects on other parts of the country. Accordingly, this office, along with the FBI has devoted a considerable portion of its manpower to the detection and prosecution of these crimes.

6. (b) The major concurrent jurisdiction crimes we routinely decline for federal prosecution are demand note bank robberies, single motor vehicle thefts, narcotics cases involving marijuana, hashish or small amounts of other drugs, or where state authorities have directed the investigation and the state desires to prosecute, gambling, drug diversion, medicaid fraud, credit card frauds and principally intrastate crimes against corporations. Again, the reasons for declination may vary with the crime. In some instances, while the nature of the crime certainly should generate some interest in the prosecution of most cases, realistic concerns for investigative, prosecutive, and judicial economy require that some, often arbitrary, limit be placed, either by number of incidents, the size and subject matter of the theft, or by the very nature of

the crime itself. The United States Attorney, the investigative agencies, and, indeed, the Courts simply cannot handle every crime over which they have jurisdiction. Moreover, the decision to refer matters for local prosecution is made that much easier where remedies available to the state are equal to or surpass those available on the federal level, as in credit card and corporate fraud cases. Finally, in some areas, the state, through specialization and experience, may also have a particular aptitude in dealing with a specific crime. In New Jersey, those cases involve medicaid fraud, drug diversion and gambling.

6.(c) Certain cases within this District have been and continue to be appropriate for federal-state coordination. Those cases include frauds against the government where monies may have been provided for projects through federal and state funding, narcotics cases, where an "up the ladder" approach requires the careful development of the case through small purchases at the street level in order to move to the top of the drug network, and environmental prosecution where the interplay between federal and state regulations requires careful coordination between prosecutors and agencies. The State of New Jersey is somewhat unique because of the nature and quality of criminal law enforcement authority vested in the Attorney General and the close working relationships which have developed between federal and state authorities. The Federal-State Law Enforcement Committee coordinates on a policy basis virtually all law enforcement efforts in the state. Cooperation between Assistant U. S. Attorneys, Deputy Attorneys General assigned to the Division of Criminal

Justice and representatives of county prosecutors' offices proceeds informally on a day to day basis. In addition, more structured coordinated protocols for conducting joint or separate investigations in primarily the white collar area have been established by the United States Attorney's Office and the State Attorney General's Office in areas such as bank fraud, government program fraud, various environmental matters and, in this last connection, the creation of a Federal-State Toxic Waste Task Force.

6. (d) We estimate that fewer than 10% of the cases investigated by this office are eventually referred to the State for local prosecution. This low percentage is the result of a conscious effort on the part of this office and the agencies to determine as early as possible whether a given investigation has federal potential in order to conserve and direct what resources are available toward the investigation and prosecution of those cases which have a definite federal interest and impact. On the other hand, in narcotics matters, DEA agents working closely with local law enforcement personnel in joint task forces operating in Newark and Atlantic City, frequently work on local level cases in order to benefit from eventual informants who may assist us in "moving up the ladder" as stated in 6(c), above. See also answer to 6(e).

6. (e) Factors which bear on our decision to refer a matter for state prosecution include (1) the degree of federal interest and impact, (2) the willingness of state authorities to handle the case, (3) the ability of state authorities to handle the case, (4) the violator's bankground, (5) the degree of federal involvement in the investigation, (6) and the likelihood that the case or

violator could lead to additional cases and violators, and (7) the congestion in our courts. It must be emphasized that no single factor can be considered determinative of the matter. Instead, each consideration is weighed against the others before a decision is made.

In connection with concurrent jurisdiction, annexed is a copy of a memorandum of understanding approved by all prosecutorial agencies in New Jersey setting up standards and procedures for an orderly referral of cases between jurisdictions. Attached also is a copy of a newspaper article which describes this understanding and the forthcoming effort to monitor referrals and develop some specific statistical base for determining how and where various criminal transactions are prosecutorially pursued. This office, with the support and encouragement of the E.O.U.S.A. and the Attorney General, has engaged professional personnel to operate the concurrent jurisdiction program.

7. While efforts to achieve greater national consistency in enforcement in subject matter areas of predominantly national interest certainly on their face would seem to merit wholehearted support, a more careful examination of the matter reveals some problems. Certainly the term "national interest" connotes a state of affairs where given crimes have an at least similar impact in terms of frequency and severity in all parts of the country. This, of course, is not the case. As only one example, though violations of the immigration laws may have an intial impact in the border states of Texas, New Mexico, Arizona and California, and thereafter a secondary but nonetheless severe impact on the industrial states such as New Jersey and New York. The

problem is perhaps not encountered to the same degree in other states. A national approach to enforcement would necessarily result in the setting of national objectives with directives for implementing those objectives, directives which would require the allocation of U. S. Attorney resources. It may be that those directives are fully consistent with the priorities set by the respective U. S. Attorneys, but to the extent that they are not, they may create an unnecessary drain on the limited resources available and require diversion of those resources away from those areas of particular significance to that area of the country. Moreover, while the U. S. Attorney strengths in force may be changed, however slowly, to meet the fluctuating demands placed upon them by directives from above, this would in turn create an increased burden on essentially static court resources. The better approach would be then to allow the U. S. Attorney to decide which area of federal prosecution best suits the needs of his District, the resources at his own disposal and the ability of the courts to respond to the demands placed upon them.

7. (a)(1) Our answer to Question 7(a)(1) is somewhat qualified where the subject matter is FDA, ICC or SEC offenses. While these areas would require uniformity of action, the efforts to achieve greater uniformity in enforcement should be carefully structured so as to avoid the potential problems previously outlined. A good example of an appropriate approach is these areas is that undertaken by the Narcotics and Dangerous Drugs Section in the Department which for some time now has effectively provided legal and educational support to our office. On the other hand, the various programs originating

under FHA are not subject to uniform management as each has a different effect in different parts of the country.

7. (a)(2) I doubt that a standard referring to matters of "solely federal interest" is workable and I believe the standard virtually undefinable. For that matter, what may or may not be of federal interest assuredly differs from place to place in this vast country. What is or is not a federal interest in a criminal context can also largely depend upon the resolve of state and local law enforcement in particular areas to attempt to deal with various problems such as organized crime, white collar crime and corruption.

7. (b) We have made use of Attorney General Levi's memorandum on prosecutorial discretion and have also utilized a variety of other standards and criteria suggested in various legal publications such as the A.B.A. I do not think it appropriate or desirable "for the Attorney General to impose more authoritative policies or guidelines." Prosecutorial discretion of necessity is not an exact science and must be undertaken with a due regard for the individualized facts of a particular situation with general policy considerations as the guideposts.

7. (c) Please see answer to 7(b) above.

8. (a) A significant majority of cases brought in this District result in guilty pleas. In 1979 probably 80% of the cases terminated in this way. Except in extremely unusual circumstances, sentence bargaining is not pursued in this District. Plea bargaining then resolves itself to make certain that a defendant pleads guilty to a sufficient number

of counts to provide the Judge the latitude to impose an appropriate sentence commensurate with the nature of the offense, with any additional counts in the indictment being dismissed. Such limited plea bargaining was probably involved in the majority of the cases resolved by guilty plea.

8. (b) Subject to the limitations set forth above, including the virtual prohibition against sentence bargaining, Assistant U. S. Attorneys may undertake preliminary plea negotiations. There is a set procedure for reviewing proposed plea bargains. With respect to certain less serious offenses, plea bargaining may be approved by a division head. In cases of any consequence, any plea bargaining has to be approved by the United States Attorney or the First Assistant United States Attorney. We, of course, strive for uniformity so that persons similarly situated are similarly treated.

9. I hesitate to attempt to answer any of the hypotheticals. Plea bargaining depends upon an intimate familiarity with all of the many individual and case related details which are involved in any matter. I find that the hypotheticals simply have insufficient information for one to make an intelligent judgment. And in this sensitive area, I would in any event hesitate to deal with hypotheticals.

10. Our general policy is not to speak at sentence except in unusual circumstances. Such circumstances might involve the need to speak out for significant retributive treatment for organized crime figures.

11. This office does have a set indictment charging policy which requires in most instances that only the highest offense be charged. We do not routinely include state offenses except in prosecutions under 18 U.S.C. §1961, *et*.

12. The Subcommittee of the Advisory Committee dealing with investigative agencies and prosecutorial priorities were always in very close contact and, indeed, we continued joint meetings. Accordingly, the merger is simply a recognition of past operating practice and the close familiarity of the subject matter. I note that the Subcommittee has continued its work of meeting periodically with all federal investigative agencies. Such meetings will unquestionably continue on a rotating basis. It has been my experience that such meetings are very useful in airing and resolving any difficulties and maintaining good working relationships.

Attachments

Additional Submission of
Prof. William J. Lockhart

Discretionary Clemency: Mercy at the Prosecutors' Option

*William J. Lockhart**

[Editor's Note: Upon the death of C. Nelson Day, United States Attorney for the District of Utah, in late 1974, Professor Lockhart was appointed to serve as interim United States Attorney. He served as United States Attorney from November 22, 1974 to May 4, 1975 — a period of crucial administration of President Ford's Clemency Program for Draft Evaders. His essay reflects the problems he experienced in the program as a result of a lack of guidance from the Justice Department and the lack of institutions or processes for adequate control of prosecutorial discretion.

On September 16, 1974, President Ford issued his Proclamation "*Announcing A Program For The Return Of Vietnam Era Draft Evaders And Military Deserters.*"[1] Young men living under a legal cloud resulting from their refusal to accept military obligations were recipients of an "act of mercy"—an "opportunity to earn return to their country, their communities, and their families, upon their agreement to a period of alternate service in the national interest, together with an acknowledgment of their allegiance to the country and its Constitution."[2]

Clemency was confined to identified violators of military service obligations, whose participation in the clemency program was conditioned upon their agreement to purge their violations by alternate service. Inevitably, then, administration of the program would require resolution of difficult questions affecting each clemency applicant:

What were the facts about the applicant's violation of civil or military law?

What was the applicant's legal status as a result of his violation?

Did the applicant require clemency in order to avoid future legal disabilities or jeopardy resulting from his violation?

What would be an appropriate term of alternate service in light of the applicant's violation and present circumstances?

Despite the need to resolve some or all of these questions in every case, the Proclamation offered virtually no guidance. Rather, the standards and procedures for those crucial decisions were left for development in the forums to which decision was assigned, presumably under the President's general guidance.

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* Professor Law, College of Law, University of Utah, and United States Attorney for the District of Utah from November 22, 1974, through May 4, 1975.

[1] 10 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1150 (1974).

[2] *Id.*

One of the forums assigned responsibility for clemency decisions was the United States Department of Justice, through the United States Attorneys in each of the federal judicial districts. While clemency for military deserters and previously convicted evaders and deserters was decided elsewhere (military departments and the Presidential Clemency Board), the United States Attorneys were assigned to determine the alternate service obligations of all clemency applicants subject to federal criminal charges for draft evasion.

This article argues that the fairness and even-handedness of the clemency decisions by United States Attorneys were inevitably infected by the more general failure of the Department of Justice to establish policies, guidelines, and procedures adequate to assure consistent and equitable exercise of prosecutorial discretion.[3] On one hand, Department instructions stated that the decision to require alternate service (to obtain clemency) would be based solely on the "evidence" of violation, raising doubt about the propriety of considering the discretionary factors which often ameliorate prosecutorial decisions. On the other hand, however, and without detailed guidance, the Department advised that alternate service should be required only of those violators whose cases were considered to "retain prosecutive merit." Persons whose cases "lack prosecutive merit" were to be advised that clemency was not necessary to avoid prosecution.[4] Thus, the crucial failure of the Department's administration of clemency arose from its assumption that adequately defined and equitable decisional standards would be triggered by the brief reference to "prosecutive merit."

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[3] The framework for thought concerning needed control of prosecutorial discretion is best elaborated in K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1971). One of Professor Davis' most telling thrusts is his suggestion in his most recent casebook, K. DAVIS, ADMINISTRATIVE LAW: CASES, TEXT, PROBLEMS 479 (1973), that the following statute would "codify the main features" of the present system:

> (a) The principle of equal protection need not apply to the exercise of discretion to enforce or not to enforce; the [prosecutor] may enforce against one party when the reasons for enforcement are weak, and he may refuse to enforce against another party when the reasons for enforcement are strong.
>
> (b) In the exercise of discretion concerning enforcement, the [prosecutor] shall be subject to neither the law nor the ethical standards that apply to judges concerning influence by parties or their representatives. . . .
>
> (c) Because discrimination or favoritism is allowed, the [prosecutor] who is exercising discretionary power concerning enforcement need not act openly, and need not consider his own precedents or make an effort to be consistent from one case to another.
>
> (d) The [prosecutor] need not formulate policies about enforcement, and even if he has clarified his policies, he need not state them publicly and he need not follow them in particular cases.
>
> (e) No court shall review any decision of a [prosecutor] not to enforce.

Initial identification of violators whose cases "retain prosecutive merit" was to be reported to the Department by January 13, 1975, in a "final list"[5] of violators who were to be advised that they must negotiate an alternate service agreement in order to obtain clemency and avoid prosecution. But the final decision requiring alternate service was to be made in case-by-case review of individual violations and in personal negotiations with the violators.

In the District of Utah, twenty-five persons were included on the "final list" sent to the Department of Justice which identified all persons whose cases "may retain prosecutive merit." The final decision of the District of Utah, however, determined that none of those persons who had remained in the United States, and hence accessible for prosecution, would be required to render "alternate service," thus exempting all Utah applicants from the Clemency Program. The following letter, in explaining the basis for that decision, explores the crucial problems of prosecutorial discretion which prompted it.[6]

Deputy Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C. 20530

Re: Disposition of Selective Service
Matters, District of Utah,
April-May 1975

Dear Sir:

This letter submits a detailed statement of the basis for my decisions in declining prosecution of certain Selective Service matters in the District of Utah during the period of my service as acting United States Attorney for that District. Although no Justice Department regulation or instruction requires this explanation, I feel obligated both by my earlier promise and by an obligation of reasoned decision.

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[4] To facilitate understanding of the decisions required of United States Attorneys under the Clemency Program, Appendix A provides a synopsis of the sequence of instructions received from the Department of Justice.

[5] Although Department of Justice instructions did not designate the January 13, 1975, report as a "final list," that was the practical result of a later agreement between the Department and Senator Kennedy's Administrative Practices Subcommittee. All persons whose names were not included on the list were treated as exempt from selective service prosecution for all violations identified at the date of the list. *See Hearings on Clemency Program Practices and Procedures Before The Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., at 180-81 (1974).

[6] The following letter faithfully reproduces the letter actually sent to the Criminal Division, United States Department of Justice on July 21, 1975. The author has edited the

Introduction and Summary

Some explanation of the disposition of Selective Service matters in the District of Utah is particularly appropriate because certain declinations (though relatively few) rested, in part, on my view that the decision making under the Clemency Program inevitably would be seriously inconsistent, subjective, and, hence, discriminatory.

Although the potential and actual discrimination arising from uncontrolled prosecutorial discretion is my primary concern in this letter, most of the dispositions in this district were based upon other considerations reflecting traditional bases for prosecutorial judgment. A number of the cases presented relatively clear factual or legal defects.[7] In other cases there was substantial reason to believe that the extended pendency of these cases not only presented a serious prospect of a speedy trial defense, but also would have prejudiced the defendant seriously in producing evidence pertinent to obvious defenses indicated by the information generated in our investigations.[8]

In addition to these relatively traditional gounds for decision, I earlier advised you that a few of the pending Selective Service matters would be declined as improper for prosecution, and hence im-

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letter to improve precision and readability, including brief additions of some explanation understood between the correspondents but needed for full understanding by persons not involved in administration of the Clemency Program. All of the footnotes have been added in the preparation of this article.

[7] An extreme example of such a case involved a local board's rejection of a conscientious objector's claim on the following grounds:

> A Registrant's religious training and belief should be the basis for classification as a conscientious objector. This Registrant's membership in the LDS Church and vows he would have taken, for his marriage in LDS Temple, would not indicate a religious background of a conscientious objector.

A similar example also involved rejection of a conscientious objector's claim on the ground that "Registrant claims to be LDS, an organization which does not sanction conscientious objection to military responsibility." Other rejections of conscientious objector status were less explicit, but made an unexplained point of the applicants' LDS church affiliations.

[8] Some cases involved claims of hardship or physical disability unresolved at the time the induction order was sent. Others dealt with failure to issue a specific order to perform any particular civilian alternate service (in prosecution of conscientious objector for failure to perform alternate service) and disputes concerning receipt of induction orders at new addresses.

proper for requiring alternate service, partly because of very serious doubts as to the equity and legitimacy of the decision making power vested in United States Attorneys. Those doubts arise from the absence of coherent policies or guidelines, or other devices adequate to assure consistent decisions under the Clemency Program. Thus, in deciding whether to impose a requirement of alternate service, United States Attorneys were left at large with a vague standard of "prosecutorial merit" in a subject matter characterized by widely inconsistent policies, standards, practices and attitudes. Furthermore, that circumstance prevailed despite the fact that United States Attorneys were vested with a virtual judicial function of pronouncing "sentence" in a context more punitive, in some respects, than the usual pre-trial diversion.[9] Therefore, it seemed appropriate in the context of the Clemency Program to adhere to the clearly established prosecutorial policy in the District of Utah, which was one of virtual nonprosecution—at least with respect to those subjects who remained within the jurisdiction.

The following discussion sets forth a more detailed explanation of the basis for these declination decisions, including, particularly, a more explicit statement of doubts about the equity and legitimacy of the decision making authority vested in the United States Attorneys by the Clemency Program. As a further predicate to this explanation, however, I should say that central to my concerns are two fundamental propositions:

(1) The Department of Justice has a moral, legal, and constitutional obligation to make a reasonable effort to assure consistency in the exercise of prosecutorial discretion, and violates the requirements of equal protection if it fails to make that reasonable effort;[10] and

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[9] In contrast to the limited reporting and supervision incident to the usual pre-trial diversion, the Clemency Program authorized United States Attorneys to determine a specific period of alternate service of up to two years, to be served in a menial public service job to be designated by the State Director of Selective Service. Applicants were required to waive their rights respecting speedy trial, statutes of limitation, and double jeopardy. No compulsory process or other means of litigating defenses before United States Attorneys was available. Applicants ran the risk of self-incrimination merely in contacting United States Attorneys to determine their status and eligibility for the Clemency Program. Even though arrangements were made with the court in the District of Utah to provide counsel (not provided under the Clemency Program), representation was not available during the crucial initial inquiries by clemency applicants who may have been uncertain of their status.

[10] As "agencies," of course, both the Department of Justice and United States Attorneys may have their final decisions set aside where they are "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. §§ 551(1), 706(2)(A) (1970). Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1970), taught that review of discretionary agency action requires a record adequate to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." In prescribing that

follow-up analysis, evaluation or decision making effort by any responsible member of the staff of the United States Attorney's Office. Thus, through November, 1974, there had been no effective or authoritative review or identification of the merits of the pending Selective Service cases.

In preparing the report of pending charges and investigations required by the above instructions, all open investigative files were identified and the merits of each case were reviewed in detail, in an attempt to comply with the instruction to identify all cases which had "prosecutive merit." Prior to rendering that report, in telephone discussion with the coordinator of the program in the Criminal Division, I explained that it was impossible to report in terms that would indicate unambiguously which cases had "prosecutive merit." Because of the inattention to these matters, there had been a failure to follow up and investigate unresolved issues of fact in almost every case, and there was simply no time, at that point, for adequate investigation.

That initial review turned up thirteen matters (out of a total of approximately forty) which, on substantive and procedural grounds, clearly lacked prosecutive merit. But because many of the remaining cases retained only doubtful "prosecutive merit," the most that could be said about them was that the facts were insufficient to show that they did *not* retain prosecutive merit. Therefore, the "final list" of pending cases indicated that the matters listed were "active draft evasion cases which my review indicates *may* retain prosecutive merit." (emphasis added) The matters that were found to be clearly lacking in prosecutive merit were declined, and the parties were advised that they would not be prosecuted. In one case, an indictment was dismissed on verbal authority from the Criminal Division.[15] The remaining persons whose cases "may retain prosecutive merit" were included on the "final list" of active cases, and were all advised by letter that they could apply for participation in the Clemency Program.[16]

After submitting the "final list" of active cases, the next step was to act on the pending applications for clemency. Because of serious doubts about the legitimacy and equity of any imposition of an obligation of alternate service, in light of the prior nonenforcement of the Selective Service laws in this district, I did not want to reach decision on the clemency applicants without a complete and thorough further review of all pending matters, or until I had all of the applications before me for consideration. Because of the extension of the clemency period[17] and the press of other business, however, review was not accomplished until the latter part of April, 1975.

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[15] The matters disposed of by this initial review were not included as active matters in the report of Jan. 13, 1975.

[16] Each defendant or potential defendant was advised that he was eligible to apply for participation, and was provided with a detailed explanation of the basis for eligibility, the procedure for application, the requirements and possible benefits of the program (alternate service and release from possible prosecution), and an explanation of the risks and protections of the Clemency Program.

Serious Doubts About the Clemency Program

In general, identification of a person eligible for alternate service and clemency was to begin with the determination that the draft evasion case against him was "not lacking in prosecutive merit." But in view of the incomplete preparation of many of the pending cases, that determination did not reflect a conclusion that the alleged evader would be subject to actual prosecution. For that reason, review of the matters on the "final list" was approached with the most serious doubts about the legitimacy of both the substantive guidelines for decision and the standards for determining the period of alternate service to be imposed as a condition of clemency. Doubt about the substantive guidelines for Selective Service prosecutions, of course, also bore upon the appropriateness of further prosecution of persons who had not applied for clemency.

These serious doubts arose, fundamentally, because the Clemency Program vested in the United States Attorneys an unreviewed power to impose sentence, in the form of a period of two years' alternate service, without trial or other adequate processes for establishing the facts, and without any understandable or meaningful standards, either for determining the kind of violation or circumstances constituting "prosecutive merit," or for determining appropriate periods of alternate service. Furthermore, the program was merely grafted on to an unpopular and controversial enforcement

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17. The deadline for application under the Clemency Program was originally set for January 31, 1975. After a two month extension, the period for application terminated on March 31, 1975, and United States Attorneys were directed to "reinstitute investigative and prosecutive procedures." Teletype message from Criminal Division to all United States Attorneys, April 1, 1975. Because the decision on the need to impose alternate service had been withheld in the District of Utah pending a complete and more detailed review of the "prosecutive merit" of all pending charges (including applicants for clemency), and because certain language in the directive raised uncertainty concerning the power to negotiate an "alternate service agreement" after March 31, 1975, I made inquiry to the responsible staff attorney in the Criminal Division, who assured me that only the right to make application had terminated, not the power to negotiate and execute such agreements.

program in its terminal stages, whose inevitable inconsistencies and incomplete investigations were further exaggerated by the wide variations of viewpoint generated by the Vietnam War.

(1) *Uncertain Recognition of the Role of Prosecutorial Discretion In Identifying Suspects Fit For Clemency*

Virtually the only guideline provided to United States Attorneys was the instruction that they were to determine the "prosecutive merit" of their pending Selective Service cases or investigations, inform those persons whose cases were determined to lack prosecutive merit, and treat those persons whose cases were found "not lacking" in prosecutive merit as eligible for the Clemency Program, and as subject to prosecution if they failed to apply.

The difficulty with the above guideline, of course, was that it left completely unclear the degree to which "prosecutive merit" for the Clemency Program should turn on the many discretionary considerations that commonly affect prosecutorial judgments by the United States Attorneys, including their personal and subjective evaluations of the relative importance of competing enforcement efforts. Thus, that ambiguity in program guidelines created a serious probability that alternate service would be imposed as a "lesser alternative" in many situations where exercise of prosecutorial discretion would have rendered actual prosecution unlikely. Criticism of that prospect was presumably the reason for the Attorney General's public disclaimer of such an outcome on October 31, 1974. That statement, however, was couched in terms that wholly avoided the crucial problem of discretionary judgments, and was limited to an assurance that alternate service would not be required where prosecution would have been declined on grounds of insufficient evidence:

> No individual will be required to perform alternate service if the Department does not believe *the evidence* against him is sufficient to justify a draft evasion prosecution.[18]

Yet that statement, in its failure to admit the crucial role of prosecutorial discretion, was seriously in conflict with the implications of earlier guidelines suggesting that a variety of discretionary considerations could appropriately be weighed by the United States Attorneys in determining whether prosecution of late registrants should be undertaken:

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[18] Teletype message from Department Director of Public Information to all United States Attorneys, Oct. 1974 (quoting the Attorney General) (emphasis added). The public announcement began with the statement that "The Department of Justice will not require an individual to perform alternate service . . . if there is insufficient evidence to justify his prosecution for draft evasion." Throughout the announcement, the implication was maintained that the crucial determinants of the likelihood of prosecution (in the absence of clemency) were evidentiary. There was no acknowledgment of the probability that many cases would otherwise be decided on discretionary grounds.

> The [Selective Service] General Counsel's pre-referral screening process has been designed to forward only those files to United States Attorneys where there is some evidence of willful, knowing, or deliberate misconduct, or in its absence, that the unexplained period of the delinquency was of an unconscionable duration. . . . [I]t may be appropriate to forego prosecution in a case where the refusal was neither open and notorious, nor of prolonged duration, and while under preliminary investigation the delinquent demonstrates contriteness and registers. On the other hand, if the individual's late refusal was open and notorious and calculated to induce others to flount [sic] the draft law, serious consideration should be given to indictment despite eventual compliance.[19]

Of course, these guidelines were wholly inadequate to deal with the bulk of the cases, which fell between the extremes outlined. In addition, they raised significant first amendment issues.[20] Nevertheless,

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[19] Memorandum from Assistant Attorney General, Criminal Division, to all United States Attorneys, Sept. 16, 1974. The memorandum was entitled "Selective Service Cases, Prosecutive Policy With Respect To Persons Who Fail To Register Timely Under the Provisions of The Military Selective Service Act." It applied only to prosecutorial decisions on violations after March 28, 1973 (*i.e.*, subsequent to the period of violations for which clemency was offered). But the considerations suggested as appropriate for prosecutors' consideration were obviously of broader application, and elaborated on the similarly vague discretionary considerations suggested in an earlier instruction of general application to selective service prosecution decisions:

> United States Attorneys should not give consideration to defendants who offer to submit to induction in lieu of prosecution where their offenses are attended by aggravating circumstances. Aggravating circumstances may appertain to those situations which clearly indicate that defendant's primary goal was to evade service at whatever cost and which reflect, for example, a long history of non-cooperation with or obstruction of the operations of the Selective Service System, particularly if such activities are the bases for additional counts in the indictments. Examples of such activities might be interfering with the operation of a local draft board, harassment of local board employees, or the like.

Memorandum from Acting Assistant Attorney General, Criminal Division, to all United States Attorneys, May 10, 1972.

[20] In United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc), the court held that a leader in the Chicago draft resistance movement who had been prosecuted for refusing induction had proffered sufficient evidence of an improper prosecutorial motive of stifling exercise of first amendment and other statutory rights to be permitted a full hearing on those issues. Based on the apparent selectivity in prosecuting Falk, the court emphasized the scope of appropriate inquiry as follows:

> [W]e think the government will be required to present compelling evidence to the contrary if its burden is to be met. If the district court finds that the prosecution was

the guidelines suggested the propriety of a traditional exercise of prosecutorial discretion in determining which persons would be subject to prosecution and, hence, proper subjects for clemency alternate service.

The Attorney General's attempted "clarification" seemed only to confuse the issue and may have tended to encourage exactly the response that he was attempting to disclaim—that is, that persons who would never have been prosecuted pursuant to a discretionary prosecutorial determination would nevertheless be subjected to alternate service obligations imposed by the judgment of a United States Attorney. The emphasis in his statement of October 31, 1974, on the sufficiency of the *evidence* of violation could well have encouraged some United States Attorneys to limit their identification of cases "not lacking in prosecutive merit" to the evidentiary and legal questions bearing on technical susceptibility to prosecution, rather than to the more traditional discretionary judgments of United States Attorneys.

Because of uncertainty as to the role of discretionary considerations, inquiry was made to the Criminal Division to determine whether the standard for identifying persons subject to prosecution, for purposes of clemency and alternate service, was intended to exclude the discretionary factors that would have affected susceptibility to actual prosecution. Based on the responses to those inquiries and the Department's continuing reliance in its clemency instructions on the words "prosecutive merit," with their discretionary and conclusory connotations, it became relatively clear that the usual discretionary prosecutorial determinations were to be the basis for selecting those persons who would otherwise be subject to prosecution and, hence, required to execute and perform alternate service agreements in order to obtain clemency.[21] Nevertheless, the

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> not the result of a purpose to punish Falk for exercising First Amendment rights as a draft counselor and Vietnam protestor and is also satisfied that the government has not made an invidious discrimination between violators who acquiesce to the power of the Selective Service System and those who continue to assert their rights to be classified as conscientious objectors, the conviction will stand. If the court finds that Falk would not have been prosecuted for violation of the card possession requirements except for his assertion of a conscientious objector claim or his draft counseling and lawful protest activities, the indictment must be dismissed.

Id. at 694.

[21] The directives to the United States Attorneys offered other indications that discretionary considerations would continue to play a liberalizing role—particularly the Nov. 8, 1974, directive that the decision respecting prosecution of late registrants (and, hence, clemency eligibility) should be based on the belief "that the case ordinarily would warrant prosecution." Similar implications may be found in the instruction that "in furtherance of the spirit" of the Clemency Program, all persons whose cases were found "lacking prosecutive

basis for that understanding was never made explicit; the Department's instructions left the distinct possibility that persons who would never have been prosecuted could have felt compelled to sign an alternate service agreement as insurance against prosecution.

(2) *Unarticulated Standards of Prosecutorial Discretion Applied Without Process by an Investigator-Prosecutor-Judge*

It may be reasonable to assume that the instructions to United States Attorneys could have been understood as permitting traditional discretionary judgments in determining the pool of potential defendants who could appropriately be required to undertake alternate service. Yet, at best, that understanding would merely have assured that "clemency" need not result in more punitive decisions to impose alternate service than could be expected from prosecutorial decisions in similar circumstances. The instructions offered nothing to assure that consistent or equitable standards would guide those traditional discretionary decisions. Traditional prosecutorial decisions, at least, are usually subject to testing and validation by the judicial process. Under the Clemency Program, however, unarticulated discretionary standards, if understood to be applicable at all, were suddenly elevated to a position central to decision in a program of fundamental importance in resolving the most divisive national moral dilemma of recent times. Moreover, these elusive discretionary standards were to form the basis for decision by United States Attorneys without any form of judicial or other check, and without any provisions for alternative processes to assure an adequate factual basis for decision. Nothing explicit was proffered by the Department to combat the natural tendency of the more aggressive prosecutors, freed of the constraint of presenting the mat-

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merit" were to be informed that they need not participate in the program in order to avoid prosecution. This was a significant modification of the Justice Department's common practices and a reversal of the position taken by the supervising Assistant Attorney General at an interim hearing on the Clemency Program:

> Senator Kennedy. If [a particular prosecution] was ended [by closure of the file] in 1972, why shouldn't he have been notified and allowed to come back before. Isn't there any responsibility of the Department to inform these people that there isn't anything hanging over their heads?
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> Mr. Maroney. I don't think so, any more than anybody else is ever notified that the Government is or isn't going to bring a criminal case. No, sir, he got the order to report for induction. He knows that he didn't obey the order and he was therefore in some jeopardy at that point. He certainly could have made an inquiry through an attorney or otherwise as to whether or not an indictment was returned or whether or not a case was dismissed.

Hearings on Clemency Program Practices and Procedures, supra note 5, at 180-81.

ters to a court and jury, to impose alternate service obligations more punitively than comparable decisions to prosecute.

The effect, in my judgment, was to place United States Attorneys in a position that raised the most serious of ethical questions, combining functions of investigator, prosecutor, and judge in a manner of doubtful constitutional validity.[22] Yet the United States Attorney responsible for investigating and prosecuting a case was the only forum before whom an alleged Selective Service violator had the opportunity to establish the facts which would determine whether he would be permitted to avoid prosecution or be required to execute and perform an alternate service agreement. The alleged violator was required to adjudicate the disputed issues before the prosecutor with no provisions for the most fundamental procedural protections, or indeed, any "process" at all, except that invented by the prosecutor. In short, the practical operation of the Clemency Program placed United States Attorneys in the unique position of prosecutor and judge, and permitted them to base their decisions upon unarticulated, unavailable, and largely non-existent "standards" of prosecutorial discretion elevated to a standard for imposition of an alternate service "sentence," without any provision for factual or legal review of the basis for those decisions.[23]

(3) *High Probability that Widely Disparate Prosecutorial Standards Would Impose Alternate Service on Persons Who Would Not Have Been Prosecuted*

Particularly in light of the broad and largely unguided discretion to be exercised by United States Attorneys in determining which matters retained "prosecutive merit," it seemed to me absolutely certain that widely disparate standards would be applied nationwide, with the likely result that many persons would be required to render alternate service who would never have been subject to prosecution. There are several bases for this judgment:

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[22] See Withrow v. Larkin, 421 U.S. 35 (1975), where the Supreme Court, in rejecting a due process claim challenging combination of investigation and enforcement functions in a state medical examining board, expressly distinguished cases where such a due process violation was based upon personal investigation of charges by persons also vested with responsibility for agency decision. *Id.* at 50 n.16. The Court distinguished *In re Murchison*, 349 U.S. 133 (1955), where a state judge exercised both inquisitorial and decisional powers as a "one-man grand jury," on the ground that due process was there denied under "the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications." 421 U.S. at 53.

[23] Presumably because the Clemency Program was adopted as an exercise of the President's pardon power, the proclamation did not provide any process for appeal of the alternate service decisions. *See Hearings on Clemency Program Practices and Procedures*, *supra* note 5, at 191. Of course, it might be argued that the United States Attorney's determination of a period of alternate service would be a final decision of an agency subject to judicial review under 5 U.S.C. § 706(2)(A) (1970). But in view of the Presidential Administration's repeated assertions that legislative enactment of amnesty would intrude on the President's pardon power, it is clear that any effort to seek judicial review would be met with vigorous assertion of the same claim. *See, e.g.*, *Hearings on the Presidential Clemency Program Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., at 83-84, 86-88 (1975).

(a) During the summer of 1972-73, I traveled to several United States Attorneys Offices and conducted detailed interviews concerning prosecutorial practices. Based on discussions with assistants in several of those offices, it was my impression that Selective Service cases were often assigned very low priority—that cases were not being vigorously prosecuted and that the vast bulk were declined, with many dismissals of pending indictments or informations. Not only were United States Attorneys (or their assistants) unenthusiastic about prosecuting the cases, but at least some of the judges tended to discourage Selective Service prosecutions. Furthermore, these observations were confirmed by several persons in responsible positions in the Department. Under these circumstances, it was inevitable that a program which required United States Attorneys to analyze, consider, and make a judgment about all of the Selective Service cases would result in many unfavorable decisions that otherwise would never have been considered.

The tendency toward significantly reduced emphasis on Selective Service prosecutions is clearly evidenced by the available statistics. While the most revealing information would be a compilation of the numbers and bases for declinations by United States Attorneys, that information is not readily available for analysis.[24] The

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[24] The most detailed breakdown of statistics in criminal matters prepared and circulated by the Department of Justice is provided by the annual United States Attorneys' Offices Statistical Report. However, that report provides little detail concerning the substantive basis for disposition or the types of cases actually filed, and provides no information respecting declinations other than a summary calculation of "matters received" in each district without segregation as to subject matter. More detail, by substantive categories, is available on special printouts from the Department's computer center; but even that information is segregated in only thirteen basic substantive categories (reflecting the forms by which the data is collected from United States Attorneys' Offices) and offers no explanation of the basis for disposition.

Adoption of a system of statistical reporting of all dispositions adequate to reveal trends in the exercise of prosecutorial discretion was recommended in a study commissioned by the Administrative Conference of the United States. *See* R. RABIN, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, THE EXERCISE OF DISCRETION BY THE JUSTICE DEPARTMENT IN HANDLING REFERRALS FOR CRIMINAL PROSECUTION FROM FEDERAL AGENCIES AND DEPARTMENTS (1972); Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036 (1972). That recommendation was rejected by the Justice Department on the basis of the unofficial reaction of certain high level Department officials. One such reaction was reflected in the following comments:

Department's statistical reports, however, do show the numbers of defendants dismissed, and reflect a substantial disproportion of Selective Service cases dismissed.[25] This is illustrated by the following table extracted from the United States Attorneys Statistical Reports:

Dismissals as Percentage of Defendants Terminated

Fiscal Year	Dismissals as % of Total Sel. Service Defs. Terminated	Dismissals as % of Total Defendants Terminated	Difference
1968	29.36%	19.68%	9.33%
1969	38.2%	18.06%	20.1%
1971	51.9%	23.2%	28.7%
1972	55.1%	23.7%	28.7%
1973	58.5%	28.5%	30.0%

(b) Because of this neglect of Selective Service cases, the information available as the basis for clemency decisions was inevitably inadequate. Furthermore, it was unlikely that thoroughgoing investigations could be initiated and accomplished on most of the matters in the time available under the schedule called for by the Clemency Program. Thus, a further irrational discrimination arose, tending to favor persons whose cases had been inadequately investi-

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> When all is said and done, Rabin's report is a fair treatment of how the system works. As Rabin describes it, it appears to be working well. The problem of "arbitrariness" does not surface—in our view is non-existent. Therefore, no solution is called for.

Memorandum from Deputy Director, Executive Office for U.S. Attorneys, United States Department of Justice to Director, Executive Office for U.S. Attorneys, May 9, 1972.

Repeated efforts to establish an adequate statistical reporting system were rejected or discarded under the administration of former Attorneys General. A new and promising effort to develop a system of data collection and case management was begun in the summer of 1975 in the Department's Office of Policy Planning, with the support of Attorney General Levy.

[25] It should be noted that there is some dispute concerning the extent to which the trend revealed in these calculations was the result of a policy of permitting violators to avoid prosecution by recanting and accepting induction. That explanation for the disproportionate number of declinations and dismissals was rejected by Mr. John E. Schulz, in testimony offered on behalf of the Public Law Education Institute in *Hearings on The Presidential Clemency Program*, *supra* note 23, at 202-04, primarily on the ground that the rate of declination and dismissal declined by only five percent when the option to accept induction was terminated. Calculations by Mr. Schultz also showed a trend of diminishing success in convictions (as a percentage of prosecutions filed) that roughly correlates with the trend of increasing dismissals reported in the text. The adequacy of the statistical sources of these calculations is subject to question because the Department's statistical collection system does not purport to track the disposition of a particular universe of cases referred. Nevertheless, the calculations reflect rough estimates which confirm the impression that:

(1) United States Attorneys were declining a highly disproportionate number of Selective Service cases.

(2) The later increases in the proportion of referrals on which charges were filed were substantially offset by dismissals after filing.

gated and prepared at the time the Clemency Program was initiated, and to disadvantage persons whose cases happened to be more fully prepared.

(c) There was no effort by the Department to establish consistent national guidelines or standards for determinations of "prosecutive merit." As previously suggested, each United States Attorney could only interpret that broad standard as incorporating the prior standards prevailing in his district for the disposition of Selective Service cases. Inevitably, the application of existing standards or practices in the exercise of prosecutorial discretion in Selective Service prosecutions in the various districts would yield wide disparities in results because of the intensity of feeling engendered by the subject matter and the volatility and wide divergence of views as to the current desirability or need for Selective Service prosecutions. Yet there was little effort by the Department to review the consistency of the discretionary standards applied.[26]

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[26] In stating his opposition to any general grant of amnesty to Vietnam era Selective Service violators, former Secretary of Defense Melvin R. Laird stated his preference for discretionary amnesty in particular cases in terms that recognized the inconsistency of enforcement:

> It is my view that circumstance and motivation on a case-by-case basis, under our concept of justice, must be taken into account . . . . It is noteworthy that only a small percentage of these men have thus far been prosecuted by the Department of Justice, and in these cases widely differing penalties have been assigned to individuals varying by jurisdiction.

Letter from Melvin R. Laird to Comdr. Ray R. Soden, Veterans of Foreign Wars, Jan. 28, 1974, *reproduced in Hearings on "Amnesty" Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess., ser. 35, at 340 (1974).

Senator Robert Taft, Jr., in his testimony before the House subcommittee was much more explicit concerning the inconsistency of prosecutorial standards:

> [T]his burden on the Justice Department [of prosecuting Selective Service violators] has been translated into a very uneven approach of prosecution with the determining factor quite often being the geographical region of the country that an individual is from as to the disposition of the case. For example, during fiscal year 1972, only 1 of Ohio's 218 defendants in selective service cases served a prison sentence compared to Minnesota with 94 convictions, 47 of which resulted in imprisonment, out of a total of 141 defendants.

Id. at 344.

Although the Department of Justice made a substantial effort to provide guidance through senior staff personnel in the Criminal Division, it was mainly a passive effort to guide decisions by inquiring United States Attorneys. There was an effort to compile and publish to the United States Attorneys the periods of service imposed in the first twenty-six clemency cases as a guide for determination of appropriate terms of alternate service, but that effort was of doubtful effectiveness in assuring consistency. *See Hearings on Clemency Program, Practices and Procedures, supra* note 5, at 189-95.

Basis for Decision in the District of Utah

Detailed review of the Selective Service matters pending in the District of Utah revealed substantial questions about the appropriateness of prosecution, on both legal and discretionary grounds. My understanding of the guide "prosecutive merit," which was confirmed with the Department, was that it should incorporate the prior standards and practices prevailing in this district in the disposition of Selective Service cases. Inasmuch as the operative policy in the District of Utah for the last several years had been virtual nonprosecution, it seemed to me highly unjust that a different policy should prevail in imposing alternate service under the "clemency" program. As previously noted, it was also my understanding, based on statistics and impressionistic judgment—in lieu of anything more substantial from the Department—that essentially similar policies involving much diminished emphasis upon prosecution of Selective Service cases had been followed in other districts.

There was little doubt that the effective or operative policy in the District of Utah was one of nonprosecution. Apparently, that policy in the District of Utah originated with the Chief Judge's reluctance to permit prosecution of Selective Service cases while the issues posed by *Imus v. United States*[27] remained unresolved. But there is also no doubt that the United States Attorney's Office declined to press the matters and, in effect, acceded to the Chief Judge's views.

The status of Selective Service prosecutions in the District of

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[27] Civil No. C-11-68 (D. Utah Jan. 29, 1968), *preliminary injunction vacated and intervention denied*, 447 F.2d 1008 (10th Cir. 1971). The action was dismissed by the district court on June 6, 1973. In *Imus* plaintiff registrants sought injunctive relief against induction, claiming that ministerial exemption of draft-age Mormon missionaries resulted in illegal and discriminatory enforcement of Selective Service obligations. A substantial basis for those claims was suggested by the deposition of the Utah State Director of Selective Service, who acknowledged that Utah registrants invoked the ministerial exemption ten times more frequently than the nationwide average. (More than three percent of Utah residents compared to about .3 percent nationwide). Deposition of Col. Evan P. Clay, May 9, 1968, at 37-38. Selective Service policy of cooperating to facilitate exercise of the exemption, rather than contesting that disproportionate number of exemptions (*id.* at 27-32, 34-37, 39-48, 54-59, 60-62), was apparently based upon an interpretation of the ministerial exemption founded in the legislative history. *See, e.g.*, S. Rep. No. 549, 84th Cong., 1st Sess. 12 (1955). That legislative history involved a number of prearranged colloquies in hearings and on the floor of the House and Senate; and counsel who acted as architect for that legislative history has asserted that "the above job on developing a legislative history and interpretation was one of the most precise and beneficial done in connection with Federal legislation." He acknowledges that "it could not have been accomplished without the full cooperation of General Hershey . . . ." (Former National Director, Selective Service System) Letter from Robert W. Barker to Elder Gordon B. Hinckley, Jan. 7, 1967.

Utah was accurately summarized by my predecessor in a letter to the Department on January 5, 1972, as follows:

> While I have not made an exhaustive search of our files, it is my recollection that in the last three years Judge Ritter has permitted the handling of three or four Selective Service matters in his court where the same have been Rule 20 pleas of guilty with matters originating in other districts and where the defendant was a Conscientious Objector who stated he would serve as a civilian employee in a hospital upon order of the Court but not upon order of the Selective Service System. Other than these three or four items, I do not recall that Judge Ritter has handled or permitted the handling of any Selective Service cases in his court since the 1968 Tenth Circuit's decision in the *Imus* case.

As a result of discussions with the Department at the time of the above letter, there was a brief effort to demand trial in three pending cases by filing a motion for a trial setting, which would lay the foundation for an order from the Tenth Circuit. But when the judge met that limited challenge by setting the matters for an immediate trial date, the motion was withdrawn and there was no further effort to demand trial in the many other pending cases. Nor was there any effective effort to develop and file complaints in the many matters under investigation. Thus, it is fair to say that the United States Attorney's Office in Utah acceded to a policy of nonprosecution.

There were other demonstrations of the general pattern of nonprosecution of Selective Service cases in the District of Utah. On many occasions over the past several years, the United States Attorney's Office was contacted by the FBI or Selective Service to determine the status of pending matters. They were repeatedly advised that the matters were awaiting submission to a grand jury or were awaiting the preparation of complaint and information, but were not ready for action. The FBI was advised that the United States Attorney's Office was arranging for assistance from the Department for analysis of the pending matters and for preparation of complaints and informations; but preparation of the cases was never forthcoming.

Significantly, the United States Attorney's Office was not alone in leaving these matters unresolved. On at least three occasions, the United States Attorney's Office advised the Department by letter of its difficulties with understaffing and requested assistance to review pending matters and to prepare complaints. On at least one occasion, an official of the Criminal Division assured an Assistant United States Attorney for the District of Utah that help for these matters would be furnished; but the requested assistance never came. Consequently, most of the cases had been pending since at least December 11, 1972, and considerably more than half since before January 5, 1972.

Not only did this extended delay offer the alleged violators a substantial basis for a speedy trial claim, but analysis of individual cases demonstrated that a belated prosecution could have prejudiced some defendants in exactly the manner contemplated by the speedy trial requirement. A number of the cases involved possible defenses, often previously raised, which would have required production of crucial facts not likely to remain available. Under these circumstances, I concluded that it would have been extremely unjust for me to commence a prosecution, and even worse to require belated presentation of defenses in the informal forum of the United States Attorney's Office without the benefit of compulsory process or other procedural protections. Therefore, all pending matters in which our evidence suggested the probability of factual defenses were declimed.

In addition to the likely effect of extended delay on the prospects of presenting available defenses, the inattention from the United States Attorney's Office had a further impact on the fairness of any possible prosecution and, hence, the fairness of an "adjudicated" alternate service requirement. For example, instructions from the Department on June 28, 1973, had required all United States Attorneys to send letters to all Selective Service violators advising that they could purge their violations by accepting service in the armed forces. The United States Attorney for Utah, however, had never complied with that instruction, despite repeated prodding from the FBI, and the Department had not followed up to assure that a proffer of the opportunity had been made. Thus, it seemed legitimate to consider the fact that Utah violators had been denied an opportunity to purge their violations because of the low priority given to Selective Service matters.

Because of these circumstances, I concluded that exercise of prosecutorial discretion should include declination of the relatively few pending matters which were not otherwise declined on the grounds of legal or factual defenses, except (1) where the violations were recently discovered for the first time, or (2) where the violators had remained inaccessible to prosecution during most of the period in which the policy of nonprosecution prevailed in the District of Utah.

The first exception left three cases unresolved, involving violations which were discovered during or immediately preceding my term of office (primarily through applications for clemency). In those cases, I would have had an obligation to prosecute in accordance with my understanding of current departmental policies, without regard for the Office's previous low priority for Selective Service prosecutions. The second exception reflected my doubt that violators who had fled the country and had not taken the risks of prosecution actually suffered any prejudice from either the local policy of nonprosecution or from the general inconsistency of discretionary prosecution policies.

Thus, the cases for which prosecution or alternate service were declined include all of the previously reported "active" matters in which the potential defendant remained available for prosecution, but which involved significant legal or factual defenses indicated by our investigations. In addition, I also declined prosecution of a few matters which may or may not have presented possible marginal defenses, but in which I concluded that all of the above considerations justified a discretionary judgment that prosecution would have been inappropriate and that alternate service, therefore, should not be required.[28]

Implications for Control of Discretion

In considering the issues raised by the preceding discussion, it seems to me that certain fundamental difficulties arise with respect to the Justice Department's general approach to supervision of prosecutorial judgments. The most fundamental difficulty lies in continued adherence to the view that United States Attorney's Offices are independent fiefdoms and that it is politically objectionable for the Justice Department to exercise any substantial supervision and control over the discretionary judgments made in those offices.[29] Almost of equal importance is the continuing practice of yielding consistency in the enforcement of national policy in favor of the predilections of particular federal judges and United States Attorneys—a practice perpetuated by United States Attorneys' inclination to "get along" with district judges and promote their success by slighting the types of cases which may be unpalatable to the judges.

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[28] Prior to acting on the pending cases, the senior staff attorney responsible for coordinating the clemency decisions was advised of the basis on which I expected to decline prosecution and alternate service.

[29] The traditional independence of United States Attorneys is undoubtedly traceable to their status as politically sponsored Presidential appointees. *See* 28 U.S.C. § 541 (1970). Yet there is no doubt of the Attorney General's legal authority under *id.* § 519 to "direct all United States Attorneys . . . in the discharge of their . . . duties" elaborated by 28 C.F.R. § 0.5 (1976), which recites the authority of the Attorney General to

> (a) Supervise and direct the administration and operation of the Department of Justice, including the offices of U.S. Attorneys . . . which are within the Department of Justice.

It is apparent in many types of cases, in addition to Selective Service matters, that the Department is not organized or inclined to require consistent adherence to policy, even where something as explicit as "policy" is announced. While there are exceptions (notably in tax prosecutions), the usual practice—even where detailed policies are announced—is to leave final determination concerning the appropriate application of policy in particular cases to the United States Attorneys, with minimal supervision and with little effective effort to compel adherence to policy, even where deviation is painfully apparent. Even where some types of cases are subject to limited supervision, there is no established channel by which lower echelon Department personnel can seek amicable resolution of a dispute with a United States Attorney over conflicting interpretations of enforcement policy. If the United States Attorney is adamant, the coordinating Department staff lawyer must decide whether the dispute is worthy of a major confrontation before a division head.

Furthermore, disinterest in careful supervision to ensure consistency of prosecutors' decision making is reflected in both the substantive reporting requirements and apparent lack of concern for adequate statistical reporting of prosecutorial decisions. There is simply no adequate rationale for the present policy which requires submission of a "Form 900"[30] explaining the reasons for dismissals of informations or indictments, while permitting a United States Attorney to decline prosecution at the threshold or to dismiss complaints prior to information without any justifying explanation. The only report required for declination or dismissal of a complaint is a simplistic summary report of the numbers of declinations in certain categories.[31] But even the categories included in the numerical reports and the uses made of them do not appear to serve any substantial purpose, either in supervising decision making by United States Attorneys or even in offering statistical assistance to them. No analysis or distribution of even a summary of the declination statistics has been made available, though such information would be of great help to United States Attorneys in understanding the pattern of enforcement in certain substantive fields and in maintaining some degree of prosecutorial consistency. Finally, it is obvious that a detailed analysis of statistical information would also be of great help to the Department if it were inclined, however mildly, to supervise the general consistency of enforcement.

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[30] The United States Attorney's Manual requires that a "Form 900"—"Request And Authorization To Dismiss Criminal Case" — be submitted by a United States Attorney and approved by the supervising Section Chief and Assistant Attorney General before submitting any motion to dismiss a filed indictment or information. Application for approval on the form is submitted under the signature of the originating Assistant United States Attorney and the approving signature of the United States Attorney, stating the reasons considered by them to support dismissal. In practice, preliminary authority is often obtained by telephone (and often acted upon) prior to submission of the form; but the Manual is generally understood to require submission of the form even in support of an informally approved dismissal. Thus, even where blanket authority to dismiss pending indictments was granted to United States Attorneys under the Clemency Program, instructions required submission of a supporting Form 900.

[31] Rabin, *Prosecutorial Discretion*, supra note 24, at 1082-83.

For example, given the very spotty pattern of Mann Act prosecutions as revealed by the Attorney General's statistical reports, it would seem useful to know more about the pattern of and basis for declinations—particularly, for example, in the large urban districts such as New York City which report virtually no enforcement.[32] Perhaps those statistics would reflect merely a sophisticated policy of permitting local determination of such "moral" issues. But it would be comforting to know that the Justice Department has made some sort of policy decision, based upon adequate information, to leave such matters to local decisions. Rather, the fact appears to be that the Department has not been concerned about knowing, or having United States Attorneys know, the details of the actual declination practices in the various districts.[33]

Similarly, in the area of Selective Service prosecutions, it would have been useful for the Department to have generated and circulated some basic information about the numbers of matters referred for prosecution, the numbers declined, and the basis for declination. Not only would there have been a data base to encourage more consistent decision making by United States Attorneys, but such information would have provided a satisfactory basis for some supervisory judgments about the need for more detailed and explicit guidelines for decision making, thus encouraging greater consistency both in prosecution judgments and in the administration of the Clemency Program. Had such information been available, the need for more sophisticated guidance for the Clemency Program than "prosecutive merit" would have been evident and the inevitable discriminations could have been minimized.

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[32] In the Southern District of New York, for example, there was no reported enforcement, while in the District of South Dakota, there were twenty-five Mann Act cases commenced in 1974. Director of the Administrative Office of the United States Courts, Annual Report 1974, at 464, 469 (1975).

[33] The Department of Justice, Office of Policy Planning, with full support of the Attorney General, is currently engaged in a promising new study and analysis of present practices, as the basis for proposing a case management information system and structuring the exercise of prosecutorial discretion. Interview with Ronald Gainer and James McMullen, Office of Policy Planning, United States Department of Justice, July, 1975. However, in-house studies of the need to revise the Department statistical collection and prosecutorial management practices have been proposed or in process since 1969. Rabin, *Prosecutorial Discretion*, *supra* note 24, at 1083.

It is apparent that the Department's wholly inadequate statistical collection and distribution is a product of a general reluctance to supervise intensively initial prosecution decisions. Yet it would seem that any effective performance of the Department's obligation to enforce national policies would require both. Certainly, at a minimum, there should be a conscious decision to leave certain matters to local decision making, while in other instances it may be more appropriate to strive for a national policy of consistent enforcement. Although the Department does follow that approach in some enforcement fields, the supervisory effort is so modest and the available information about its actual administration is so sparse that it is difficult to determine what policies, if any, actually emerge as a result of the Department's efforts. Even in an area such as Selective Service, where the national interest is paramount and consistency of enforcement is a particularly sensitive national concern, the Department's efforts to supervise the United States Attorney's Offices, or even to inform them of the joint product of their decision making, has been episodic at best.[34]

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[34] By 1970, at least, the Department was compiling statistical analyses of the burden of uninvestigated, unreviewed, and uncharged selective service violations as the basis for assigning a few special assistants to selected districts with large backlogs. See Rabin, *Prosecutorial Discretion*, *supra* note 24, at 1051-52.

Although supervisory effort by the Criminal Division was increasing the dispositions by late 1972, supervision appeared largely to be confined to a limited number of selected districts, and continued to confront large numbers of uninvestigated or unreviewed as well as untried cases. Thus, a Criminal Division status report in late October, 1972, summarizing discussions with prosecutors in eight districts who generally reported more intensive efforts to indict and try violators, nevertheless acknowledged a backlog in those districts of 2101 Selective Service referrals not yet investigated or reviewed for charging decisions. The status report also reflected the Department's difficulties inducing compliant application of its intensive prosecution policies in some of the more inaccessible districts, as suggested by the following comments on Selective Service prosecutions in the District of Columbia (with 317 cases awaiting review):

> On October 2, 1972, I spoke with an Assistant United States Attorney about the lack of Selective Service prosecutive activity. He was totally unaware of what was being done in this area although he supervises it. He stated that the one Assistant who processes our cases is on leave . . . [and] that this Assistant only handles Selective Service cases on a part-time basis. During our discussion I advised him of the Department's policy of prosecuting Selective Service violators as rapidly as possible and the apparent need for immediate action in his district.

U.S. Department of Justice, Criminal Division, "Status Report on Problem and Potential

Finally, I must challenge the Department's unstated policy of permitting a local United States Attorney to determine the degree to which particular types of prosecutions will be withheld in order to appeal to the local judge's biases. My investigations of discretionary decision making by prosecutors indicated that such local accomodations often result in a failure to prosecute consistently, even in matters involving legislative policies of clearly national scope.[35]

While the reasons for such accommodations are readily apparent, as in the Selective Service cases in Utah, they generally amount to acquiescence in judges' selection of the matters deemed appropriate for federal enforcement. The Department's acquiescence is invariably motivated by a short term interest in maintaining the good will of federal judges in order to promote effective enforcement. But the long term effect exacts a high price for the prosecutors' success. Not only is the consistency and effectiveness of the federal enforcement effort diminished in direct proportion to the sum of the biases of the federal judges, but the failure to demand consistent enforcement assures that bad policy will be permitted to stand unexamined and untested by the crucible of trial,[36] with inevitable discriminatory application where convenience happens to encourage prosecution.

The policy of acquiescence in such biases also has a more subtle and serious effect on the enforcement effort. Because the Department has become accustomed to catering to these local peculiarities, United States Attorneys become vested with the power to "interpret" and "apply" the judges' biases in explaining or justifying their own discretionary decisions and in making recommendations to the Department. As the local "expert" on the foibles of a particular judge, the views of the United States Attorney are too likely to be accepted without challenge as an essential ingredient in the practical workings of the legal system; and such judgments too read-

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Problem Districts" at 5 (Oct. 17, 1972), supplied to the author upon informal Freedom of Information Act request.

[35] This conclusion was reached in the author's presently unpublished study of exercise of discretion in the prosecution of Food, Drug, and Cosmetic Act violations by General Counsel for the FDA, the Department of Justice Consumer Affairs Section, and United States Attorneys' Offices. The study was prepared under sponsorship of Professor Kenneth Culp Davis for the Ford Foundation, and awaits submission for consideration by the Administrative Conference of the United States.

[36] The convenient result of the policy of acceding to the Chief Judge's reluctance to permit prosecutions in the District of Utah after filing of *Imus v. United States*, of course, was to avert resolution of serious questions concerning the discriminatory impact of Selective Service acquiescence in the tenfold disproportion of ministerial exemptions in Utah. *See* note 27 *supra*.

ily become a common ground for discretionary prosecution decisions.

There are, of course, fundamental constitutional objections to a system which permits such judicial control over prosecution efforts to fulfill legislative policy. But even if the validity of such influences were acceptable, there would be serious hazards in permitting prosecution decisions to be formed in such a fashion.

First, there is a substantial risk of the prosecutor's inaccurate assessment of judges' special biases. Because of the doubtful propriety of such judicial control over prosecution policy, judges are often inclined to communicate their preferences and prejudices by signals rather than by direct and explicit instructions. Such signals may be subject to serious misinterpretation, both as to their specific meaning and with respect to the intensity or universality with which particular views are held. Second, because the United States Attorneys become the official interpreters of judges' views, there is a serious risk that they may tend to confuse their own views and preferences with those of the judges.

In my view, the only proper approach is to mount a national effort to require consistent enforcement without regard for, and directly challenging, the special biases of particular judges that result in a discernible and general pattern of nonenforcement. Failure by the Department to seek relief from such judicial nullification not only amounts to acquiescence in the judges' special policies, but raises serious questions of equal protection in enforcement. Obviously, similar questions arise where the Department's failure to enforce is the product of a similar pattern of nullification by the discretionary prosecutorial decisions of United States Attorneys who are left unsupervised and uncriticized by the Department.

APPENDIX A

(See note 4, *supra*).

Sequence of Department of Justice Instructions to United States Attorneys, Implementing President's Clemency Proclamation

Sept. 16, 1974	Clemency Proclamation assigned responsibility to United States Attorneys for decision with respect to draft evader clemency applicants.
Sept. 16, 1974	Attorney General's Memorandum outlines "Prosecutive Policy" for administration of the Clemency Program: (1) Available to any violator of section 12 of the Military Selective Service Act. (2) Alleged violators must report to the United States Attorney for the District in which the alleged violation occurred. (3) Applicant must agree to perform a designated period of alternate service of twenty-four months or, where certain discretionary factors suggest, a lesser period determined by the United States Attorney. Form of Agreement requires acknowledgement of allegiance and waiver of various constitutional and statutory rights. (4) If no agreement is reached on a period of alternate service, a violator who has appeared to request participation may be prosecuted for his violation. (5) In presenting his position and negotiating alternate service agreement, applicant may "have counsel present." (6) Upon request by a person who thinks he may be under investigation for draft violation, United States Attorney "shall promptly review that individual's case file, if any exists, and in any event inform the individual whether or not Section 12 charges against him will be pursued if he does not report for Clemency participation." (Including persons not previously under investigation if offense is admitted.) (7) If a violator fails to complete the agreed period of alternate service, the United States Attorney may proceed to prosecute the case. (8) If alternate service is completed, charges are to be declined or dismissed.
Sept. 17, 1974	(1) Until further notice, terms of proposed alternate service agreements are to be cleared with the Department before signing. (Applied only to first twenty-six applicants as a means of guiding decisions concerning the period of alternate service. Also facilitated by requiring reporting of details of agreements actually executed.) (2) Arrest warrants are to be cleared and no arrests are to be made unless individuals clearly refuse to sign an alternate service agreement.
Sept. 19, 1974	Evaders entering at the border are not to be arrested if they agree to report to the appropriate United States Attorney within fifteen days of entry.
Oct. 7, 1974	Cancels requirement of prior clearance for alternate service agreements. Summarizes periods of service required by agreements to date, and related circumstances cited as basis for decisions.
Oct. 31, 1974	Attorney General's clarification of program: (1) "Every effort" to be made to afford clemency applicants their right to counsel through public or private agencies. (But no financial provision for indigents.)

	(2) No alternate service will be required unless the "evidence" against an applicant is sufficient to justify prosecution.
Nov. 5, 1974	Applicants who fail to appear before termination of the program on January 31, 1975, nevertheless will be permitted to participate if a United States Attorney is contacted before the deadline and the applicant demonstrates that he could not appear for reasons beyond his control.
Nov. 8, 1974	Nonregistrants whose possible offenses are brought to the attention of United States Attorneys by their applications for clemency are to be referred to the Selective Service. If referred back as prosecutable, and if otherwise warranting prosecution, then alternate service opportunity is to be proffered as a means of avoiding prosecution.
Nov. 18, 1974	All case files of unconvicted draft evaders are to be reviewed. Where a case "lacks prosecutive merit," charges are to be dismissed or investigation terminated; and all reasonable steps are to be taken to notify the individual that alternate service is not necessary to avoid prosecution.
Nov. 22, 1974	In conducting the above file review, United States Attorneys may not dismiss pending charges until permission is obtained on the basis of a "Form 900" statement of reasons, in accordance with usual procedure for dismissals.
Dec. 17, 1974	Emphasizes instructions to correspond with all known violators, advising them of clemency opportunity (specifically including fugitives).
Dec. 23, 1974	After file review of all cases, United States Attorneys are to report names of all violators whose cases are "found not lacking in prosecutive merit" (alternatively stated as cases which "have" or "retain prosecutive merit"). To be reported by January 13, 1975.
Jan. 30, 1975	Termination date of Clemency Program extended from January 31, 1975, to March 31, 1975.
Jan. 31, 1975	Authorization to dismiss charges against all persons whose cases were found "devoid of prosecutive merit" in connection with above-required file review. For this purpose only, disregard of usual procedures for obtaining permission for dismissal is authorized.

APPENDIX B

Summary of Review and Disposition of Pending Selective Service Charges or Investigations, District of Utah, Pursuant to Instructions Implementing President's Clemency Program

1. Number of individual files reviewed and determined to "lack prosecutive merit" prior to the report to the Department of Justice dated January 13, 1975:

Matters pending since 1/5/72 or earlier:	8
Matters pending more recently or where earlier reference is not identified:	4
Matters pending since 9/14/73 or earlier:	1
Total: (one indictment dismissed; remainder declined)	13

2. Number of individual draft evasion charges or open investigations reported to the Department on 1/13/75 which "may retain prosecutive merit":

Indicted for draft evasion and pending since 1/5/72 or earlier:	3
Criminal complaints outstanding and pending since 1/5/72 or earlier:	2
Under investigation:	
Pending since 1/5/72 or earlier:	8
Pending since 12/11/72 or earlier:	5
Pending since 9/14/73 or earlier:	2
Pending more recently or where earlier referral not identified:	5
	25

3. Number of persons whose cases were listed in report of January 13, 1975, as cases which "may retain prosecutive merit," subsequently declined or dismissed on substantive or discretionary grounds:

Declined on substantive grounds	3
Declined on substantive and discretionary grounds:	5
Declined primarily on discretionary grounds:	3
	11

4. Number of persons whose cases were listed in report of January 13, 1975, as cases which "may retain prosecutive merit" and remaining outstanding after above dispositions:

Indicted for draft evasion, and out of the country:	3
Criminal complaints outstanding, and out of the country:	2

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DEPARTMENT OF JUSTICE AUTHORIZATION
JUSTICE MANAGEMENT DIVISION

THURSDAY, MARCH 13, 1980

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 9:34 a.m. in room 2228, Dirksen Senate fice Building, Senator Max Baucus presiding.

Present: Senator Baucus.

OPENING STATEMENT OF SENATOR BAUCUS

Senator BAUCUS. The hearing will come to order. This morning we l continue hearings on the Department of Justice Authorization l for fiscal year 1981.

Today's hearing focuses on the Office of Professional Responsibility l internal audit sections of the Justice Management Division. ese are particularly significant hearings because the public trust our Government's ability to investigate its own wrongdoing has ded in the past years.

Vatergate, Koreagate and Abscam all give the public ample reason question the underlying moral fiber of our Government.

lthough the Justice Department is charged with the responsibility investigating compliants of Government wrongdoing, the Departt itself has been the target of much criticism. This morning's ring is on the oversight on those portions of the Department of tice which are responsible for investigating employee misconduct identifying fraud and mismanagement.

he purpose of the hearing is to try to determine the degree which e parts of the Department are equipped to effectively carry out e goals.

addition, we plan to explore the options Congress can take to ress concerns raised by a series of events that have taken place the past 2 years.

hy did the Attorney General decide to appoint a special investir to investigate the Abscam leaks? Shouldn't the Office of Proonal Responsibility have investigated the Abscam leaks?

oesn't the creation of a special investigator undercut the Office of essional Responsibility and raise serious questions about its current tiveness?

ecent New York Times articles on the Department's Immigration Naturalization Service questioned its ability to discipline eme misconduct and properly review complaints. Should someone outside the INS but within the Department of Justice be responsible for dealing with these problems?

Was the "Marston affair" ever fully investigated by the Department of Justice? Can the Office of Professional Responsibility conduct truly independent investigations of charges involving the Attorney General?

Do the problems at the Department of Justice require the creation of an inspector general for the Department?

These are some of the issues we wish to address this morning. We are pleased to have with us three employees of the Department:

Michael E. Shaheen, Jr., Counsel, Office of Professional Responsibility;

Kevin Rooney, Assistant Attorney General for Administration, Justice Management Division; and

Maurice Rosenberg, Assistant Attorney General, Office for Improvement in the Administration of Justice.

Gentlemen, we are delighted to have you here this morning. If you have statements, they will be placed in the record. Please proceed with any brief opening remarks you may wish to make.

At the conclusion of the hearing I will give each of you an opportunity to make whatever other statements or comments you may have. You will have ample opportunity to say whatever is on your mind.

STATEMENTS OF MICHAEL E. SHAHEEN, JR., COUNSEL, OFFICE OF PROFESSIONAL RESPONSIBILITY; KEVIN D. ROONEY, ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION, JUSTICE MANAGEMENT DIVISION; AND MAURICE ROSENBERG, ASSISTANT ATTORNEY GENERAL, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE

Mr. SHAHEEN. I have no prepared statement to submit but I have some opening remarks, Mr. Chairman.

Senator BAUCUS. Why don't you proceed at this point.

Mr. SHAHEEN. Mr. Chairman, for myself and for the Department, to the extent that I represent the Department, I'm delighted to be here this morning. For the Office of Professional Responsibility this is the third crack at oversight that we've had, we've come out stronger in the two earlier instances and we hope the dialog with the committee this third time will result in mutual benefit to the committee and the Office as well.

The Office of Professional Responsibility was created mid-December 1975 by former Attorney General Levi. It became operational the first of January 1976 and was created in the wake of Watergate and in response to disclosures that the Department and other offices of the executive branch were making to the House and Senate Intelligence Committees.

I served the Department and Mr. Levi as Mr. Levi's Special Counsel for Intelligence during those Intelligence hearings. It was through my office that the Department's participation principally through the FBI and to a lesser extent the DEA were made public via the Church and Pike committees.

In proposing to the Attorney General that an Office of Intelligence be created so that no Attorney General would have to come in as

Mr. Levi did to find out what those people across the street in those other buildings are doing, I sent a memo proposing the establishment, with the help of a good friend of mine on the Senate Intelligence Committee, of an Intelligence Office.

That has now come to pass. Mr. Levi called me up a few days after I sent that memo and he handed me an order and he said this is the job I want you to have and I looked at it and it was the OPR order. I said that's not the office whose establishment I recommended and that I planned on leaving the office shortly. And he said I still want you to have it and let me have your answer.

I told him I had to think about it, came back a few days later and told him I'd take it because, as he said, I, with the small staff I had, knew where all the dead bodies were at the time. I'm not sure I know where all of them are now.

The office receives and reviews and, in special instances, investigates by itself allegations involving violations of law or violations of professional ethics or of Department regulations by Department employees.

The Office's range over the Department involves all components of the Department. The FBI, DEA, INS, the litigation divisions, the U.S. attorneys offices and U.S. marshals offices and all headquarters offices. We have a very small staff, it's six in number, in terms of attorneys, one paralegal, and one secretary,

I think with the exception of the Marston affair, it has a documented and demonstrated history of success. A lot of it cannot be made public until a later date because of the sensitivity of matters still ongoing, and because the privacy of individuals is involved. But that's thanks to the Attorney General's grant of authority to allow me to personally select and approve for hiring what has been without exception a uniformly extraordinarily bright group of attorneys.

When I was in the Civil Rights Division, I supervised sections numbering 25 attorneys in one instance and 40 attorneys in another section and found out that in each instance in was with a smaller group that the bulk of the section's work could be done. Five attorneys were needed to do or redo their own work as well as the work of the other attorneys in one section and about 7 attorneys were doing the work in the 40-attorney section.

We've been very successful using a small corps of attorneys to do what we do for the Attorney General in the Department. And this is to serve as his eyes and ears and make recommendations after investigative reports have been prepared and disciplinary or prosecutive actions by the Department have been proposed.

I think that's about as brief as I need to make my remarks, Mr. Chairman, because it appears from the draft questions you have provided, I would be repetitive.

Senator **Baucus**. Thank you Mr. Shaheen.

Mr. Rooney, do you have an opening statement?

Mr. **Rooney**. Thank you Mr. Chairman.

I have a prepared statement which I would be more than happy to submit for the record outlining, at the committee's request, our rationale for the establishment of an evaluation staff and the transfer of some of the resources of the audit staff to the evaluation staff.

I think if, briefly, I could summarize that——

Senator **Baucus**. Briefly; as I said, all your statements will be included in the record.

Mr. **Rooney**. Thank you, Mr. Chairman.

I would just indicate at this point, Mr. Chairman, that the audit staff, now as it has in the past, with the exception of a 3-month period at the end of 1979, reports directly to me. The evaluation staff has been created in order that we have the opportunity to provide management assistance to the Attorney General in assessing program impact and providing program strategies as opposed to audits which concentrate exclusively on efficiency, effectiveness, compliance, integrity, et cetera.

My statement I think outlines our rationale.

Senator **Baucus**. We have some questions on that so why don't we discuss that later.

Mr. **Rooney**. Fine.

Senator **Baucus**. Mr. Rosenberg.

Mr. **Rosenberg**. Mr. Chairman, I'm delighted to have the opportunity to continue this dialog with you. I think its opened our eyes to some questions we would have assumed the answers to if we hadn't known that we would have to speak those answers aloud to you. So I think it is mutually constructive for us to engage in this exchange of points of view. I believe we will benefit from it.

In lieu of any formal or extended statement, I would ask that the report that was submitted to Congress on February 15, 1980, prepared by my office and entitled "The Performance of Inspector General Functions Within the Department of Justice," be inserted in the record.

[The report referred tȯ above appeares at the end of today's hearing.]

I do want to say a couple of things that are very, very short, although I don't want to anticipate the substance of what you are going to be asking as you go along.

First, we think the purposes and objectives that led the Congress to enact the Inspector General Act of 1978 are sound. As the report says, we think those objectives are being fully achieved by the system and approch we have in the Department of Justice. We believe that approach is tailored to the unique responsibilities and the different mission of the Department of Justice as a law enforcement agency. There are peculiar sensitivities in the conduct of investigations involving the actions of the 3,500 Department lawyers where you want enforcement more than mere legality. You must be concerned with responsibility, professional accountability, and sensibility to very subtle issues that transcend mere obedience to the law.

We think those functions are being carried forward well by the present system. And I suppose you could say that the report invokes the "principle of parsimony" as a conclusion, and that is the simple axiom that if it isn't broken you don't fix it. For the most part, except in a couple of respects where the dialog has been eye opening to me speaking as an outsider to the operations, we believe we can show you that the Department is doing on the monitoring side, in investigation and audit and related activities, what the Congress wants done in the departments of Government.

Senator **Baucus**. I think it has opened my eyes too.

Mr. **Rosenberg.** I will reserve any further comments that I have until your questions.

Senator **Baucus.** Thank you. A copy of the report you referred to will be put in the record. In addition I'm submitting a copy of H.R. 4121.

Finally, Congressman Richardson Preyer was scheduled to testify this morning, but he was unable to come. He has a statement which I am also submitting for the record at his point.

[The statement of Congressman Preyer follows:]

PREPARED STATEMENT OF REPRESENTATIVE RICHARDSON PREYER

I appreciate the opportunity to discuss with you the Department of Justice's internal review operations.

We are dealing here with two cultures: that of the investigator and that of the auditor. The two have been brought together in a shotgun marriage at Federal agencies where an inspector general has been established. An inspector general presides over reviews conducted by agency investigators and auditors. Although still new, the experiment seems to be working in those departments where this has been done by statute.

The Department of Justice, however, was not included in the 1978 Inspector General Act. Its Office of Professional Responsibility, which investigates allegations involving Justice employees, and its Internal Audit Staff, are based on departmental order.

The House of Representatives' Subcommittee on Government Information and Individual Rights, which I chair, has long been interested in the Department of Justice's internal review operations. In 1977 and 1978 the subcommittee undertook a year-long examination of the Department's internal investigation policies and the manner in which its Office of Professional Responsibility was carrying them out. As a result of this examination, the Committee on Government Operations on August 21, 1978, issued a report entitled "Justice Department Internal Investigation Policies" (House Report No. 95–1520), which contained findings and recommended a number of actions for the Department to take to improve its internal investigation operations.

Most significantly, the committee recommended that the Office of Professional Responsibility be established by statute. However, a Department official recently informed me that the Department was not considering making the office a statutory office.

Although the Attorney General has expressed his support for the Office of Professional Responsibility, as it is currently mandated by departmental regulation, the stature and permanence of the Office would be assured by establishing it statutorily. We did not want some future Attorney General to be able to abolish or downgrade this important office. On May 16, 1979, I introduced a bill (H.R. 4121) to provide such a statutory charter for the office.

I have compared my bill with the amendment to the Department of Justice fiscal year 1981 authorization bill which was introduced by Senator Baucus and which would establish an Office of Professional Responsibility and Internal Audit. Both pieces of legislation would establish the office statutorily. However, the methods of appointing the head of the office would be different. Senator Baucus's amendment gives the responsibility for appointing the Counsel General to the Attorney General. My bill provides that the Counsel be appointed by the President, by and with the advice and consent of the Senate.

I believe that the method proposed by Senator Baucus's amendment may allow some future Attorney General to exert undue influence on the office since he could remove or transfer the Counsel General anytime he wished. The method proposed in my bill, on the other hand, would protect the Office by requiring the President to remove the Counsel.

The committee noted a weakness in the Office's operations because it can not impose administrative sanctions on Department employees or review those imposed by other components of the Department. Thus, while the Office may conclude that an employee has violated the Department's ethical standards, it can at most only recommend what sanctions should be imposed. The power to actually impose such sanctions is delegated from the Attorney General to the Associate Attorney

General, the Justice Management Division, and the heads of the bureaus depending on the location and level of the employee to be sanctioned. This often results in sanctions imposed for similar offenses varying among the bureaus.

Both the bill and the amendment contain similar provisions to improve the Office's operations to lessen the impact of this weakness. They provide that the Office recommend the appropriate sanction to be taken against a Department employee and, if the official responsible doing so declines, he must report his reasons for declining to the Office.

The committee also noted a weakness in the Office's operations when it must investigate an allegation of wrongdoing by the Attorney General. By regulation the Office must report its findings either to the Attorney General or one of his subordinates. However, the public has difficulty accepting the Office's findings, particularly it they absolve the Attorney General of wrongdoing, when the only ones reported remain within the Department. Both the bill and the amendment solve this weakness in the same manner, that is, by requiring reports of the Office's findings in an investigation involving the Attorney General to go to reviewers outside the Department. This should better protect the Attorney General against unfounded allegations and the Office against any improprieties of some future Attorney General.

The most obvious difference between the bill and the amendment is that the amendment goes further than the bill by including internal audit in the proposed office. The Subcommittee on Government Information and Individual Rights is currently examining the Department's internal audit operations. I would be happy to furnish the committee a copy of the subcommittee's hearings and report on this subject once they are printed. Although the subcommittee's examination is not complete at this time, it has raised a number of concerns which I would like to share with you.

The Department's Internal Audit Staff has had its resources reduced to a level at which it is no longer, in my opinion, adequate to support a competent level of internal audit activities in the Department. The Department reorganized its administrative functions on October 1, 1979. As a part of this reorganization, the Internal Audit Staff on February 25, 1980, was reduced from 57 staff positions to 31 positions. Three of the remaining positions are clerical, leaving 28 auditor positions. Six of those positions are committed to the Federal Prison Industries by a reimbursable agreement. This leaves 22 positions to conduct internal audits in the rest of the Department.

The Department does not seem to have a clear conception of the difference between evaluations and internal audits, and thus could result in confusion within the Department's internal audit operations. One of the reorganization's stated purposes was to establish a departmental ability separate from the Internal Audit Staff to conduct evaluations. The Department, however, has never defined what it means by evaluations and how they differ from internal audits.

The Department's confusion can be seen in the way it determined how many of the Internal Audit Staff resources would be transferred to the Evaluation Staff. The Assistant Attorney General for Administration said he reviewed the fiscal year 1980 audit plan to determine how many of the proposed audits were essentially evaluations. From this review he identified between 9 and 14 staff years of effort which were to be devoted to evaluations and made the decision do transfer 14 Internal Audit Staff positions to the new Evaluation Staff. One would expect a similar transfer of the planned audits which were essentially evaluations; however, no such transfers were made. This seems to indicate either that the Internal Audit Staff will continue to perform audits which are essentially evaluations, in which case the reorganization was for naught, or that none of the audits were in fact essentially evaluations, in which case the transfer of the 14 positions may be questionable.

The planned role of the Budget Review Committee in determining the order in which the Internal Audit will perform its audits raises questions about the Staff's independence. The Department plans to have the Internal Audit Staff identify the audits it wants to perform and present these planned audits to the Budget Review Committee. The Budget Review Committee is to prioritize the audits. The Deputy Attorney General, the Associate Attorney General, and the Assistant Attorney General for Administration are members of the Budget Review Committee. They have the responsibility for conducting the Department's operations, and this procedure gives them the opportunity to delay an audit which might be embarrassing to them. In fact, they may be able to delay the audit enough times that the Internal Audit Staff decides not to perform it.

Finally, the Department is able to reorganize or move the internal audit function at will because it is established by departmental regulation and not by statute. By constant reorganization, the Department could weaken internal audit's ability to perform effectively. The Department's record on this point seems to be one of reorganizing the internal audit function into weaker and weaker units. The internal audit unit in the Department has been reorganized, redesignated, or moved at least 6 times in the 13 years it has been in existence.

The internal audit function was established in the Department in March 1967 as the Office of Management Inspection and Audit which reported directly to the Assistant Attorney General for Administration. At that time the Assistant Attorney General for Administration reported directly to the Attorney General.

In early 1970, the Office was downgraded to a unit, although in March 1970 the unit was returned to the status of an office as the Office of Internal Audit. In November 1974, the Office was redesignated as the Internal Audit Staff.

In June 1978, the Assistant Attorney General for Administration was downgraded to report to the Associate Attorney General. As a result the Internal Audit Staff found itself three reporting levels below the Attorney General.

The most recent reorganization, in October 1979, placed the Internal Audit Staff under the Deputy Assistant Attorney General (Controller), four reporting levels below the Attorney General. However, after a number of congressional expressions of concern over this location, the Internal Audit Staff was returned to reporting directly to the Assistant Attorney General for Administration.

The Internal Audit Staff may be facing another move in the near future for, as you know, the Attorney General testified on March 11 before this committee, that he had not yet decided the proper location for the internal audit function. I believe that uncertainty such as this can only weaken the internal audit function further.

Thank you for the chance to express my concern.

Senator BAUCUS. In addition, I am submitting a copy of my amendment, No. 1679, to S. 2377.

[A copy of the amendment appears at the end of today's hearing.]

Now I have a series of general questions. One of the basic questions is, why did the Attorney General decide to appoint a special investigator to investigate the Abscam leaks?

Mr. SHAHEEN. Mr. Chairman, I'll answer that.

First I would like to tell that your questions were directed as a result of having only read the newspaper accounts that preceded my introduction of Mr. Blumenthal at his press conference when his designation, as opposed to his appointment, was made by the Attorney General. That I believe was on a Tuesday morning.

On the Friday preceding that announcement, before any press coverage indicated that someone outside OPR would be doing the Abscam leak investigation, I met with the Attorney General a couple of times to discuss with him the need for more personnel than OPR had available to address what we considered a most outrageous situation: the leak, the improper disclosure of sensitive investigative material, acronymed Abscam, in the Abscam case.

The Attorney General and I discussed several names and in the list of names was Mr. Blumenthal. I had met Mr. Blumenthal before. He was one of the people I approved that Friday night as subject to further consideration by the Attorney General, and we drew up a list of, I believe, three people that I would concur in the designation of.

Monday, I was at the Bureau on the Abscam matter and the Attorney General called and we discussed by phone that it was his preliminary choice to announce Mr. Blumenthal's designation. I again repeated my concurrence and suggested that one of the other two people we were considering might be brought in at a later date. That's still the case.

The Attorney General announced Mr. Blumenthal's designation at the National Press Club at a speech he gave and the next day I introduced him to the press, explaining to the press exactly what I'm explaining to you and that is that his designation was with my concurrence, that he was working in my office and using its full resources which are the full resources of the Department of Justice, that his appointment was with my concurrence and acquiescence and that I applauded it, that I joined the Attorney General in the selection and that he would be reporting to me and those subordinates of mine and that is the case. And Mr. Blumenthal will so testify.

The Abscam leak investigation is being conducted by 30 agents from the field, 3 inspectors, 6 assistant U.S. attorneys, and 1 U.S. attorney operating out of the Office of Professional Responsibility, much as the prior task forces have operated in the past out of OPR.

Senator BAUCUS. Who is the one person other than the Attorney General who is in charge of the Abscam investigation?

Mr. SHAHEEN. I am.

Senator BAUCUS. Then Mr. Blumenthal reports directly to you.

Mr. SHAHEEN. Yes, sir.

Senator BAUCUS. And you report directly to the Attorney General.

Mr. SHAHEEN. Right.

Senator BAUCUS. Does Mr. Blumenthal also report to the Attorney General?

Mr. SHAHEEN. He can report, like other task force leaders in the past, to the Attorney General when it's appropriate, but when he reports to me, he reports to the Attorney General.

The reason for the misimpression——

Senator BAUCUS. It sounds as though he reports to both.

Mr. SHAHEEN. A lot of us report to more than one person in the Department, Mr. Chairman. I think the misimpression in the news is to be laid to the credit of a new Director of Public Information who didn't bother to read his departmental manual. Nor did he consult with me or the Attorney General on how to properly phrase the designation of Mr. Blumenthal. You should take that up with Mr. Smith; I have.

Senator BAUCUS. Were the three names you mentioned suggested by you or by the Attorney General?

Mr. SHAHEEN. One name was suggested by me, we both came up with Blumenthal's name, and another was suggested by the Attorney General.

Senator BAUCUS. Mr. Blumenthal was originally suggested by the Attorney General. Is that correct?

Mr. SHAHEEN. That's correct.

Senator BAUCUS. The name was not first mentioned by you but you did concur?

Mr. SHAHEEN. Oh, absolutely. I would say that if I had not concurred the Attorney General would not have considered him further.

Senator BAUCUS. Isn't there a perception problem here? The "Style" section of the morning newspaper shows a big picture, not of you, but of Mr. Blumenthal who is not even in charge of the investigation.

Mr. SHAHEEN. I'm in charge of the office out of which he is running it. That's a good point, Mr. Chairman.

Senator **Baucus**. The public perception is that an outsider has been appointed to investigate the Abscam leaks. An outsider apparently suggested by the Attorney General and appointed by the Attorney General, rather than by you. The public is not aware that this investigation is being conducted by the Office of Professional Responsibility which is in fact conducting the investigation.

Wouldn't you agree?

Mr. **Shaheen**. I don't disagree. My approach, and my office's approach has always been to maintain a low and discreet profile.

I will not disagree that it appears that the man in charge of the Abscam leak investigation does not follow my approach, but I don't want to deny him his first amendment rights and he——

Senator **Baucus**. Why did you not go to the Attorney General to request additional personnel? Was the problem that you had an insufficient number of personnel to investigate the news leaks or was the problem that you didn't have a big enough name to conduct the investigation?

If you want to keep a low profile and if you only needed additional personnel you could have hired additional people on the staff and kept a low profile in the job.

On the other hand, it sounds as if you wanted a big name.

Mr. **Shaheen**. Whoever would have gotten the designation would have gotten the big name. Blumenthal would have been unknown if he hadn't been appointed to Abscam, in Washington circles. He would probably still be remembered as U.S. attorney in Connecticut. You could have appointed any other U.S. attorney and he would have been the beneficiary of the same high profile that was accorded Mr. Blumenthal by his introduction to the press in the manner in which it was made.

It was the assignment that made the man, not the man who brought the big name to the assignment.

Senator **Baucus**. But doesn't bringing in an outside person who is perceived to be a big person——

Mr. **Shaheen**. He seems to be a big person because he got this assignment. That is inconsistent with earlier task force designations and assignments. The need for publicity has not been there for earlier designees and earlier task forces to sit for press interviews and maintain a public profile as opposed to a low investigative one.

Senator **Baucus**. I don't mean to belabor this but doesn't this series of events undercut the stature and perhaps even the integrity of the Office of Professional Responsibility?

Mr. **Shaheen**. If the New York Times article that had me arguing with the head of the Public Information Office had gone unaddressed in subsequent editions of the Times and the Washington Post, the answer to your question would be yes, but I'm not concerned so much with the needs of various designees of my office to appeal to the media as much as I am concerned about the nitty-gritty of what we have had to get done in the last 4 years, and as we've done it.

There is a perception problem in this instance. That will just have to be dealt with as a separate matter. It does not bother me and I do not think the Office's image has at all suffered by it. It would probably have been enhanced if every time Mr. Blumenthal's name appeared in the paper my name or the Office's had been in parenthesis next to his, but that's not happening and I don't stay up nights worrying about things like that.

Senator **Baucus**. Well it seems to me that one of the critical questions is to whom does Mr. Blumental report.

Mr. **Shaheen**. He reports to me. I believe the Attorney General would give you that answer and I believe Mr. Blumenthal would give you that answer. That is except for the Washington Post.

Senator **Baucus**. It wouldn't be the first time that the Washington Post was in error about something. But if he also reports to the Attorney General, doesn't that raise questions about the stature of OPR and the degree to which you control this investigation?

Mr. **Shaheen**. I believe, Mr. Chairman, that I absolutely control this investigation and I can assure you that I will control the investigative product.

Senator **Baucus**. Why has it taken so long to get the investigation into the leaks underway?

Mr. **Shaheen**. Mr. Chairman, unless my memory fails me, the appointment was made within 7 days of the public disclosures of the Abscan investigation.

Senator **Baucus**. Why is the special investigator getting so much press attention now?

Mr. **Shaheen**. You'll have to ask Mr. Blumenthal.

Senator **Baucus**. Recent articles in the press have questioned the Justice Department's ability to discipline employee misconduct and review complaints at INS. Aren't these charges against INS a bad reflection on the entire Department of Justice?

Mr. **Shaheen**. Which part of the Department of Justice?

Senator **Baucus**. There have been recent articles in the press questioning the Justice Department's ability to discipline employee misconduct with INS.

My question is aren't these charges a bad reflection on the entire Department?

Mr. **Shaheen**. Yes, sir.

Senator **Baucus**. If that is the case, shouldn't somebody in the Department but outside of INS be responsible for dealing with these problems?

Mr. **Shaheen**. I am not wedded to one answer or one feeling about that. INS is unique in the Department. It has been regarded—the staffers and I have talked about it at length—as sort of the stepchild of the Department of Justice.

Let me just enumerate very briefly the reasons that INS is uniquely a problem in the Department. It has been placed in many agencies historically. It has not always been in the Department. It deals in a most vulnerable commodity, illegal aliens, people who are not legally in the country seeking employment.

The questions that INS have to address have international ramifications. The administration and the Congress cannot agree on a unified INS policy. They have hassled with Congress, suggesting the creation of an inspector general. Then there is a special investigator passed, then there are no appropriations for that. The same thing has happened with the Nazi special investigating unit.

These things have been remedied. We have now the creation in the INS of the special investigator. We have discussed at length with the Department leadership how he or she should and will interface with our office, how he will relate to the INS Office of Professional Responsibility. There is nothing that is wrong with INS that can't be cured by a common commitment by the administration and by the Congress, with generous financial support. The Congress must assist the administration in addressing the special problems at INS of unionization and civil service protection as they affect effective discipline and sanctions. We are involved with INS OPR problems, requiring that they change it from its present detail work basis to permanent investigative work.

Senator BAUCUS. Do you have enough personal authority to investigate INS OPR operations?

Mr. SHAHEEN. I have complete authority to look at what they list in their monthly reports as their investigations. I keep telling them what disturbs me is what doesn't appear on those monthly reports.

Senator BAUCUS. Do you feel you have sufficient control over their investigations?

Mr. SHAHEEN. I probably have more control over their investigations than their own investigative personnel. I don't know against whom that is an indictment.

Senator BAUCUS. Are you able to insure that you will obtain complete reports?

Mr. SHAHEEN. We have in the last few months, Mr. Chairman. I believe it was before you all had indicated an interest in their office. I had been sending over two attorneys every day, for several hours a day, then we reduced it to one, to manually go through their investigative files and have them explain to us why certain things were open or left where they were in terms of status. We have gotten the backlog substantially cut down. We have addressed both the Attorney General and the people in the Associate's office who have direct responsibility for INS. There are some very sensitive people over there now. That is another problem. You need in the No. 1 and 2 slots people who know more than politics, who know INS problems. You have that in Acting Commissioner Crosland who has a level of sensitivity and exposure that previous INS Commissioners have not had. You have as one of my choices for INS Commissioner, Doris Meissner in the Associate's office, with whom I have researched, at great length, the appointment of a special investigator and how he would interrelate with our office.

You have two people in those two individuals who are quite concerned about the things I raised earlier that make INS uniquely a problem. I also wish to note the recent New York Times series on the problems, past and present, of INS. Our office has asked the reporters who wrote the series numerous times to provide us with anything solid they had. One of the reporters is a friend of mine and has in the past provided allegations not involving INS that we proceeded on and found to have merit, 3 years ago. We have asked them to provide us with documents to the extent they can, consistent with their own journalistic ethics. They said they were considering the request.

There is a problem with INS. One person asked me about the recent case involving four border patrolmen, why it was the first case of its kind ever brought in the history of INS. I said it was just a quirk. It was the first time that the aliens who had been subjected to physical abuse had reported the allegations to people who were not the people who were perpetrating the abuse. You have language problems. You have problems with the people who are crossing the border who do not understand our constitutional system, our complaint system. We have people at INS who don't understand that as well. But we are trying to address the problem. I am the first to acknowledge that the New York Times did a good job of raising the sensitivity level of everyone concerned about the Herculean dimensions of INS problems.

Senator **Baucus**. My question, though, is do you think that your office has sufficient authority to clear up these problems at INS?

Mr. **Shaheen**. I have sufficient authority.

Senator **Baucus**. My premise is that INS is like any other organization. Sometimes it needs some outside help.

Mr. **Shaheen**. Right.

Senator **Baucus**. You can't depend on any single organization——

Mr. **Shaheen**. My office has sufficient authority.

Senator **Baucus**. Do you have sufficient resources?

Mr. **Shaheen**. We need INS to have more sufficient and adequate resources.

Senator **Baucus**. You feel that INS should have more resources.

Mr. **Shaheen**. Yes, sir.

Senator **Baucus**. That is more investigative resources.

Mr. **Shaheen**. Yes, sir.

Senator **Baucus**. Do you personally need any more?

Mr. **Shaheen**. We are going to ask for an increased budget and three more positions next year.

I would like to tell you and I want the record to reflect that the office has been the beneficiary of the lavish attention of two incredibly, and in their own way, powerful, back-to-back Attorneys General, Mr. Levi, who created the office, and Attorney General Bell, who remarked early on in his administration that he thought that OPR would be Mr. Levi's legacy. He took it knowing that it was not his own creation, embraced it, and gave it absolutely everything personally and professionally that was within his power that we ever asked for. When Mr. Civiletti leaves office, when he is no longer the incumbent, I will give you my comments on his performance, when, as a nonincumbent, he is in a "gradable" position.

Senator **Baucus**. There has been a lot of publicity, as you know, surrounding the firing of U.S. Attorney David Marston in Pennsylvania. The charges were that the firing was politically motivated. My question is whether, in your judgment, those charges were ever fully investigated by the Department of Justice.

Mr. **Shaheen**. I am going to confess error. I wish I had never gotten involved in that. I think that in hindsight and with 20-20 vision beforehand, that I would have handled it a little differently. I believe, that to the extent that OPR was involved, I am fully satisfied that the allegations of obstruction were satisfactorily resolved regarding the Attorney General and the leadership of the Department.

I do not know whether the Criminal Division has finally closed its case on whether the Congressman involved may have attempted to impede or obstruct. The Office of Professional Responsibility's participation——

Senator **Baucus**. Is your Office the office that was in charge of the investigation?

Mr. **Shaheen**. It was in charge of the allegations that the Attorney General's actions vis-a-vis Mr. Marston amounted to obstruction.

Senator **Baucus**. Was anybody else in charge of the investigation other than OPR? I am sure the Attorney General himself wasn't in charge.

Mr. **Shaheen**. He was not. The Solicitor General and I were in charge of the investigation. The Solicitor General asked me never to come back unless I really had to again.

Senator **Baucus**. My experience has been two people in charge——

Mr. **Shaheen**. I was involved, Mr. Chairman.

Senator **Baucus**. OK.

Mr. **Shaheen**. I had to report to the highest ranking official not involved in the matter, not the subject of the investigation.

Senator **Baucus**. Do you think the investigators had sufficient independence to conduct an effective investigation?

Mr. **Shaheen**. For OPR?

Senator **Baucus**. OPR and whoever else was involved.

Mr. **Shaheen**. The Criminal Division would have been involved with any participant who was not a departmental employee. I can assure, you, Mr. Chairman, that we had sufficient independence.

Senator **Baucus**. You can't speak for the Criminal Division's involvement?

Mr. **Shaheen**. No, sir.

Senator **Baucus**. To what extent did the Attorney General himself become involved in the investigation, in a supervisory capacity?

Mr. **Shaheen**. In my activities? None at all.

Senator **Baucus**. In your what?

Mr. **Shaheen**. In any way. He didn't become involved in any way except to provide me with an affidavit on my request and to ask me once, in the presence of two aides, if he had been cleared sufficiently to talk to me about it, after he had been cleared.

Senator **Baucus**. Some of the public felt that perhaps there may have been a problem here. They felt that perhaps the Attorney General was involved when, in fact, I am sure what you said is true, that he was not. But, nevertheless, the perception is that there is a possibility that he may be involved because of the setup of the Office.

In your judgment, how do we assure the public that investigations of this nature are in fact independent, objective, and in no way influenced by the Attorney General or whoever is the subject of the inquiry?

Mr. **Shaheen**. Mr. Chairman, I think that is the best example you could use. It is the lousiest incident that OPR has ever gotten involved with. I regret it and always will. I know Mr. Bell, had you mentioned it in his presence, probably would have had to have been reluctantly brought back by Federal protective officers.

The problem is having a person of sufficient rank to whom the office can report its investigative results. We hit the bottom of the ladder, I don't mean this disparagingly. I don't know whom I would have reported to if the Solicitor had been involved. I can't tell you to whom I would have reported.

The Solicitor is the highest official in our regulations to whom I can report after I have exhausted the Attorney General, the Deputy, and the Associate.

I will give to you, as I indicated to your staff I would, when the question is an appropriate one and I consider what you have asked is appropriate, my pledge to the entire Judiciary Committee what I have given earlier to Chairman Preyer and his subcommittee. This pledge is what I first gave in executive session to the Senate Intelligence Subcommittee chaired by then Chairman, Senator Walter Mondale. I gave my personal pledge under oath that I will resign first if I am ever asked to do anything I think is improper or illegal, to investigate anything improper or illegal, or to do with an investigative product something that is improper or illegal. I will try to resolve it with the Attorney General if he is not involved or with the other high officials of the Department to the extent that they can participate. If I am not satisfied that my complaint has been adequately addressed, I will come to the Senate Judiciary Committee and advise them that I am tendering my resignation for cause and leave it to all of you to determine why.

Senator **Baucus**. I think that is pretty admirable. I commend you for that statement. But what happens if somebody else is in your position who has standards that are not quite so high? In that case, isn't there a greater possibility that the public may perceive insufficient objectivity and independence on the part of your office?

Mr. **Shaheen**. There is always that possibility. I am a big proponent of the passage of an antislouch law, making it a Federal crime for the President to nominate and the Senate to confirm any slouch to a Presidential appointment in the executive branch.

I think that is why the Senate has to get involved along with the Executive in making certain that there are no slouches or irresponsible people appointed to important positions.

Senator **Baucus**. Who should appoint you, the President or the Attorney General?

Mr. **Shaheen**. I will leave that to the President and the Congress. I am satisfied with my appointment now by the Attorney General. I have argued, as I have told your staff and they have read the testimony, both sides, the merits and the disadvantages of statutory and nonstatutory creation.

Mr. **Baucus**. You sound like you don't have a position.

Mr. **Shaheen**. You mean that I may not know what I am doing as well?

Senator **Baucus**. I don't mean that. We all don't have a position a good part of the time.

Mr. **Shaheen**. I wish someone would tell me.

Senator **Baucus**. Do you have a personal view on that question?

Mr. **Shaheen**. I am happy with my designation, as an appointee of the Attorney General, who can only be fired for cause. One of the arguments against statutory creation is that I or someone in my position with statutory protection could conceivably pose a professional or a personal threat by having someone in there whom the Attorney General could not feel comfortable with for statutory reasons. Someone who would always be looking over his shoulder.

I don't think he has that feeling with me. I don't think Judge Bell ever did, except for maybe twice, when I came in and started examining him under oath, and Mr. Levi once. But those occasions were rare, happily.

Senator BAUCUS. Don't you think the Attorney General should have somebody keeping him on his toes?

Mr. SHAHEEN. I think he does. You can ask Mr. Levi and Mr. Bell.

Senator BAUCUS. Isn't it a problem when the Attorney General appoints the person who is supposed to keep him on his toes?

Mr. SHEHEEN. Mr. Levi appointed me. I will tell you that with each Attorney General I have offered my resignation when each succeeded to the incumbency. Whenever there is the prospect of a blunder by me based on a decision made by me or one of my lawyers the responsible individuals are also expected to volunteer their resignation. That has never happened, but that is also an unwritten condition of employment in the office. I am not uncomfortable being a designee of the Attorney General.

Senator BAUCUS. I am sorry. I missed that.

Mr. SHAHEEN. I said that is an unwritten condition understood to apply to attorneys in my office.

Senator BAUCUS. But you must admit the public would probably feel a little more confidence in these kinds of investigations if he were perhaps appointed by the President.

Mr. SHAHEEN. Yes; I won't argue with that.

Senator BAUCUS. And public perception is very important.

Mr. SHAHEEN. I think it is.

Senator BAUCUS. Sometimes the perception is more important than the fact.

Mr. SHAHEEN. Unfortunately, you are right.

Senator BAUCUS. I have a series of questions. Perhaps we can go through these fairly quickly.

How many allegations of employee misconduct has your office handled since it was established?

Mr. SHAHEEN. About 1,400.

Senator BAUCUS. 1,400.

Mr. SHAHEEN. This is as of the close of January 1980, it was 1,353.

Senator BAUCUS. What is your staff size and budget fiscal 1980?

Mr. SHAHEEN. In fiscal 1980, Mr. Chairman, the budget is $306,000 with a projected deficit of $51,000. That is why we brought Mr. Rooney along. The staff size is eight, six lawyers, one paralegal, and one clerical.

Senator BAUCUS. Is that your present staff or is that your budgeted staff?

Mr. SHAHEEN. Two of them have just left to go to their hometowns as assistant U.S. attorneys. We have hired two to replace them. They will be on board——

Senator BAUCUS. You have authority to hire how many?

Mr. SHAHEEN. Six attorneys.

Senator BAUCUS. Six. and you presently have six?

Mr. SHAHEEN. We presently have on board or have hired six. If you went to the office this morning, you would see four. There are two that are awaiting background clearances.

Senator BAUCUS. So you will be fully staffed?

Mr. SHAHEEN. Yes, sir.

Senator BAUCUS. What is your department's request for staff and budget for 1981?

Mr. SHAHEEN. I think it is $419,000 and a staff of 11. That would be three additional slots.

Senator BAUCUS. Do you feel that you will have adequate resources to perform your mandate to investigate complaints?

Mr. SHAHEEN. I do.

Senator BAUCUS. Do you have adequate resources to pursue responsibilities proposed by the Attorney General, for ORP oversight of mismanagement, gross waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety?

Mr. SHAHEEN. We are concerned about pursuing our first allegation of a threat to public health and safety. We are not sure what form that would take, or how much of a staff drain that would cause.

I am satisfied that we will have enough there, Mr. Chairman, to address that order and its provisions.

Senator BAUCUS. Should OPR be established by a statutory charter?

Mr. SHAHEEN. My feeling is that is a question that the Attorney General and the committee should address. I can argue both sides. My personal——

Senator BAUCUS. What is your personal preference?

Mr. SHAHEEN. My personal preference is that I would prefer to stay in regulation form.

Senator BAUCUS. Why is that?

Mr. SHAHEEN. Because I am able to capitalize on my personal relationship with the Attorney General to the extent that one develops as his alter ego and designee to draw upon the limitless resources of the Department.

Mr. Kay is probably going to ask you to ask me a question that is going to embarrass me.

Senator BAUCUS. How will you feel years from now when you are a private citizen and you are wondering if your successor or your successor's successor is acting properly? As a private citizen would you feel better if there were a statutory charter for OPR?

Mr. SHAHEEN. If the Attorney General is as careful with the choice of my successor as he was with the choice of me, I wouldn't be concerned.

Senator BAUCUS. But you are still implying in your statement that there is a danger there.

There is a possibility——

Mr. SHAHEEN. Yes, it is. But I must say that I have been disappointed with some of the confirmations that the Senators have advised and consented to.

Senator BAUCUS. Disappointed in what respect?

Mr. SHAHEEN. In some of the confirmations that the Senate has advised and consented to in the past, with the Presidential appointments, the statutory charters.

Senator BAUCUS. Disappointed with the process or disappointed with——

Mr. SHAHEEN. With the thoroughness of it.

Senator BAUCUS. Sometimes we are, too.

Mr. SHAHEEN. I just wanted to share that concern with you.

Senator BAUCUS. There are others in this body who think that perhaps we are too thorough.

The Department has been criticized for its failure to provide adequate guidelines for the imposition of uniform sanctions for employee misconduct throughout the Department. How are disciplinary sanctions in each of the OPR units determined?

Mr. **SHAHEEN**. By the Department's OPR. They are uniformly established because we make all the recommendations involving Presidential appointees, the U.S. marshals, the U.S. attorneys, and the appointees at headquarters.

In the various units, the standards for sanctions are disparate, for various reasons. You have civil service protection afforded some employees that are not afforded, say, to attorneys. You have unions which, by contract, have taken away the right of some employees, some of the agency heads in the Department, to take certain corrective behavior without going through certain special legal routes.

You have, say, the head of the U.S. marshal service who is an appointee of the Attorney General in charge of Presidential appointees. This makes for an untenable position when you are talking about disciplining a U.S. marshal whose only claim to earlier law enforcement fame was nonexistent.

There are all sorts of incongruities. But in the various components that involve the nonlitigating divisions, you have exclusive delegations to those component heads. Each has the exclusive control to determine administrative sanctions. They set up their own boards and commissions. So you have a disparate arrangement now, a disparate system, and inequitable application of sanctions or correntive actions.

Senator **BAUCUS**. Equitable?

Mr. **SHAHEEN**. Inequitable.

Senator **BAUCUS**. How do we remedy that?

Mr. **SHAHEEN**. You can do it by law, Mr. Chairman. You could order the Attorney General to redelegate to himself powers he has delegated to the agency heads and set up in one place a commission which would decide on punishment for employees or corrective behavior, corrective sanctions on employees irrespective of agency. But it is now expressly delegated to the agency heads.

Senator **BAUCUS**. Have you submitted any recommendations to anyone to make these changes?

Mr. **SHAHEEN**. No, sir. We just noted in our annual report that there seems to be an inequitable or disparate situation. There are pros and cons to that. We think, for instance, that it's essential that an agency head be looked to by his subordinates, his employees, as the man who will and can and is in power to do anything with respect to taking disciplinary action, short of prosecution, which of course is the Department's sole prerogative.

That has to remain an effective tool of the agency head. I don't think the FBI Director or the Administrator of DEA could function without the threat of sanction retained in his office.

I think some sort of proposal requiring uniformity to a greater extent than we have it now is warranted. By raising the question, we are not trying to address it with a soloution. We are just trying to raise the awareness of the leadership of the Department.

Senator **BAUCUS**. Does OPR make recommendations for sanctions to other components?

Mr. **Shaheen.** Unofficially, we do, yes, sir. And officially we do.

Senator **Baucus.** Are these recommendations followed?

Mr. **Shaheen.** Almost uniformly. I can think of two exceptions in 4 years.

Senator **Baucus.** Do you review sanctions made by the OPR units or components of the Department?

Mr. **Shaheen.** We do.

Senator **Bacus.** Do you look at them and agree or disagree?

Mr. **Shaheen.** We usually agree because, in the course of reaching a sanction determination, the agency feels more comfortable making a recommendation if they can say they have advised and consulted with the Department's OPR.

On one or two occasions, we have disagreed with one. We can't do anything about it.

Senator **Baucus.** You can't? You don't have the power to alter the sanction?

Mr. **Shaheen.** Not once it is imposed. That is fixed by law.

Senator **Baucus.** Don't you think the Attorney General should have that power?

Mr. **Shaheen.** Do you want to delegate to the agency heads? I happen to feel personally that uniformity should be reposed and the requirement for uniformity should be reposed in one place. That is a policy and a management question that is best addressed by the Attorney General, I think.

Senator **Baucus.** Are your records set up to give you information to evaluate the uniformity of the sanctions throughout the Department?

Mr. **Shaheen.** Laboriously, but, yes, sir, they are.

Senator **Baucus.** When OPR refers a case for prosecution to another Justice Department component, do you make a recommendation on whether or not to prosecute?

Mr. **Shaheen.** We make a lot of referrals to the Criminal Division. We let them make the prosecutive determination.

Senator **Baucus.** You don't make the recommendation?

Mr. **Shaheen.** We do, but only rarely. The reason is that abuse of prosecutorial discretion is one of a common set of allegations that we receive that is a favorite of the defense bar.

One raised by the defense bar is that the Criminal Division headquarters or strike force attorney in the field or the U.S. attorney or the assistant U.S. attorney has abused his prosecutorial discretion by recommending indictment. So we try to exercise that power as rarely as possible so that we are not the subject of an allegation that prosecutorial power was abused.

Senator **Baucus.** What are your options if you determine that prosecution is necessary but no prosecution is initiated.

Mr. **Shaheen.** That has never happened.

Senator **Baucus.** What has never happened? There has never been a case where you made——

Mr. **Shaheen.** There has never been a case that we disagreed on with the Criminal Division on the question of prosecution or not.

Senator **Baucus.** What is OPR policy on investigating complaints directly related to a pending or ongoing court action?

Mr. **Shaheen.** The general policy is that because it is a pending criminal or civil complaint, a court action, the proper form for legitimate complaint is before the court, the tribunal. If, however, it cannot be properly addressed by the court, in pleadings, we will hear it. If it appears to be exceptionally egregious, affecting directly the integrity of the prosecution or the proceeding, we have the authority to stop it. But we have never done that except once and then, for only a day.

We have the authority. But we are reluctant to interfere in an ongoing criminal or civil matter because we think that most allegations of misconduct or violations of the law can be addressed in the course of the tribunal's hearings.

Senator **Baucus**. Where are the individual OPR units located?

Mr. **Shaheen**. By name, INS has an OPR. By name, there is one at FBI. Our counterparts, but not by that name, exist in DEA, Marshals Service, LEAA, and the Bureau of Prisons.

Senator **Baucus**. Under current regulations, what is your authority over operations of those OPR units?

Mr. **Shaheen**. It is to coordinate except in instances and on occasions to allow them to coordinate with us in an investigation that they may have that would put them in real or actual conflict or when they might have an institutional interest in the outcome. Then their rights suddenly become subordinate to ours. In those instances, they are subordinate to us.

Senator **Baucus**. Which of those units have presented you with problems?

Mr. **Shaheen**. Each has.

Senator **Baucus**. Which have the greatest problems?

Mr. **Shaheen**. You call it a problem. I consider it—and I am serious—a measure of the health of our relationship that we can suddenly invoke the pleading: You ought not to be involved and you will not be involved in this investigation.

It has happened more often with the FBI because of a long history of unfettered one-man control in the FBI. We did the Martin Luther King assasination security investigation, harassment investigation, issued however long ago. We did the abuse of authority and alleged corrupt activities in disbursements and vouchers at the FBI and issued a public report on that. We did one on the FBI's infiltration of the KKK in Alabama with Gary Thomas Rowe. That is a report that is not public yet, but will be published in some form eventually. That has been delivered to the Attorney General.

In those examples, when the Bureau had an institutional interest in the outcome, we have taken it away from them and in each instance, addressed it with a task force.

But it has happened with DEA. It has happened with the Marshals Service.

Senator **Baucus**. I am wondering in light of the INS problems, whether you feel that INS' OPR unit is the one that you are least in control of?

Mr. **Shaheen**. I think that it had been until they appointed Mr. Connery. We have met with him on several occasions and discussed at length what his role ought to be. I think that he is a man who clearly sees that he has got a problem and has strong ideas about how to correct it. I had been concerned until we got him on. I am comforted by the prospect of having a special investigator as well. There is no question that INS was deserving of being considered for bankruptcy and placed in receivership.

Senator **Baucus**. Are there any written guidelines for the receipt and processing of complaints in OPR?

Mr. **Shaheen**. In our regulations.

Senator **Baucus**. What does that mean?

Mr. **Shaheen**. The regulations establishing the office——

Senator **Baucus**. Are these in writing?

Mr. **Shaheen**. They explain how we receive and review complaints.

Senator **Baucus**. Are these guidelines in writing?

Mr. **Shaheen**. Yes, sir.

Senator **Baucus**. Do all units have uniform procedures for processing of complaints?

Mr. **Shaheen**. Yes, sir.

Senator **Baucus**. Do the OPR units follow a uniform procedure for reporting to OPR?

Mr. **Shaheen**. They do.

Senator **Baucus**. Is that in the regulations?

Mr. **Shaheen**. We advise them as what the reporting requirement is. Yes, we do.

Senator **Baucus**. Where are the procedures for interaction between OPR and IAS?

Mr. **Shaheen**. In INS?

Senator **Baucus**. IAS. Internal Audit.

Mr. **Shaheen**. What are the procedures?

Senator **Baucus**. Yes.

Mr. **Shaheen**. I regard them as a component of the Department as I do any other component. They are available for my unfettered and unlimited use. Mr. Rooney can refute that if it is not so.

If I need 1,000 people from the FBI, as I have recently for Abscam, 33 agents and inspectors, I ask the Director and they are brought in.

IAS is the same way. If I have a problem that needs to be addressed by Internal Audit Staff group, I send them a communication telling them to get on with it.

Senator **Baucus**. Are any of those procedures in writing?

Mr. **Shaheen**. No, sir.

Senator **Baucus**. Do you have suggestions for the improvement of OPR and OPR units complaint processing procedures or the reporting procedures?

Mr. **Shaheen**. I did before Mr. Connery came on at INS. But they are all reporting well.

Senator **Baucus**. According to your 1978 annual report, you had plans to adopt a two-track system to permit closer monitoring of component investigations. What is that system? How does it work?

Mr. **Shaheen**. We have designated each agency, the nonlitigating components, with an internal inspection function to be overseen by one lead attorney in my office and one backup. Those attorneys meet regularly with the head of the agency and the head of the internal inspection or OPR unit.

We are going to try, to the extent possible, to measure each performance vis-a-vis the others. It may be a question of doing something with apples and oranges, but we are going to try. It will be an assessment problem, which amounts to doing the best with what they have.

Senator **Baucus**. What are the types of cases and types of recommendations that OPR refers to the Attorney General?

Mr. SHAHEEN. That the Department's OPR refers to the Attorney General?

Senator BAUCUS. Right.

Mr. SHAHEEN. The types of cases involve the entire gamut of allegations, bribery against a ranking official, especially against all Presidential appointees and their immediate subordinates or section chiefs, or deputies. They involve bribery, unethical conduct short of violation of the law, violation of departmental standards. You name it and we have had to address it, and those are the kind of matters that we refer.

Senator BAUCUS. Of the 1,400 complaints you have received, how many cases were referred to the Attorney General.

Mr. SHAHEEN. I would say very few.

Senator BAUCUS. Three? Eighty?

Mr. SHAHEEN. No, sir. Twenty, twenty-five to the three Attorneys General I have served.

Senator BAUCUS. Does the Attorney General respond promptly to your requests for action by him?

Mr. SHAHEEN. With Mr. Levi and Judge Bell, I got the impression that they waited for something to hit their inbox from my office and send it back with an OK, do it, by return mail. From my perspective, Mr. Civiletti hasn't the same kind of a record.

Senator BAUCUS. Has not?

Mr. SHAHEEN. Has not.

Senator BAUCUS. So he doesn't wait for them to hit his inbox and send them back?

Mr. SHAHEEN. I don't get the impression that he set——

Senator BAUCUS. He's not breaking any records.

Mr. SHAHEEN. Land speed records, right. But that is from my perspective. He has had a number of crises.

Senator BAUCUS. What delays have there been?

Mr. SHAHEEN. There is the Iranian crisis. I think some of the problems we have sent to him ask for or recommend a tough call. He wants to make certain, in his point of view, that the call is a fair one, an appropriate one.

Senator BAUCUS. How many cases have you referred to him and what is the delay in receiving a response for each of these cases?

Mr. SHAHEEN. I don't know how long it has been for each one, whether it has been several weeks.

Senator BAUCUS. How many have you referred to him.

Mr. SHAHEEN. Four.

Senator BAUCUS. Four?

Mr. SHAHEEN. About four.

Senator BAUCUS. Have you received any direct response on any of the four?

Mr. Shaheen. One or two, yes.

Senator BAUCUS. How long did it take?

Mr. SHAHEEN. These four are not all to require discipline or——

Senator BAUCUS. Corrective action? In the two that took more than a month, do you think you should have received a response within 30 days?

Mr. SHAHEEN. In one of them, I do.

Senator BAUCUS. Which one was that?

Mr. SHAHEEN. I can't be specific, Mr. Chairman. It would be inappropriate.

Senator BAUCUS. I understand. Has the Attorney General ever refused to follow OPR recommendations?

Mr. SHAHEEN. No Attorney General has ever refused to follow our recommendations.

Senator BAUCUS. Do you have any recommendations to insure OPR accountability to Congress?

Mr. SHAHEEN. We are here today. I am always glad to testify when invited. You have oversight. You have the purse strings. You will be favored, as usual, with a copy of our annual report which we have no requirement to share with the Congress, but we have. I think we sent you one last year and before. Through the power of the purse and oversight, I don't know any way in which you could have us any better.

Senator BAUCUS. How many minorities and women are employed in your office and in what capacities?

Mr. SHAHEEN. If you count women, we have three minorities. One is clerical, one paralegal, and the third will be a woman lawyer coming along. We have just rectified our abysmal affirmative action program.

Senator BAUCUS. Do you think that your affirmative action program is deficient?

Mr. SHAHEEN. I did, but I don't now.

Senator BAUCUS. But you have corrected it?

Mr. SHAHEEN. Yes, sir. We have corrected it.

Senator BAUCUS. Do you think that the activities at OPR have been adequately publicized to both the public and to the employees at the Department?

Mr. SHAHEEN. Our mistakes certainly have been. That has been rare, fortunately. The serious answer is that there is no excuse for any employee not to know we are there because it started with Mr. Levi and his Deputy Attorney General, continuing through Judge Bell, and soon to be Mr. Civiletti. Each Attorney General and one Deputy has sent out at least twice a year a memorandum to all component heads and field office heads, requiring each recipient to report our existence and responsibility in writing to every subordinate employee twice a year.

Senator BAUCUS. How important is it to your office to be able to use employees from other divisions?

Mr. SHAHEEN. It is critical.

Senator BAUCUS. Would you explain that please? Why it is critical.

Mr. SHAHEEN. When we need 33 investigative types and 6 U.S. attorneys from Abscam.

Senator BAUCUS. Are you required to have both Attorney General and division head approval for the use of personnel from other Department of Justice divisions?

Mr. SHAHEEN. We have found it fully adequate just to have the Attorney General's approval.

Senator BAUCUS. You do need the Attorney General's approval?

Mr. SHAHEEN. Yes, sir.

Senator BAUCUS. Has that always been granted?

Mr. SHAHEEN. Yes, sir.

Senator BAUCUS. It has never been denied?

Mr. SHAHEEN. No, sir.

Senator BAUCUS. If you were denied the use of personnel by a component head, what would your procedure be for acquiring the needed resources?

Mr. SHAHEEN. If I felt I needed additional resources and I could not get them pursuant to the provisions of the regulations, and I felt that I alone through my own office personnel could not handle it and had discussed this with the Attorney General and there was no help forthcoming?

I would probably issue a press release saying that the office could not address the concern. It would probably be cause for me leaving the Department, for resigning. I would probably tell him I was.

Senator BAUCUS. Has any component head either denied or impeded your request for personnel?

Mr. SHAHEEN. No, sir. They have all been quite generous.

Senator BAUCUS. The Attorney General has proposed a departmental order to expand OPR responsibilities to include mismanagement, gross waste of funds, abuse of authority, or a substantial civic danger to health and safety. When was the order proposed and when will it become effective?

Mr. SHAHEEN. It was proposed several months ago. I believe it will become effective shortly, for example, within a matter of a very few weeks.

Senator BAUCUS. Why has it taken so long?

Mr. SHAHEEN. We are in part responsible for that. We, as an office, sat on it for several months because in the form it was given us, the office would not have been equipped to address directly the responsibilities we now would have. The order now enjoys the form that allows us to draw upon the personnel of the Department to the extent necessary. So we can handle it.

It has to be approved as to form and substance by the Office of Legal Counsel and the new Deputy Attorney General would like to see it. The Attorney General will finally approve it.

Senator BAUCUS. It sounds like the original draft might have weakened your office.

Mr. SHAHEEN. No, the original draft would have strengthened it.

Senator BAUCUS. In order to insure your ability to assume these additional responsibilities, do you think OPR should be merged with IAS?

Mr. SHAHEEN I have thought that out at great length with members of your staff. I am satisfied now with OPR as it stands. It should not be merged with IAS because it is unnecessary.

Senator BAUCUS. Why is it unnecessary?

Mr. SHAHEEN. It would limit greatly our flexibility. It would make us a bureaucracy which we are not now. It would eliminate a component with an important function over which we now have oversight. We would not have that oversight if it became a part of us.

Senator BAUCUS. You get all the information you need from IAS currently?

Mr. SHAHEEN. Yes, sir. That is correct.

Senator BAUCUS. You said that earlier.

Mr. SHAHEEN. Yes, sir.

Senator BAUCUS. Thank you very much, Mr. Shaheen. We are pleased to have you here.

Senator **Baucus**. Mr. Rooney, as the Assistant Attorney General for Administration, are you not the official in charge of the Justice Department Division which contains the IAS?

Mr. **Rooney**. That is correct.

Senator **Baucus**. Would you tell me briefly what the function of IAS is?

Mr. **Rooney**. Yes, I can, Mr. Chairman.

If I may, before I respond to that question, however, I would like to make a comment on one issue Mr. Shaheen raised regarding uniformity of sanctions for employee misconduct. There is, as part of personnel management procedures and regulations within the Department, a disciplinary and adverse action order which we follow throughout the Department.

It includes a table of penalties for various types of misconduct. One of the problems with the arrangement as it now stands—and I have not discussed this with Mr. Shaheen—is that it does provide for a vast range of penalties. I have asked my staff to begin to look at it in order to tighten up penalties, to make them perhaps more severe in some instances, and to work with the Office of Professional Responsibility on it. I just wanted to make that point regarding sanctions on employee misconduct.

You asked about the functions of the Internal Audit Staff. The staff basically has four functions. The principal one is to schedule, conduct, and report on internal audits of all organizations, programs, and functions within the Department. Second, as part of this, they conduct independent examinations of ADP systems which support the program and administrative functions of the Department.

Senator **Baucus**. I am sorry. The first one is?

Mr. **Rooney**. To schedule, conduct, and report on internal audits of activities throughout the Department.

They conduct the ADP systems examinations. They review the implementation of financial management information systems. They develop and maintain internal audit plans, policies, standards, guidelines, training programs for the other components of the Department, and issue special reports, followup systems, et cetera, on their audit recommendations.

Senator **Baucus**. What is the legal basis for IAS?

Mr. **Rooney**. The principal legal basis for IAS is the Budget and Accounting Procedures Act of 1950. Within the Department, under 28 CFR, it is lodged within the Justice Management Division, reporting to me. We also have implementing procedures in the Department under DOJ Order 2900.

Senator **Baucus**. How often are they updated?

Mr. **Rooney**. The regulations?

Senator **Baucus**. Yes.

Mr. **Rooney**. The regulations have not really been updated in recent memory. But we are amending the implementing procedures under the order to some extent right now to cover the evaluation and the EEO investigation functions which had been lodged previously with the audit staff.

Senator **Baucus**. So there are regulations covering your responsibilities. Is that correct?

Mr. **Rooney**. Yes, under the 28 CFR.

Senator Baucus. When were those regulations promulgated?

Mr. Rooney. I would say that the current version, with some minor adjustments, would probably have been in 1973 or 1974. I could get that for you.

Senator Baucus. But which ones have not been updated in some time?

Mr. Rooney. The 28 CFR, to my understanding. The implementing procedures have been updated but I don't recall that the regulations have been changed during my tenure.

Senator Baucus. It is my understanding that IAS has been in three organizational locations within the last year. The staff has recently been cut from approximately 57 to 33. Why has IAS been so unstable in your division?

Mr. Rooney. I would have to take issue with the instability issue, Mr. Chairman. The audit staff has not been in three organizational locations. During my entire tenure as Assistant Attorney General until October 1, 1979, the audit staff reported directly to the Assistant Attorney General for Administration, along with several other staffs within the predecessor organization of the Justice Management Division.

There were 12 staffs, I believe, that all reported directly to me. On October 1, we, at the direction of the Attorney General, divided the Justice Management Division into three subunits reporting to me, one of which was the Office of the Comptroller, headed by a Deputy Assistant Attorney General. The audit staff was temporarily lodged there. Frankly, it was after about a month of that and a couple of issues coming up, that I felt it was improper to have the internal audit staff reporting to the Comptroller. We had it moved, after notifying the Congress, back up so that the audit staff reports directly to me.

There have only been the two variations, one for a very brief period of time.

Senator Baucus. So IAS does report directly to you?

Mr. Rooney. Yes, indeed.

Senator Baucus. And you report directly to whom?

Mr. Rooney. I report administratively to the Associate Attorney General. However, on audit matters or any other matters which, since we have Department-wide responsibility, any matter which affects an organization reporting to the Deputy Attorney General, I report on those matters to the Deputy Attorney General, and there is always access to the Attorney General.

Senator Baucus. So there are two steps between IAS and the Attorney General. IAS reports to you and you report to the Deputy——

Mr. Rooney. The Associate.

Senator Baucus. The Associate, as far as management questions are concerned. On audit problems, whom do you report to?

Mr. Rooney. If there is an instance where the Attorney General ought to be advised, I report directly to the Attorney General. I ordinarily go to the Associate Attorney General.

Senator Baucus. Do you report to OPR?

Mr. Rooney. Ordinarily I would not get involved in it. If there is a problem in internal audit, either the auditor or the director of the

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audit staff would usually refer directly to the Office of Professional Responsibility.

Senator BAUCUS. Are you personally responsible for followthrough?

Mr. ROONEY. I am sorry.

Senator BAUCUS. Are you personally responsible for followthrough?

Mr. ROONEY. Followthrough to audits?

Senator BAUCUS. Yes.

Mr. ROONEY. When an audit report is issued, it goes out to the organization head over my signature. They have a period of time, usually 45 days, to respond to issues which we have raised where we disagree with the organization. If those are not followed, then I get personally involved with the organization head. If the organization head and I cannot resolve it, then it goes to AG, the Deputy, or the Associate.

Senator BAUCUS. I am sure you know that GAO guidelines recommend that internal audit should be responsibile to the highest practical organizational level, preferably the agency head. In fact, the Comptroller General recommended in 1967 that the Justice Department central internal audit organization be responsible to the highest organizational level, preferably the Attorney General or the Deputy. Why hasn't that recommendation been implemented?

Mr. ROONEY. I think the principal point, and the 1967 audit I am not familiar with, is that the span of control for the Attorney General is obviously a question here, particularly with the audit staff recommendations. I would say 50 percent at the very least of the activities of the audit staff are matters of administrative or management practices in compliance with procedures which, frankly, the Attorney General would not really be able to respond to.

Senator BAUCUS. What about those that are important? Shouldn't there be some way for audit heads to determine that some are more important than others and if it is an important one, it should go directly to the Attorney General?

Mr. ROONEY. Certainly. When an issue has got to be raised to the Attorney General level, we do.

Senator BAUCUS. Shouldn't somebody in the Attorney General's office be making the assessments rather than somebody down in the Department?

Mr. ROONEY. When you say "down in the Department," Mr. Chairman, as Assistant Attorney General for Administration, I am the Department level official with the principal responsibility to go to the Attorney General for all mangement responsibilities within the Department. I am his personal representative in that regard.

Senator BAUCUS. Essentially, then, you are disagreeing with the GAO recommendation.

Mr. ROONEY. No, I think the GAO recommendation is generally sound. Although I have not seen the 1967 audit relating to Justice, I know their general guidelines are that audit should report to the Attorney General or the next highest official or somebody in that chain of command. Admittedly, the very fact that I report on the organization chart to the Associate Attorney General who reports to the Attorney General adds one more layer.

Senator BAUCUS. I guess part of my problem is that IAS also has responsibility for auditing your division. It seems to me that the audit function should be independent of budgeting and accounting. Audit functions should report directly to the Attorney General.

Mr. Rooney. I understand that point. The view that we have, and I feel fairly strong about this, is that if I am to be the official responsible to the Attorney General for management financial integrity and management administrative programs, I am the appropriate official. I am most interested, probably more than anyone else, in how well the departmental programs and implementation of departmental policy are being followed. Although I am not responsible for running a specific program, we provide departmental oversight.

Senator Baucus. Why did you contract out the audit of your own working capital fund?

Mr. Rooney. As a matter of fact, that specific issue is the one that made me realize why we have not in the past had the audit staff under the Comptroller.

There are several reasons, however, why we decided to contract it out. There have been two people in the Department who have been responsible for working capital fund: myself and my prodecessor. My predecessor is the director of the internal audit staff. I have no difficulty with the internal audit staff conducting any audit of any activity of my division. When an audit is conducted in my division, the report does not come to me. It goes to the Attorney General directly. However, in this regard, I felt that the working capital fund situation in the Department is a new concept. Every organization in the Department contributes money to the operation of the organizations that are funded by the working capital fund.

There is a vested interest in each organization. There is great interest in the Department that it be operated with great integrity. I felt that it would not be consistent with an independent audit if either I or my predecessor, who is now the director of the audit staff, reviewed the establishment, and implementation of that fund.

Senator Baucus. If that is true, then it seems to me that the audit function should also be separate. You wanted to give the appearance of propriety. That is why you contracted the project out to an independent auditor. If that is the case, then why shouldn't IAS be more independent?

Mr. Rooney. I think the specific point here, Mr. Chairman, is that the auditor himself was the first official responsible for that fund. This audit is the first audit we have had of that operation. I don't believe anyone ought to be auditing their own activity.

Senator Baucus. As I understand it, you are responsible for resolving disputes between IAS and management officials concerning implementation of audit recommendations. If you determine that an audit recommendation should be implemented, and it is not, what do you do? How do you proceed?

Mr. Rooney. Ordinarily, after the audit report is issued, if the response from the organization indicates they will not implement the recommendations, I ask the staff to try to work it out with the organization. If, as a result of that, the audit staff reports that they still believe the recommendation ought to be implemented, I then obviously will review the recommendation involved in great detail. The first action we usually take is to prepare detailed memorandum

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for documentation purposes and to eliminate the need for extensive personal involvement with the organization head.

If there is still a problem, I usually meet with the organization head on the matter or my deputy does. If we still cannot resolve it, it goes immediately to the Deputy or the Associate Attorney General, whoever is responsible for organizational oversight for that particular problem.

Senator BAUCUS. How do you determine if audit recommendations should be implemented and whether they are being implemented?

Mr. ROONEY. We routinely provide our audit reports to the GAO, which is, of course, an arm of the Congress. We have always provided audits upon request, to any member or any committee. I know we provided you, Senator, with the audit reports of the last few years.

Senator BAUCUS. What are the basic qualifications for auditors assigned to IAS?

Mr. ROONEY. Up until the last few years when we started to expand some of the audit responsibilities to include some of the other areas I addressed in my formal statement, we have always required that the auditors be in the professional auditors series, the GS-510 series. However, in the past couple of years we have begun to recruit some people without the strong audit credentials because of the expansion of staff responsibility to include some less traditional audits and getting more into the evaluation function. We have gotten some management analysts and some program analysts now.

As we transferred the resources for program impact and evaluation to the evaluation staff, we tried to keep the senior cadre—mostly the 510 series professional auditors and the accountants—in the audit staff.

Senator BAUCUS. Earlier I touched upon the question of merging IAS and OPR. One of the reason is to insure integrity of procedure and process and congressional access to information.

In your judgment, what would be the impact on the Justice Management Division and on the Department if IAS and OPR merged under some kind of statutory charter?

Mr. ROONEY. As far as the Justice Management Division is concerned I don't think there would be any significant impact. As far as the Assistant Attorney General for Administration, I think there would be. I make that distinction because I think we can: The Justice Management Division is responsible for certain policy oversight and for certain direct operations, and I am the head of that division. However, the audit staff functions relevant to me or any incumbent as the independent auditor reviewing practices throughout the Department.

I think that it would not be desirous to remove the audit staff from a direct reporting relationship to me because, with some very few exceptions, I am the official responsible for insuring that all Department components are operating in compliance with statute or departmental regulations and all of the administrative operations: financial management, personnel management, procurement, et cetera. We are trying to make the internal audit function a lot more independent and remove it from some of these other responsibilities that it has, but without this valuable asset—and it is—without the ability to send an independent auditor into one of my own organizations or into one of the organizations throughout the Department at my call, I believe I would function less well in my duties to the Attorney General.

Senator BAUCUS. Besides the IAS unit in your Division, what other parts of Justice have audit units?

Mr. ROONEY. All of the bureaus have some form of audit or inspection or management review groups. We work with them.

Senator BAUCUS. Do you have oversight responsibilities?

Mr. ROONEY. We have general oversight responsibilities. We do not review all of their audits. I don't want to say they are not as complete, but many of them are in different forms. We have not had a very strong coordinating function with any of the audit functions in the other bureaus.

We principally have the responsibility for auditing their audit staffs and their own internal operations. We do not have that with regard to the LEAA, however.

Senator BAUCUS. Do you have any recommendations in this general area? Should you have more oversight responsibilities? Should you control those audit sections more?

Mr. ROONEY. I have not seen the problem. Mr. Chairman. But as you raise the issue, I have asked and will pursue with the director of the audit staff some recommendations in that area. I know we have some concerns with regard to a lack of authority to get involved with the LEAA audits. Beyond that, I have not seen any great issues.

Senator BAUCUS. Last Tuesday, Mr. Civiletti testified before this Senate committee about combining the functions of internal audit evaluation and inspection with OPR or the Executive Office of the U.S. Attorney. I am wondering why he is considering the Executive Office for U.S. Attorneys as the location for these functions. I am wondering whether you could explain what he was talking about.

Mr. ROONEY. I will try although I am not sure exactly what was in Mr. Civiletti's mind at the time. I have had several discussions with him on these subjects, however, so I think I can.

The Attorney General, when we were establishing the evaluation function, was particularly interested in the ability to evaluate. I think he was referring to two types of evaluations, not only what the evaluation staff is responsible for—the problem impact and strategy assessment evaluations—but also efficiency audits of one nature or another with regard to U.S. attorney offices. He feels that there are 94 U.S. attorney offices out there, and yet we do not have the capability within the Department to really get into each one of those offices and see how well they are performing their job. He has a concern in that area and has considered establishing some function in the U.S. Attorney Executive Office. I know as part of our own evaluation staff, we have three or four or five positions devoted to looking at the legal operations of this Department. It had been my proposal that these positions would probably be best placed in the U.S. Attorney Executive Office.

I think those discussions were uppermost in his mind. Beyond that, I really can't offer anything.

Senator BAUCUS. Thank you very much, Mr. Rooney.

[The prepared statement of Mr. Rooney follows:]

PREPARED STATEMENT OF ASSISTANT ATTORNEY GENERAL KEVIN D. ROONEY

I have been invited today to discuss with you the Department's internal audit function, our recent reorganization with regard to evaluation, and to comment upon the proposed amendment to the Department's 1981 Authorization Bill, which would create an Office of Professional Responsibility and Audit. I am pleased to have this opportunity to discuss our program with you and to respond to your questions and concerns.

During my tenure as Assistant Attorney General, and for several years prior, the Internal Audit Staff has been a part of the Assistant Attorney General for Administration's responsibility. This has been consistent with his role as the senior advisor to, and personal representative of, the Attorney General in the management and financial matters of the Department.

A major function of the Assistant Attorney General for Administration is to direct the activities of the Departmental management staff. This staff was reorganized by Attorney General Civiletti on October 1, 1979, to form the Justice Management Division, headed by the Assistant Attorney General for Administration, and comprised of the Office of the Controller, the Office of Personnel and Administration, and the Office of Litigation and Management Systems, each headed by a Deputy Assistant Attorney General. While this reorganization was accomplished to improve the delivery of several management and financial programs and services, two aspects of it are of special interest to this committee today. These involve (1) the impact upon the Internal Audit Staff, and (2) the creation of a new Evaluation Staff.

In restructuring the Justice Management Division, we have kept in mind that there are major conceptual role differences between the various elements of management. Specifically, we have been cognizant of the differences between audit and evaluation and how the integrity of these roles can be safeguarded by organizational alignment. That is, audit is viewed as a watchdog or enforcer function whereas evaluation is viewed as an advisory function. These are important distinctions which are now more clearly manifested by the reorganization. It should be noted that the role differences which we have identified are also recognized throughout the Executive Branch and similarly treated in other Executive Departments and Agencies.

As I advised this committee by letter to Chairman Kennedy on August 22, 1979, both the Audit and Evaluation staff would be part of the Office of the Controller. At that time, I also advised that the Audit Staff would continue to function as had in the past, but that the conduct of several of its program evaluation function would be shifted to the Evaluation Staff by January, 1980. The planned delay in implementing this aspect of the reorganization was designed to allow us to review the 1980 audit agenda to determine which evaluations and relevant resources should appropriately be transferred. As you know, in January 1980, we advised that, as part of finalizing our new structure, the Internal Audit Staff would once again report directly to my office.

The establishment of a separate Evaluation Staff and the direct reporting relationship of the Internal Audit Staff are closely related and support our efforts to strengthen (1) the independence of the internal auditor, and (2) the ability of the Department to respond to the need for comprehensive, in-depth assessments of program strategy and impact.

Over the years there has been a tendency in the Department to ask the Internal Audit Staff to assume a broader role with regard to program and activity review. This has included expansion of the audit function to include Equal Employment Opportunity investigations, ADP systems quality control reviews, and program liaison with the General Accounting Office. In addition, the Internal Audit Staff had become the only staff element responsible for program evaluation, which would include the conduct of evaluations designed to assist the Attorney General in assessing program strategies and impact. These activities, we believe, limit the independence of the internal auditor in pursuing his principal mission.

With the tremendous expansion of requests for program and strategy evaluations by the Congress and the President, and the continuing limited resources available to the Department, we saw clearly that the independent audit function of the Internal Audit Staff would be quickly chipped away to compensate for a growing focus on evaluations. By actually conducting evaluations designed to assist management in determining strategy and policy, the Internal Audit Staff de facto loses its ability to be an independent consumer of these products in pursuing its charter for continuing review of program economy, efficiency, fiscal integrity and compliance.

If I am to advise the Attorney General on the management and financial integrity and soundness of Department programs, I must have the freedom to react to independent audits. In turn, the Internal Audit Staff must have the freedom to conduct audits in an orderly and unhindered manner, following audit issues and findings to their logical conclusions. The auditor must not be faced with changing priorities for study and analysis. This is inevitable in the conduct of the types of studies which we are transferring to the Evaluation Staff, i.e., evaluation of program strategy and impact. Such studies are more time sensitive and associated with tight time deadlines and the need for quick response. To be effective, they also demand active participation of experienced program officials in the actual study. I cannot reconcile this need with the role of an independent auditor. Placing the two activities together produces irreconcilable conflicts to the detriment of both.

As a result of the reorganization, the Internal Audit function will include a renewed emphasis on program efficiency and effectiveness and financial and compliance audits. More specifically, this will enable the Internal Audit Staff to:

Independently determine whether current agency operations comply with legal and regulatory requirements;

Independently identify problems affecting efficiency and economy of operation;

Independently assess the integrity of agency financial practices and systems;

Independently assess the implementation of *approved* recommendations of program evaluations regarding policy, strategy, and impact;

Exercise Department oversight of internal bureau-level audit activities, e.g., those in the Federal Bureau of Investigation, Immigration and Naturalization Service, etc.; and

Support the Office of Professional Responsibility in performing investigations of alleged impropriety and misconduct.

To provide senior Department management with a single information source on on-going GAO activities affecting our components, and to serve as the focal point between the Attorney General and the GAO in responding to GAO recommendations, another feature of our recent reorganization is the conduct of the GAO liaison activity by my immediate office. This will ensure a higher level coordination point, without affecting the conduct of our internal audits. This is particularly helpful since the Internal Audit Staff is also a consumer of GAO audits in the performance of its own activities.

The Evaluation Staff, created through the realignment of existing resources, performs the role of management advisor. It has two perspectives. In a retrospective sense, it is responsible for advising top management on the effectiveness of on-going programs in meeting objectives set by law, the President or the Department. The Evaluation Staff has no major programmatic responsibility, so it too is an independent agent. In addition to acting as a staff advisor to Department management it is also called upon to conduct evaluations requested of the Department by the Congress. The trend of congressional requests is clear and as we continue to operate in an environment of fiscal constraint the demand for internal evaluations will grow as well. This brings me to the second perspective of the Evaluation Staff, i.e., prospective.

Now more than ever the Department needs to be able to evaluate future program strategies and policy options. We need to improve our ability to examine several alternatives in order to decide on the best course of action. We may find that the present course is, indeed, viable. But without a capability to evaluate alternatives to the status quo we cannot be sure that our programs are as effective or as responsive as they could be to the wide range of needs the Department of Justice is charged with meeting. The establishment of an independent Evaluation Staff is a major initiative toward that goal.

In the reorganization we have attempted to establish a Departmental evaluation capability that is free of programmatic or operational responsibility, so that it can function in its intended role—as an unbiased advisor in the strategic policy, planning, and decision-making process. As one might expect we have not altered the capability in the major Department program areas themselves to conduct evaluations with these same perspectives. But by the consolidation of Justice Management Division resources for evaluation we have highlighted the importance of the function at the Department level and do anticipate a renewed emphasis on evaluation as a management aid at the major program levels.

In addition to the transfer of resources to evaluation, I have located quality and policy control reviews of ADP systems with the Systems Policy and Planning Staff. The reason behind this move is that this type of ADP review is highly technical and specialised, and must emphasize the effectiveness of systems design to meet management objectives. Audits of systems activities of the Department, of course, will continue as a responsibility of the Internal Audit Staff. Hopefully, the conduct of pre-implementation reviews at the policy level will lessen the need for the previously large concentration of audit staff resources in this area and improve Departmental ADP systems activities.

In sum, we expect to see an increased independence of audit. This will be the result of elevating the Internal Audit Staff above any operational activities of the Justice Management Division. The Staff Director will report directly to the Assistant Attorney General for Administration. Independence also will be increased by eliminating the need for the Staff to focus on externally required evaluations. Secondly, we expect to achieve increased regulatory compliance and financial integrity within the Department by more sharply focusing audit attention on inspections rather than program reviews. Third, and last, we expect to improve our management capability by having consolidated evaluation resources in a Departmental staff function where those resources can more effectively assist Department management in evaluating alternative strategies. Together, there two perspectives should add insight to the Department's decision-making process which the previous organisational alignment did not as effectively accomplish.

Early in the foregoing discussion I described the conceptual role differences between audit and evaluation, i.e., watchdog versus advisory. In a recent study regarding the establishment of an Office of Inspector General in the Department of Justice, a study directed in the Justice Authorisation Appropriation Act for Fiscal Year 1980, we carefully examined the role of Inspectors General and concluded that the same role difference existed. That is to say, the Inspector General role which is typically composed of audit and investigation, it also watchdog in nature. To my knowledge no one in the Executive Branch has effectively argued that evaluation should be merged with the Inspector General functions. Conversely, the consensus of U.S. Government Inspectors General on this point was recently expressed at the Second Annual Management Conference held at Cherry Hill, New Jersey. At the conference, held February 1980, the Inspector General of the National Aeronautics and Space Administration, speaking for the group as a whole, expressed the very logic that our audit/evaluation realignment was based on. He said, in effect, evaulation is a management policy and decision-making tool and should not be merged with Inspector General, i.e., audit/investigation, functions. He expressed the same concerns we had, that evaluation would lose its credibility as an objective alternative seeker if seen as an investigator or auditor; and an Inspector General Office would lose its independence if it became part of the management and decision-making process as an evaluator. Our alignment of audit and evaluation functions and resources in the recent reorganisation is consistent with the currently accepted view on the role and place of an Inspector General.

With respect to the report requested by the Judiciary Committees of the House and Senate concerning the performance of Inspector General functions with the Department of Justice, I will defer at this point to the Assistant Attorney General from the Office for Improvements in the Administration of Justice, Mr. Rosenberg, to comment on our overall position. Following this presentation, I will be pleased to discuss relevant issues you wish to address.

Senator **Baucus**. Now we will hear from Mr. Rosenberg who has been very patient.

I must say I am very proud to have you here, Mr. Rosenberg. We have often spoken previously about the report that you produced and submitted to the committee. After reviewing the report and talking with you, I must say that I am very proud as an American citizen to have somebody such as you working for us. I think your report is scholarly and intelligently written. There is a lot of good commonsense in it.

What I would like to do this morning, though, is to flush out some of the reasons why you think that the Department of Justice should not have an Inspector General. We will lay a record so that Congress can be better informed in its deliberations as to whether or not to set up an Inspector General in Justice.

As I understand your report, you conclude that an Inspector General as defined by the 1978 Inspector General Act would be inappropriate for Justice. Could you briefly tell us why?

Mr. ROSENBERG. Gladly, Mr. Chairman. When we undertook the study and produced the report, we addressed the question of why the Congress thought that inspectors general were a good idea when the act of 1978 was passed. We didn't have to look very hard or very far to find the answer. The Congress identified a number of objectives which it expressly stated that it wanted the Inspector General to perform. These objectives were four. Congress wanted someone to detect and prevent misconduct; to maintain financial integrity; to promote efficiency and economy; and to monitor administrative problems in the departments.

We took it that the form in which that was done was less important than the matter of getting the job done. That was our point of departure. The Congress also seemed to have in mind that the jobs that it wanted done would be done by three distinct kinds of activities or functions. These were the fact-finding function, what we call the facilitating function (seeing that the right things happen) and the reporting functioning.

When we came to do the report, we asked ourselves if we apply these objectives to what is going on in the Department of Justice and look for these functions, can we honestly say that the objectives are being met and that the functions are being performed? The report was written from that point of view. The conclusion is that Congress was right when it said in the 1978 act that it was not desirable to have a law enforcement officer, that is, an inspector general superimposed on a law enforcement agency.

Senator BAUCUS. Did the act say that or did the act just not include Justice when it listed the departments that would have IG's?

Mr. ROSENBERG. In the accompanying report, I believe you will find the substance of what I have said, if not the exact words. The report said it would be undesirable to superimpose a *law* enforcement officer on a law enforcement agency.

Going beyond these words, you must consider the special mission of the Department of Justice which, as I said earlier, has to do with law enforcement. It has to do with measures of responsibility that go beyond the question of whether conduct is lawful or not lawful. There is also the question of whether conduct is ethical, whether it is up to the hghest standards of government lawyers, of whom there are 3,500 in the Department, practicing professionally. It goes to the question of how they should behave even though the positive crimina law doesn't reach their behavior in matters of prosecutorial discretion and the like.

Senator BAUCUS. Is there a difference?

Mr. ROSENBERG. I think so.

Senator BAUCUS. Criminal law proscribes certain activity. Canons of ethics proscribe certain activity. What is the difference?

Mr. ROSENBERG. The criminal laws don't deal with all the subtleties of the decision that a prosecutor enters into when the prosecutor makes the virtually unreviewable decision not to prosecute.

Senator BAUCUS. But doesn't that same question face an Inspector General in HUD or HEW?

Mr. ROSENBERG. I don't think in quite the same form, Mr. Chairman. In the end, the Inspector General has to refer prosecutorial matters to the Department of Justice and to the Attorney General for prosecution. That is, he doesn't have his own prosecutorial enforcement agency there. That is one of the great distinctions. Decisions to prosecute are made right there in the Department. Much of what Mr. Shaheen was testifying to earlier had to do with questions involving alleged abuses of prosecutorial discretion.

Senator BAUCUS. Why can't a separate Inspector General in the Justice Department make the same recommendations to the appropriate personnel in the Department?

Mr. ROSENBERG. Conceivably he could, but I don't see that there would be anything gained by having a separate Inspector General who would then enter into competition with the Attorney General at the very level of the important question of enforcing the laws against Department employees. The difference would be, as far as I can see, that you would either have to give this Inspector General in the Department power that was equal to or above the Attorney General in the Attorney General's own mainline function, that is, discretion to enforce the law, or you wouldn' have gained on the present situation at all. You probably would have lost so far as I conclude.

Senator BAUCUS. I am unclear as to the role of an Inspector General under the 1978 act. I hear you to say that an Inspector General in HEW or HUD will make a recommendation to Justice to prosecute or not to prosecute. Is that correct?

Mr. ROSENBERG. That is correct.

Senator BAUCUS. Then why can't an Inspector General in Justice make that same recommendation. He would not have the authority, but he would make the recommendations to keep top personnel at Justice on their toes.

I ask the question because we, as Members of the Congress, are kept on our toes by voters. House Members self destruct every 2 years, Senators self destruct every 6 years. I can tell you that it is a very sobering experience when you are talking to your voters. They keep you on your toes. Everyone wants to run for reelection, at least most do, and the voters do keep you on your toes. Thank goodness that we are elected. If we were appointed for life, we simply might not be responsive to the country's needs.

I am wondering why the same argument cannot be made with respect to the Attorney General. Who keeps the Attorney General on his toes? Doesn't he need an Inspector General?

Mr. ROSENBERG. It seems to me that we have heard from Mr. Shaheen about his asking hard questions of two Attorneys General and about his getting affidavits from at least one. He is keeping the Attorney General on their toes by performing the office in the way that he does.

Senator BAUCUS. I understand that. That is Mr. Shaheen. Mr. Shaheen sounds like a very honest, decent fellow. But we don't have any statute here prescribing this relationship. And second, we learned this morning that the present Attorney General is much slower in responding to recommendations by Mr. Shaheen. It just seems to me that the present relationship is built on trust rather than on a statutory or institutional framework. Our Founding Fathers said we are a nation of laws, not men. There is something to be said for that.

Mr. ROSENBERG. I think there is a lot to be said for it. But in the end, it is going to take men and women to enforce the laws. They don't enforce themselves.

It is clear that you can enact a law to govern almost every facet of human—and especially official—behavior. But it is equally clear that you don't always want to do that, that we probably have almost enough laws in this country already.

Senator BAUCUS. We could repeal two-thirds of the laws and create an Inspector General at Justice.

Mr. ROSENBERG. When you tell me which two-thirds of them, we can do business.

Senator BAUCUS. The fundamental problem is that the present relationship is subject to the whims of the present Attorney General and the present head of OPR. That is the problem.

Mr. ROSENBERG. I think there is a fundamental safeguard, though. That is, given the way the office has been set up and the tradition that Mr. Shaheen has developed in his stewardship of the office, it seems to me that at any point at which the incumbent should find it necessary to resign or should find it necessary to report about some activity, including excessive and repeated slowness about moving if that should ever eventuate, the media could be depended upon to take notice of that very, very vigorously. Congress would respond equally vigorously.

Senator BAUCUS. The media would take note of what, Mr. Rosenberg, I am sorry?

Mr. ROSENBERG. The report, the statement, the press conference that Mr. Shaheen said that he would call——

Senator BAUCUS. That is Mr. Shaheen. What if Mr. Shaheen were not Mr. Shaheen?

Mr. ROSENBERG. What I am saying is that it is possible that even statutory provisions would be disregarded.

Senator BAUCUS. It is possible, but isn't it less likely?

Mr. ROSENBERG. I think that depends on the area in which you are dealing and what the costs of codifying and writing statutes in the area are. I won't pretend to you that I am against the law or against the statutes or that I think it would be an utter calamity if statutes——

Senator BAUCUS. That is the whole basis of our system of justice. We have criminal statutes, for example. We don't just go and prosecute on the basis of the whim of a prosecutor. You have to have a violation of some written statute.

Mr. ROSENBERG. What we are talking about is whether it would be beneficial overall to write a statutory charter instead of leaving the situation in regulation form. It seems to me that is what it comes down to. That is an arguable question. I believe the balance of the argument is in favor of not disturbing the present situation because of some of the costs of writing the statute.

Senator BAUCUS. Precisely what are the costs in writing the statute?

Mr. ROSENBERG. We have a system now that permits a great amount of flexibility, of the kind of nonrigidified, nonossified attention that we heard Mr. Shaheen describe this morning. He can wax or wane in the size of the operation. He can bring together task forces. He can dismantle those task forces when their job is done. He can keep his focus very sharp. He can avoid the bureaucratization that would result from getting too many people in what should be a highly sophisticated, sensitive, and professional kind of organization. All that is now possible. It seems to me if you start writing this structure into law, then you lose a lot of the flexibility.

Senator BAUCUS. Aside from the loss of flexibility, what other costs are there?

Mr. ROSENBERG. I think that if you could write a statute that had the flexibility the present situation contains that would take care of a great many of the problems that I would have.

Senator BAUCUS. Do you think that my amendment provides sufficient flexibility? Maybe Mr. Shaheen could answer that one, if he has had a chance to look at it.

Mr. ROSENBERG. I will gladly defer.

Senator BAUCUS. Or any of you who have seen it, if any of you have.

Mr. SHAHEEN. Except for the merger, Mr. Chairman, the proposed merger of IAS with OPR, I think that with a couple of refinements—and I have read the amendment—that it would be workable. I don't have any standing objection to being statutorily created. I just have said that I am comfortable with the regulations. But I see your concern and it is a real one.

Senator BAUCUS. You do feel there is sufficient flexibility, absent some refinements, in the proposed amendment.

Mr. SHAHEEN. Yes.

Senator BAUCUS. I see.

Mr. ROSENBERG. That is, without the merger.

Senator BAUCUS. The merger is a separate issue. Putting that issue aside for a moment, do you believe that the amendment provides sufficient flexibility. Is that correct?

Mr. SHAHEEN. I think that fairly states my view.

Senator BAUCUS. What other change would you suggest?

Mr. SHAHEEN. I am not certain that the time constraints need to be precisely drawn as to the number of days. There may be problems with the recommendation that involves literally volumes of reading to be done before a determination by the Attorney General can be made whether to accede to the recommendation or to ask what could be changed.

Senator BAUCUS. Could you personally supply those recommendations into this committee in the next 2 weeks? Is that possible? Is that too great a time constraint?

Mr. SHAHEEN. I would have to discuss that with the authorities on the amendment and that is Mr. Rosenberg and Mr. Alan Parker and the Attorney General.

I am seeking for myself as well as for my—an Inspector General, by the way, would not have what I have. I don't think any Inspector General has the grand jury power. I have it in 94 districts. No Inspector General has the prosecutive function. I have it in 94 districts.

Senator BAUCUS. We could include those in the statute.

Mr. SHAHEEN. I want to make reference to an earlier remark about how oversight by the people of Congress has been so exacting. I think you have a convicted felon running around loose in the House of Representatives. I believe.

Senator **Baucus**. We could tailor a statute according to the need. Speaking as an attorney, I think that attorneys don't like other attorneys second guessing them. Don't you think that accounts for the reluctance of the Justice Department to support an inspector general proposal?

Mr. **Shaheen**. On wanting an Inspector General? No. I would agree generally with the earlier statement, that is that attorneys don't like others to disagree with them in a professional judgment.

Senator **Baucus**. I can understand that. I think that is nothing to take light by.

Mr. **Rosenberg**. Mr. Chairman, it just has come to me this morning, listening to this, that there is another reason against the statute. That is although it may sound romantic to put it this way, as long as you don't have to express a lack of confidence in the capacity of the Attorney General as the first law enforcement officer of the country to keep the Department of Justice honest, you have said something quite important and symbolic about the confidence of Congress in the first law enforcement officer of the country. You take that away if you proclaim the necessity of writing a statute that puts the Attorney General in the same position as the non-law enforcement people of the country. That occurs to me as one of the symbolic costs of the statute.

Senator **Baucus**. Are you saying that setting up a separate Inspector General would somehow diminish the stature of the Attorney General as the Nation's chief law enforcement officer?

Mr. **Rosenberg**. You spoke of perceptions earlier in the morning. I believe that some people would perceive that the Congress was saying that the Attorney General has not been doing a proper job of seeing to the integrity of personnel, the financial integrity, efficiency, and economy of the operation of the Department of Justice, and that is supposedly why you now need an inspector general-type person in the Department. It seems to me not unlikely that some people would make that argument and have that perception.

Senator **Baucus**. I am sure you are correct. Some would make that argument. Given the present climate, however, I don't believe that would be the main deduction that people would draw. The integrity of the Justice Department has been diminished by Watergate. That is why OPR was created as I understand Mr. Shaheen's earlier testimony.

Mr. **Rosenberg**. Mr. Shaheen has been the stopper since Watergate.

Senator **Baucus**. I understand and appreciate that. So much of this is perception. I am wondering, Mr. Rosenberg, whether you think the American public deserves a greater guarantee than it now has that the Department of Justice will always address issues of ethics, fraud, and mismanagement?

Mr. **Rosenberg**. It's hard to quarrel with the idea that the public deserves a guarantee or even a greater guarantee. My problem is whether the statute does it. That is whether the statutory course, not any particular statute, does it.

Senator **Baucus**. If I understand your report correctly, you feel that OPR and IAS jointly have greater information-gathering powers than any statutory inspector general. Is that correct?

Mr. **Rosenberg.** That is correct.

Senator **Baucus.** Why does that necessarily mean that there should not be an IG? Why can't a Justice Inspector General be given the same kinds of information-gathering powers that IAS and OPR presently have?

Mr. **Rosenberg.** It would mean giving to the Counsel General or the Inspector General more power than any other Inspector General-type functionary has in the Act of 1978, for example.

Senator **Baucus.** What is wrong with that?

Mr. **Rosenberg.** There isn't anything wrong with preserving the present powers at all.

Senator **Baucus.** Can't that be done by statute?

Mr. **Rosenberg.** That is my problem. As I say, that raises problems of perception and of ossification of the flexibility at the administrative level. I guess I just have a different point of view about the downside, the cost of both those factors.

Senator **Baucus.** In your view, if we do not maintain these broader powers in the statute, the operation will be ossified? Is that correct?

Mr. **Rosenberg.** Yes, Mr. Chairman.

Senator **Baucus.** Don't you think they could build in that flexibility in the statute?

Mr. **Rosenberg.** If you can——

Senator **Baucus.** Mr. Shaheen seems to feel that it is not only possible but that the proposed amendment does provide for sufficient flexibility.

Mr. **Rosenberg.** That would not be, from my point of view, a terrible thing. I just would choose to observe it in a nonstatutory form and see if we could work out a better modus by oversight such as this and by continued administrative efforts to improve operations within the Department.

Senator **Baucus.** In your report, you submit that one difference between the Inspector General operation and the current operation of the Department is the absence of a provision for regular and comprehensive reporting to Congress by OPR. Although Justice may have a different mission than those agencies included in the Inspector General Act, why should there be less accountability to Congress?

Mr. **Rosenberg.** I am in favor of having the reports of OPR and IAS go regularly to Congress.

Senator **Baucus.** On page 37, you make the point—excuse me.

Mr. **Rosenberg.** Excuse me, Mr. Chairman, if I might. I think that the proper way to do it would be for the Attorney General to send these reports to Congress. The reports should be made to the Attorney General and he would transmit them to the Congress. As far as the substance of it is concerned the Congress should be aware of what is being done by these offices, yes, indeed.

Senator **Baucus.** One final point. In your report on page 37, you state that I personally have been supplied with IAS reports and have been assured of receiving future IAS reports on a continuing basis.

Why shouldn't that right of access to such reports be determined by statute, rather than by the good will of the Department?

Mr. **Rosenberg.** I think it has gone beyond good will. Those practices can become inveterate and secure, and I hope we have that.

Senator **Baucus.** In your judgment, if we do pass this statute here, providing for an OPR general counsel, who should appoint him?

Mr. **Rosenberg.** The Attorney General.

Senator **Baucus.** Not the President?

Mr. **Rosenberg.** I think it will achieve nothing to have the President do the appointing.

Senator **Baucus.** Why would nothing be achieved? What would the problem be?

Mr. **Rosenberg.** I have been going back to what the Congress appeared to be looking for in the original idea of an inspector general. I can't see that it advances any of those purposes to have the President instead of the head of the agency appoint.

Senator **Baucus.** Why shouldn't the same rationale apply to everybody else in Justice? Why shouldn't all the assistants attorney general, deputy, associate, and so forth, be appointed by the Attorney General himself rather than by the President? What is the difference?

Mr. **Rosenberg.** I suppose it is so that when the departmentwide officers of the Department of Justice deal with other people, they deal as Presidential appointees, and have a higher measure of, I don't want to say respectability, authority in that regard.

Senator **Baucus.** Shouldn't the OPR counsel have that high a degree of respectability, if not higher?

Mr. **Rosenberg.** I would not single out an inspector general-type functionary within the Department of Justice for Presidential appointment.

Senator **Baucus.** If there is no advise and consent of the Senate, how can the Congress be assured of proper standards of integrity?

Mr. **Rosenberg.** I suppose in the same way that it apparently is assured of the integrity and standards of the IG's in the 13 departments and agencies to which the act of 1978 applies.

Senator **Baucus.** Then you would agree that with a statutory IG, everything would be proper.

Mr. **Rosenberg.** We are dealing with the question of Presidential or non-Presidential appointments. That again is not one of those questions that one ought to lie down on the street and bleed to death about. It just seems to me that the call favors having somebody who is a subordinate of the Attorney General. As I said earlier, if you try to elevate the IG too high and put him above or on the same level for these purposes as the Attorney General, you are really compounding the question of who is the chief law enforcement of the country.

Senator **Baucus.** OK, sir. Do any of you three gentlemen have any concluding statements?

Mr. **Rooney.** Mr. Chairman, if I may just offer some personal reactions to a couple of the comments that have been made.

Senator **Baucus.** Surely.

Mr. **Rooney.** After observing the close working relationship between the Counsel for Professional Responsibility and the Attorney General on matters not involving the Attorney General, I, with regard to the proposed statute, have some difficulty, when the Attorney General is not involved, in making the Counsel General more independent than he would be now in dealing closely as a personal adviser to the Attorney General. I have seen that work very well. I would hate to see that diminished with regard to other Department officials.

I don't know whether this really goes to the question of Presidential or Attorney General appointees. I know the Attorney General, because of his close working relationship with inspectors general, has been a participant in the process of selecting nominees for inspector general. I think it is very critical that whoever does work within the Department as Counsel General, or the position that Mr. Shaheen now holds, does have a very close working relationship.

The only other general comment that I would offer is that I think we have raised some issues here which probably would require more deliberation than just being part of the oversight hearing and the authorization bill. Perhaps we ought to consider the amendment in a little broader context.

Senator BAUCUS. I appreciate the comments of all of you.

One final question, Mr. Shaheen. You stated that no Attorney General has ever refused to follow an OPR recommendation. Has any Associate, Deputy, or Assistant AG refused to follow an OPR recommendation?

Mr. SHAHEEN. Yes.

Senator BAUCUS. Could you explain the circumstances or how many times?

Mr. SHAHEEN. I think that it would involve, Mr. Chairman, an unwarranted invasion of privacy.

Senator BAUCUS. How many times?

Mr. SHAHEEN. I think two times.

Senator BAUCUS. Two times. Was it the same person?

Mr. SHAHEEN. No, sir.

Senator BAUCUS. Don't you think that the refusals have some bearing on your ability to independently and objectively perform your duties? And shouldn't the Congress also be informed of these problems?

Mr. SHAHEEN. I am not sure, Mr. Chairman, and I will tell you why. First of all, both instances involved actions that were not criminal and sanctions that were not criminal; they were administrative sanctions.

You would have to do more than pass a new law. You would have to change some existing regulations and I think substantive law. Because in both instances, when proposed action had been taken, and we proposed it to the head of that agency, in one instance it was the Assistant Attorney General, for example. Once the decision had been made to repose in that Presidential official, the Assistant Attorney General, say, he would for jurisdictional purposes be the one to propose sanctions. The law and regulation state that that employee is in jeopardy and can't be placed again in jeopardy. So in appealing the sanction determined by the Assistant Attorney General, whose job it is by assigment, the sanction cannot be enlarged. It can only be reviewed for purposes of diminishing it or sustaining it as initially taken. We are not talking about attorneys, for example. It was not a decision that I could appeal to the Attorney General. It was not a matter that indicated any forfeiture on either my part or the Attorney General's part. It was res judicata, by regulation.

Senator BAUCUS. So you are saying in each instance——

Mr. SHAHEEN. In each instance.

Senator BAUCUS. It was res judicata by regulation. Is that proper? Do you think you should have had in the absence of regulation some right to appeal that decision to the Attorney General?

Mr. SHAHEEN. Absolutely.

Senator BAUCUS. Are you, therefore, telling me that you think the regulation should be changed?

Mr. SHAHEEN. Yes, sir.

Senator BAUCUS. Who proposes those regulations?

Mr. SHAHEEN. I think that this is a regulation that fleshes out the law. I am not familiar with the law. I think there are old civil service regulations as well. OPM now is its successor.

Senator BAUCUS. What action can Congress take?

Mr. SHAHEEN. What could they take?

Senator BAUCUS. Yes. To correct this regulation.

Mr. SHAHEEN. I would like to recommend some action but since it would put me in a conflict with the people in OPM and the Merit System Protection Board, I best save my remarks and probably give them to you in executive session.

Senator BAUCUS. OK. Well, thank you all very much. I appreciate your coming this morning. Thank you.

This concludes the hearing.

[Whereupon at 11:45 a.m., on March 13, 1980, the subcommittee hearing was adjourned.]

[Appendix material follows.]

APPENDIX TO HEARING OF
March 13, 1980

THE PERFORMANCE OF INSPECTOR GENERAL FUNCTIONS WITHIN THE DEPARTMENT OF JUSTICE

A REPORT

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE FOR IMPROVEMENTS IN THE
ADMINISTRATION OF JUSTICE

February 15, 1980

THE PERFORMANCE OF INSPECTOR GENERAL FUNCTIONS WITHIN THE DEPARTMENT OF JUSTICE

EXECUTIVE SUMMARY

The Department of Justice has completed a report on the performance of Inspector General functions within the Department of Justice. The report describes the results of a study requested by the Committees on the Judiciary of the United States Senate and House of Representatives with respect to establishing an Office of Inspector General within the Department.

Part I of the report outlines the background, purposes and functions of the Office of Inspector General created by the Inspector General Act of 1978 and related legislation. Part II describes the existing and planned mechanisms within the Department for conducting internal audits and investigations. Part III relates the Department's approach to the purposes and functions of the statutory Office of Inspector General. Part IV evaluates the Department's approach and possible changes.

The report concludes (1) that the Department has been and is achieving the objectives of the 1978 Act in its own way; (2) that the Department's approach is effective and does not manifest the shortcomings that existed in other agencies prior to the 1978 legislation; and (3) that the Department's arrangement is one suited to the special characteristics of the Department as the nation's law enforcement agency.

The report finds that OPR's independence would not be enlarged either by giving the Office a statutory charter or by providing for the Presidential appointment of OPR Counsel. Finally, the report suggests that OPR Counsel be required to report regularly and publicly any instance in which the Attorney General declines authority or resources that OPR Counsel requests as necessary to discharge his responsibility.

THE PERFORMANCE OF INSPECTOR GENERAL FUNCTIONS WITHIN THE DEPARTMENT OF JUSTICE

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THE PERFORMANCE OF INSPECTOR GENERAL FUNCTIONS WITHIN THE DEPARTMENT OF JUSTICE

INTRODUCTION

This report describes the results of a study, undertaken by the Department of Justice at the request of the Committees on the Judiciary of the United States Senate and House of Representatives, with respect to establishing an Office of Inspector General within the Department of Justice. 1/ The study--conducted by the Department's Office for Improvements in the Administration of Justice--included examination of pertinent statutes, legislative history and regulations, interviews with Department officials responsible for and knowledgeable concerning relevant Department activities, and interviews with Inspectors General of other executive departments. 2/

The results of the study are set forth below in four parts. Part I, entitled "The Office of Inspector General," outlines the background, purposes and functions of the Offices of Inspector General created by the Inspector General Act of 1978 and related legislation. Part II, designated "The Department of

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1/ The request was made in the Conference Report of the two committees on the Department's Appropriation Authorization bill for fiscal year 1980, in connection with the establishment of a Special Investigator for the Immigration and Naturalization Service. Conference Report accompanying S. 1157, November 16, 1979, at 22-23.

2/ Approximately two dozen officials were interviewed, several on more than one occasion.

Justice Approach," describes the existing and planned mechanisms within the Department for conducting internal audits and investigations. Part III, "A Comparison of the Department of Justice Approach and the Office of Inspector General," relates the Department approach to the purposes and functions of the statutory offices of Inspector General. Part IV, headed "Evaluating the Department's Approach and Possible Changes," sets forth conclusions and recommendations for improving the Department's performance of internal audit and investigation functions.

Part I--The Office of Inspector General

A. Conditions Sought to be Remedied

Commencing in 1977 with the creation of an Office of Inspector General for the Department of Health, Education and Welfare (HEW),3/ Congress has enacted legislation creating fifteen such offices in a wide range of federal departments and agencies. 4/ Thirteen Inspectors General are governed by the Inspector General Act of 1978; 5/ the remaining two, the Inspectors General for the Department of Energy (DOE) and for the Department of Health and Human Services (HHS) (formerly HEW), are governed by separate legislation.6/

In affecting the programs and operations of the agencies to which it applies, the Inspector General Act of 1978 (hereafter "the Act" or "the 1978 Act") can be said to have four

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3/ See 42 U.S.C. §3521-3527.

4/ In addition to the Inspector General for HEW (now the Department of Health and Human Services), Congress has established Inspectors General in the Departments of Agriculture, Commerce, Education, Energy, Housing and Urban Development, Interior, Labor, and Transportation, and in the Community Services Administration, the Environmental Protection Agency, the General Services Administration, the National Aeronautics and Space Administration, the Small Business Administration, and the Veterans' Administration.

5/ See Pub. L. No. 95-452, 92 Stat. 1101 (1978) and Department of Education Organization Act, Pub. L. No. 96-88, §212, 93 Stat. 675 (1979).

6/ The Inspector General for the Department of Energy is governed by the legislation creating that Department in 1978. See 42 U.S.C. §7138. The Office of Inspector General in the Department of Health and Human Services continues to be governed by the original provisions regarding HEW. See Pub. L. No. 96-88, §§508(n), 509, 93 Stat. 694-95 (1979).

objectives: 7/ detecting and preventing misconduct; maintaining financial integrity; promoting economy and efficiency; and monitoring administrative problems, deficiencies and corrective actions. To achieve these objectives, the Act charges the Inspector General with performing three major functions: 8/

Fact-finding--the Inspector General is to conduct and supervise audits and investigations;

Facilitating--the Inspector General is to provide leadership, coordination and recommendations for policy actions designed to achieve the objectives of the Act; and

Reporting--the Inspector General is to inform the head of the agency, the Congress and, where appropriate, the Attorney General about the status of the administration of the agency's programs and operations.

The perceived inadequacies of pre-existing audit and investigation units in discharging these functions were the motivating force behind the Act, and many features of the Act were designed to meet specific problems in these areas. The major shortcomings identified in the House and Senate Reports can be grouped into three categories--fragmentation and lack of resources, lack of independence, and problems in cooperation with law enforcement agencies.

7/ This statement is based on an analytical, not literal, reading of the Act.

8/ This analysis reflects an effort to comprehend and to summarize the major functions of an Inspector General and should not suggest an exhaustion of the possible legitimate functions that might be performed by such an official within a given agency. Program evaluation, for example, may be a legitimate, though incidental, function of an Inspector General provided it does not duplicate the work of existing program evaluation units within the agency. See Senate Report at 12.

1. Fragmentation and Lack of Resources.

The Congressional Reports identified the fragmentation of existing inspection units as a major problem. In many agencies these functions were divided among several units, resulting in a lack of overall coordination of auditing and investigative activities, and in restrictions on the scope of these activities imposed by the jurisdictional limitations of particular units. Lack of resources was also cited as a serious problem, frequently consisting of a grossly inadequate level of staffing, and the placement of inspection authority in the hands of officials who were forced to divide their time between oversight of inspections and other responsibilities.

The Act responded to these problems by placing authority over all audits and investigations, and related policy-making, in the hands of a single official who is empowered to procure necessary personnel and services. Although the resources of the Inspector General are limited by the available appropriation, which was not increased by the 1978 Act in itself, it was expected that the existence of an overall authority might result in a more effective allocation of available resources. It was also expected that the Inspector General would become an effective advocate for the appropriation of additional funds for inspection activities, and that such increased allocations would more than pay for themselves through resulting reduction in fraud and waste. 9/

9/ See Act §§4(a)(1), 6(a)(6)-(8); H.R. Rept. No. 584, 95th Cong., 1st Sess. at 5-7 (1977) (hereafter "House Report"); S. Rept. No. 1071, 95th Cong., 2d Sess. at 5-7, 35 (1978) (hereafter "Senate Report").

2. Lack of Independence.

The Congressional Reports also emphasized the need for independence, as to which existing audit and investigation arrangements were deficient in a number of respects. In some agencies investigators were required either to obtain permission from the official responsible for the program to be looked into before commencing an investigation, or to report the results to that official. In such cases the interests in effective investigation, disclosure and correction of deficiencies would conflict with an administrator's interest in avoiding findings of misconduct or inefficiency in a program subject to his control, and investigations that (as subsequent events showed) would have disclosed serious misconduct were often disallowed. Non-statutory Inspector General offices created by administrative action were also perceived as inadequate to insure effective, on-going suppression of misconduct, since they could be abolished at will by the agency head, as had been done, for example, by then-Secretary Butz in the Department of Agriculture in 1974. 10/

The Act responded to these concerns by various measures designed to ensure the independence of the new Inspectors General. The office created by the Act is statutory, and cannot be abolished by administrative action. The Inspector General is appointed by the President and confirmed by the Senate, and can be removed only by the President. He is subject to supervision only by the agency head, or the agency head's delegate of next lower rank,

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10/ See House Report at 5, 7; Senate Report at 5-6, 23.

and even the agency head has no authority to prevent an audit or investigation directed by the Inspector General. 11/

3. Problems in Cooperation with the Department of Justice and Other Agencies.

The legislative history also emphasized the difficulties confronted by elements of the Department of Justice charged with investigating and prosecuting fraud and other white collar crime in securing cooperation from other governmental agencies under the existing system. The specific problems cited were the lack of a single official with overall authority who could be dealt with by DOJ, and non-referral or serious delays in referral of cases resulting from requirements of prior screening by the legal office of the referring agency.

The Act responded to these and other problems of coordinating enforcement efforts by vesting in the Inspector General authority over all activities likely to turn up matters referrable to DOJ or other law enforcement agencies, and by directing explicitly that the Inspector General recommend policy for, and conduct, supervise, and coordinate relationships between the agency and other agencies and entities relating to "the identification and prosecution of participants in . . . fraud and abuse." 12/

11/ See Act §3(a)-(b), Senate Report at 7-8, 25-26.

12/ Act §4(a)(4)(B); see House Report at 5-6, 13; Senate Report at 6-7, 28.

B. Functions of the Inspector General

As noted above, the statutory Inspector General discharges three major functions: fact-finding, facilitating, and reporting.

1. Fact-finding.

Under the Act, the Inspector General exercises supervisory authority over all audits and investigations within the agency.[13] To facilitate discharge of this function and of his other functions, the Inspector General has a variety of specified powers, including a right of access to all records, reports, and other documents of the agency which are relevant to his purposes; the power to initiate investigations and make reports at his own discretion; the authority to request information from other government agencies; the power to subpena documents; a right of ready access to the head of the agency; and the power to procure necessary personnel and services within the limits set by the available appropriation.[14] The Inspector General is also authorized to receive and investigate complaints from employees of the agency, and the Act provides protection of complaining employees from disclosure of identity and reprisal.[15]

2. Facilitating.

The Inspector General's functions are not limited to managerial oversight of inspections, but include a responsibility to facilitate the agency's attainment of the Act's objectives by providing leadership, coordination and recommendations designed to promote economy and efficiency, and to detect and prevent fraud and abuse. This function includes reviewing existing and proposed legislation and regulations to determine their impact on the achievement of the objectives of the Act, and making recommendations based on these determinations. [16]

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[13] See Act §§2(1), 4(a)(1); House Report at 12-13; Senate Report at 27-29.

[14] See Act §6(a); House Report at 14-15; Senate Report at 33-35.

[15] See Act §7, Senate Report at 35-37.

3. Reporting.

The Inspector General is also responsible for keeping the agency head and Congress informed about problems in his area of responsibility, making recommendations for their correction, and indicating how well corrective measures are working. He is to discharge this function primarily by means of mandatory semiannual reports which are to include descriptions of problems, recommendations for rectifying them, information on implementation of corrective measures suggested in earlier reports, and summaries of referrals for prosecution, reports to the agency head, and audits. The semiannual reports are submitted by the Inspector General to the agency head, who is then required to forward them to Congress within a specified time period. There is also provision for expedited reporting to the agency head and Congress concerning particularly serious or flagrant problems; [17] and the Inspector General is to report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law. 18/

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[16] See Act §§2(2), 4(a)(1)-(3); Senate Report at 27-28.

[17] See Act §§2(3), 5(d); House Report at 13-14; Senate Report at 30-33. The Act provides that all semiannual reports are to be made available to the public; but this provision is mentioned only in passing in the legislative materials, and public disclosure appears to be no more than a secondary objective of the Act.

Part II--The Department of Justice Approach

The major components of the Department of Justice with responsibility for conducting or overseeing internal audits and investigations are the Office of Professional Responsibility (OPR) and the Internal Audit Staff (IAS) of the Justice Management Division (JMD). In addition, there are internal inspection units in six of the Department's operating organizations--the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Immigration and Naturalization Service (INS), 19/ the Bureau of Prisons (BOP), the Marshals Service, and the Law Enforcement Assistance Administration (LEAA).

A. The Office of Professional Responsibility

1. General Character and Functions.

The Office of Professional Responsibility was created by administrative action in late 1975 and began operation in early 1976. 20/ The Office is headed by a Counsel who reports directly

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18/ See Act § 4(d).

19/ The relationship of the INS internal inspection unit to the Special Investigator for INS mandated by the DOJ Appropriation Authorization Act, Fiscal Year 1980 (Pub. L. No. 96-132, 93 Stat. 1040 (1979)), is unclear.

20/ See 28 C.F.R. §§0.39-0.39c (general regulations governing structure and operation of OPR).

to the Attorney General or, in some instances, to the Deputy Attorney General, and has a permanent staff of eight: the Counsel, a Deputy Counsel, four Assistant Counsels, a paralegal, and a secretary. Although the permanent staff is small, OPR is authorized to borrow personnel from other components of the Department of Justice as needed for the conduct of particular inquiries, and has had as many as 70 persons at one time detailed for such purposes. Temporary assignment of personnel to OPR requires the authorization of the Attorney General or the Deputy Attorney General and, normally, the agreement of the head of the unit to which the personnel are regularly assigned. 21/

The central function of the OPR is receiving and processing information and allegations concerning conduct by Departmental employees that may be in violation of law, of Departmental regulation or orders, or of applicable standards of conduct. 22/ The Office's main concern is with ethical or criminal misconduct, as opposed, for example, to administrative violations. The major categories of cases dealt with by OPR are abuse of prosecutorial or investigative authority, mistreatment by prison or parole officials, unauthorized release of information, obstruction of justice, fraud against the government, misuse of official position, conflict of interest, improper political activity, and larceny. OPR's jurisdiction extends to all

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21/ See 28 C.F.R. §0.39b(d).

22/ See 28 C.F.R. §0.39a(a).

Departmental employees, but the Office usually plays no active role in matters involving clerks or secretaries unless the misconduct charged is serious.

The establishment of OPR was not intended to alter the primary responsibility for investigating allegations of misconduct, which normally remains with (i) the head of the component of the Department for which the employee works, or (ii) the internal inspection unit in the six parts of the Department (FBI, DEA, INS, BOP, Marshals Service, and LEAA) which have such units, or (iii) the appropriate investigative or prosecutive agency when criminal misconduct is charged. 23/ Accordingly, in most instances OPR does not conduct the full investigation, but limits itself to a preliminary inquiry designed to determine whether referral for further action is warranted.

2. Screening and Referral.

The bulk of OPR's time is devoted to review and referral of individual cases. When an allegation is received, a pre-referral preliminary inquiry may be conducted, possibly including interviews with the complainant and corroborating parties. An appropriate referral will then be made unless it is absolutely clear that an allegation has no substance (e.g., if it is obviously a result of a psychological aberration of the complainant and could have no basis in fact).

Once a decision to refer has been made, allegations

23/ See 28 C.F.R. §0.39b.

involving criminal activity are usually referred to the Criminal Division. Non-criminal allegations are referred to the office, bureau, or division in which the subject of the investigation is employed, except that in the case of the six parts of the Department having internal inspection units, referral is normally to the appropriate inspection unit. 24/

An agency or unit to which an investigation has been referred will report its findings to OPR, with either a statement of the action taken against the employee or a request for advice as to the appropriate action. OPR does not itself prosecute cases or impose administrative sanctions, but it participates in the decision process as to whether a Department employee should be indicted and recommends the imposition of particular administrative sanctions. OPR also assists in securing the resignation of employees in cases in which past experience shows that the employee will be offered the alternative of resigning or being dismissed.

3. Conduct and Oversight of Investigations.

OPR monitors the investigative activities of the six internal inspection units mentioned earlier (in FBI, DEA, INS, BOP, Marshals Service, and LEAA), though normally without close oversight of individual investigations. The internal inspection units are required to report at least monthly to OPR on investigations of matters coming directly to their attention (rather

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24/ See 28 C.F.R. §0.39a(c)(1)-(2).

than being referred to them by OPR). If an investigation by such a unit appears inadequate in light of the investigative files or reports submitted to OPR, OPR may require additional investigation or clarification.

In a relatively narrow class of cases OPR will conduct an investigation itself or directly supervise an investigation on a daily basis rather than refer it to the employing agency or to an internal inspection unit. These cases tend to be particularly sensitive matters or to involve an allegation against the head of an office, bureau, division, or board. The cases actually handled only by OPR attorneys normally involve presidential appointees and allegations that investigations or prosecutions were politically motivated. Unauthorized releases of official information are most frequently handled solely within OPR, but sometimes assistance is secured from personnel in the departmental component in which the disclosure occurred. Complex special cases are investigated by a task force of attorneys and investigators borrowed from other agencies. The members of the task force are detailed to OPR and report only to OPR. Principal examples of this approach include the investigation into ties between the FBI and a private electronics firm, and the investigation of the FBI's conduct of the Martin Luther King, Jr., security and assassination investigations.

4. Reporting, Recommendation, and Miscellaneous Functions.

OPR also makes reports and recommendations, and discharges various other functions. Monthly reports summarizing all current investigations are submitted to the Attorney General. An annual report is prepared for the Attorney General, reviewing and analyzing the prior year's activities, and recommendations are made for changes in the Department's operations and procedures based on OPR's investigatory findings. 25/

OPR also participates in educational programs for departmental employees relating to ethical responsibilities and OPR activities, and participates in the inspection of component field offices (though the latter function has been limited to DEA so far). OPR has at least one of the six internal inspection units fully audited each year by the Internal Audit Staff of the Justice Management Division, and a public report is made on the findings and conclusions of that audit.

Finally, the Attorney General may assign special functions to the OPR not directly related to internal investigations. 26/ For example, OPR conducted the COINTELPRO Notification Program by which direct victims of FBI "counter-intelligence" programs were notified that they had been the targets of improper actions and were furnished the details of those actions.

B. The Justice Management Division

The Justice Management Division has broad responsibilities in the general areas of organization, management, and adminis-

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25/ See 28 C.F.R. §0.39a(f)(3)-(4), (g).

26/ See 28 C.F.R. §0.39a(h).

tration, including such matters as budget and financial management, auditing, personnel management and training, data processing, communications, and security. The Division is headed by the Assistant Attorney General for Administration under the general supervision of the Attorney General and the direction of the Associate Attorney General. 27/

The auditing functions of the JMD are concentrated in the Internal Audit Staff. There are, in addition, three other functions of the division which have some relationship to the general area of auditing or investigation: Departmental liaison with the General Accounting Office (GAO), investigation of complaints of discrimination, and evaluation of program impact and effectiveness.

1. Internal Audit Staff.

The Internal Audit Staff, a component of JMD, is headed by a Director who reports directly to the Assistant Attorney General for Administration, and has three main functions: (1) directing and administering an audit program that focuses on the economy and efficiency of Departmental programs and operations, including financial integrity and regulatory compliance; (2) maintaining oversight of audit policies, standards, programs, and activities in all components of the Department to ensure that they conform

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27/ See 28 C.F.R. §§0.70-0.79 (1979) (general regulations governing the Division under its previous designation of "Office of Management and Finance"; new regulations relating to the Division's reorganization as JMD have not yet been issued, but e basic purposes and functions of the agency remain the same).

with standards established by the Comptroller General; and (3) providing staff support, pursuant to 28 C.F.R. §0.39b(d), to the Office of Professional Responsibility in investigations of alleged misconduct or wrong-doing. Discharge of the last general function--support of OPR--involves both conduct of special inquiries at the request of OPR and referral to OPR of evidence of misconduct which appears in the course of IAS's other activities. 28/

In the conduct of its normal audit and oversight activities, IAS is governed by DOJ Order 2900.1B (11/1/77) (implementing 31 U.S.C. §66a), subject to certain changes effected by a recent reorganization (see discussion at p. 20 infra). The Order provides that the audit jurisdiction of IAS runs to all activities and functions within the Department 29/ except for the audits of records of the recipients of LEAA contracts and grant funds. The responsibility for auditing such contracts and grants is assigned by statute 30/ to the LEAA Administrator and IAS is

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28/ In the last twelve months IAS has, for example, conducted administrative inquiries at the request of OPR into problems involving the Bureau of Prisons, INS officials, Community Relations Service officials, and Antitrust Division officials, and referred to OPR allegations made by an INS official to IAS concerning possible fradulent contracts, and evidence concerning questionable use of government credit cards by FBI employees.

29/ This is true although the FBI's Office of Inspections also audits the Bureau's operating and financial management activities, and several organizations (DEA, Marshals Service, and BOP) have management review units that report directly to senior level officials. Further, IAS access to certain information contained in FBI investigative files may be limited to ensure that the identity of FBI informants and confidential sources is not disclosed.

30/ See Justice Systems Improvement Act of 1979, Pub. L. No. 96-157, §§ 102(8), 817(b), 93 Stat. 1171 (1979).

barred by regulation 31/ from auditing such activities. However, the performance of LEAA's Office of Audit and Investigation is itself subject to audit by IAS as part of IAS's responsibility for audit of all programs and functions of LEAA. 32/

Order 2900.1B also provides that IAS is to have "complete freedom and authority" to select and schedule organizations, programs, and functions for auditing. Audits by IAS may also be requested by management officials. 33/ The heads of all organizational units within the Department are directed to provide full support to the IAS in its conduct of audits, including granting access to records and employees, giving prompt consideration to findings and recommendations, and initiating appropriate follow-up actions. 34/ Officials of an agency or program being audited are consulted on scheduling and are entitled to submit comments on proposed findings before a report is completed, but in making final decisions on such matters as scheduling and report content, IAS is not subject to the control of the subjects of the audit. 35/

When an audit is completed, the conditions ascertained in the audit, together with appropriate recommendations, are reported

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31/ 28 C.F.R. § 0.76(t).

32/ See DOJ Order 2900.1B, para. 4(a).

33/ See DOJ Order 2900.1B, para. 5(b), 8(a)(1).

34/ See id. para. 5(c).

35/ See id. para. 5(b), 8(a)-(b).

to the Attorney General or other appropriate officials for use in correcting deficiencies or making suggested changes. 36/ During 1979, the IAS audit staff (50 accountants, ADP specialists, program analysts; 7 supporting personnel) issued 43 audit reports on various aspects of the Department's operations, conducted 11 EEO investigations and responded to 3 administrative inquiries.

IAS maintains a follow-up system as to actions taken on the reported conditions and recommendations, and will regard an audit assignment as closed only after receipt of an organization's written response that specified actions have been taken. The head of an audited organizational unit is required to prepare, within a specified time period, a progress report for the Assistant Attorney General for Administration, indicating (1) for each adopted recommendation on which action has been completed, a description of the action taken and an estimate of resulting annual savings or other expected improvements; (2) for each adopted recommendation on which further action is necessary, a description of the action planned and a target date for its completion, together with subsequent quarterly progress reports until all proposed actions have been completed; and (3) for each rejected recommendation, a statement explaining the reasons for its rejection, or a description of alternative courses of action being taken or considered. Disagreements between IAS and management officials as to findings or recommendations, or tardiness or neglect in taking required action,

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36/ See *id*. para. 7(b).

are resolved at the operating level where possible, but significant matters which cannot be resolved at the operating level are referred by the Director of IAS to the Assistant Attorney General for Administration for resolution. 37/

2. Other Relevant Functions.

Under DOJ Order 2900.1B, the Internal Audit Staff performed certain additional functions, related to its audit and investigation responsibilities, which have recently been reassigned to separate components of JMD. Specifically, these functions are GAO liaison, investigation of complaints of discrimination, and program evaluation. 38/

Liaison with GAO is currently carried out within the Office of the Assistant Attorney General for Administration. This function is intended to provide the Department's senior management with a single information source regarding on-going GAO activities within components of the Department and to serve as the focal point between the Attorney General and the GAO in responding to GAO recommendations.

Investigations of complaints alleging discrimination on the basis of race, color, religion, sex, age, or national origin are carried out by the Equal Employment Opportunity Staff of JMD. Such investigations are an integral part of the general EEO program of the Department of Justice.

37/ See id. para. 8.

38/ See DOJ Order 2900.1B, para. 7(a)(4)-(5), (6)(c).

Evaluation of program impact and effectiveness has been assigned in part to JMD's Program Evaluation Staff. One of the purposes of this function is to provide the Attorney General and other senior Department officials with insights on substantive policy and program strategies to meet executive and legislative branch priorities regarding the administration of justice. Evaluations of this sort are not always executive branch initiatives, but are often conducted as a result of requests for program evaluation from Congress, routed through the Attorney General.

C. The Internal Inspection Units

The internal inspection units in six of the Department's operating organizations (FBI, DEA, INS, BOP, Marshals Service and LEAA) vary in size and volume of complaints investigated. In 1979, for example, the one investigator assigned to LEAA's Office of Audit and Investigation (whose staff of 80 professionals audit LEAA's third-party grants and contracts) conducted approximately 5 internal investigations. By contrast, the staff of 46 investigators comprising DEA's Office of Internal Security conducted approximately 127 integrity-misconduct investigations during the same period.

D. Contemplated Changes in Current Operations

1. OPR Responsibility Relating to Detection of Waste, Fraud and Error.

A proposed departmental order, currently at the draft stage, would strengthen the Department of Justice's efforts in detecting and suppressing fraud, mismanagement, and abuse within the Department. The order contemplates additional responsibilities in these areas for the Office of Professional Responsibility; the Internal Audit Staff of JMD; internal audit, inspection, and management review groups within individual components of the Department; and the FBI.

OPR would be charged with overall responsibility for implementation of the order. Its specific duties would include the establishment of policies and procedure for reporting of suspected fraud and malfeasance, and the review of reports submitted relating to such misconduct.

IAS's duties under the order would include incorporating within its normal audit activities measures designed to detect malfeasance and fraud, ensuring that its personnel are adequately trained in fraud detection techniques, referring cases of suspected fraud or malfeasance to OPR in the specified format, and ensuring compliance by internal audit and management review groups with their responsibilities under the order.

The internal audit, inspection, and management review groups similarly would be directed to include as part of their normal review activities measures designed to detect malfeasance, fraud, and incompetence, to ensure adequate training of their personnel in fraud detection techniques and to report suspected fraud and malfeasance to OPR.

The FBI would be directed to investigate suspected fraud and malfeasance cases referred to it by OPR, and to submit an investigative report to OPR on each suspected case of fraud or malfeasance.

Some aspects of the proposed order would simply formalize existing practice. For example, IAS always has referred suspected fraud cases to OPR, and frequently has conducted inquiries into possible fraud at the request of OPR. The overall effect of the order would be to intensify affirmative efforts by the affected groups in searching out fraud and abuse, and to vest in OPR general authority over the Department's activities in this area.

2. Procedure Relating to Employee Complaints and Protection of Whistleblowers.

Employees of the Justice Department generally enjoy protection from reprisal for disclosure of misconduct under 5 U.S.C.A. §2302(b)(8) (Cum. Supp. 1979). This provision is enforced by the activities of the Special Counsel of the Merit Systems Protection Board pursuant to 5 U.S.C.A. §§1206-1208 (Cum. Supp. 1979).

The FBI is specifically exempted from the protection normally afforded to executive employees under these general provisions, but a special provision, 5 U.S.C.A. §2303 (Cum. Supp. 1979), prohibits reprisal against FBI employees for disclosure of misconduct, and directs the Attorney General to prescribe regulations for enforcing this prohibition. The Attorney General has submitted to the President a proposed order implementing this provision, as well as expanding the current regulations governing OPR. The major changes that would be effected by the order include the following:

(1) The specification of the class of complaints which OPR is to receive and review would be expanded. 28 C.F.R. §0.39a(a) states that OPR shall receive and review information and allegations "concerning conduct by a Department employee that may be in violation of law, of Department regulations or orders, or of applicable standards of conduct." The proposed order, by contrast, follows the language of 5 U.S.C.A. 2302 (b)(8) (Cum. Supp. 1979) in characterizing the relevant class

of complaints as also including "mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety."

(2) The proposed order states that OPR shall receive and review allegations of reprisal against employees or applicants for complaints falling within the specified class. There is no corresponding provision in the current regulations governing OPR.

(3) The proposed order makes explicit provision for protection by OPR of the confidentiality of complaining employees, corresponding to a like statutory restriction on the Special Counsel of the Merit Systems Protection Board relating to disclosures to the Special Counsel, Inspectors General, and other officials designated to receive such disclosures. 39/

(4) The proposed order authorizes OPR to request the Attorney General to stay any personnel action against an FBI employee if it appears that the action is taken as improper reprisal for a disclosure of information. This is comparable to the authority conferred on the Special Counsel of the Merit Systems Protection Board to request stays of apparently improper personnel action against non-FBI employees. 40/

Part III--A Comparison of the Department of Justice Approach and the Office of Inspector General

The basic functions of the Inspector General established

39/ See 5 U.S.C.A. §1206(b)(1)(B) (Cum. Supp. 1979).

40/ See 5 U.S.C.A. §1208 (Cum. Supp. 1979).

by the 1978 Act and related legislation are (1) to conduct and supervise audits and investigations relating to programs and operations of the agency; (2) to provide leadership and coordination, and recommend policies, regarding activities designed to promote economy and efficiency and to prevent and detect fraud and abuse; and (3) to keep the head of the agency and Congress informed concerning internal problems and deficiencies and about the necessity for and the progress of corrective measures. 41/ The discussion in Part II above demonstrates that the organizations having audit and investigation responsibilities within the Department--OPR, IAS, and the six internal inspection units--jointly exercise a comparable range of functions, with the exception that provision of information to Congress is not a central function of any of these organizations. The discussion below describes in greater detail the similarities and differences between the Department's approach and the statutory Inspector General approach in five basic areas: (1) institutional independence; (2) duties and responsibilities; (3) powers; (4) handling of employee complaints; and (5) reporting requirements.

A. Safeguards of Institutional Independence

As mentioned above, the lack of independence of existing audit and investigation units was a major motive for the 1978 Act. The major Congressional responses to this problem are contained in section 3 of the Act--the Inspector General's

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41/ See, e.g., 1978 Act, §2.

office is established by statute and cannot be abolished by administrative action; the Inspector General is a Presidential appointee and can be removed only by the President; and even the head of the agency cannot prevent an audit or investigation by the Inspector General.

By contrast, OPR was created administratively and has no statutory guarantee of continued existence. Nor is there any statutory requirement for the existence of IAS or JMD as such, though 31 U.S.C. §66a implies that there must be some operation within an executive agency carrying out financial control functions comparable to those of IAS and JMD.

So far as concerns appointment and removal, the permanent staff of OPR are not political appointees. All are in the civil service and can be dismissed only for cause or misfeasance.

OPR and IAS do not have the extraordinary, legislative assurance of exemption from control by superior executive officials which the last sentence of section 3(a) of the Act grants the Inspectors General. However, substantial safeguards of the independence of their auditing and investigative activities exist under current arrangements. IAS has "complete freedom and authority" to select and schedule organizations, programs, and functions for auditing. 42/ Most importantly, this means that a targeted organization has no power to prevent an audit. While OPR's activity is limited in most cases to screening and

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42/ See DOJ Order 2900.1B para. 5(b).

referral, it too can and does undertake its own investigation of appropriate cases. When it undertakes such an investigation, it acts with the full authority of the Attorney General.

B. Duties and Responsibilities

Section 4 of the 1978 Act identifies five specific duties and responsibilities that are to be carried out by the Inspector General: (1) conducting and overseeing audits and investigations; (2) reviewing existing and proposed legislation and regulations in relation to their effect on promotion of economy and efficiency and prevention of fraud and abuse; (3) recommending and carrying out other activities designed to promote economy and efficiency and prevent fraud and abuse; (4) managing relevant relationships between the agency and other government agencies; and (5) keeping the head of the agency and Congress informed on relevant matters.

In relation to the first point--conduct and oversight of audits and investigations--the Department of Justice does not employ the type of unified command contemplated by the Inspector General legislation. Eight separate organizations--IAS, OPR, and six internal inspection units--have special responsibility for audits and investigations. However, these organizations have cooperated closely in the past in carrying out activities relating to the investigation of fraud and abuse, and a still closer working relationship is contemplated by the proposed order discussed above 43/ which would give OPR general author-

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43/ See p. 22, supra.

ity, and IAS special responsibility, in implementing procedures designed to detect and suppress fraud and mismanagement.

The review of existing and proposed legislation and regulations in relation to their effect on promotion of economy and efficiency and prevention of fraud and abuse is not now centralized within the Department. However, JMD reviews legislation for its potential impact on the Department's resources 44/ and appropriate elements of the Department routinely review legislation and regulations, existing or proposed, for their effect on law enforcement activities.

Under section 4(a)(3), the Inspector General exercises a broad function of recommending policies and overseeing other activities designed to promote economy and efficiency and to prevent fraud and abuse. The legislative history suggests that this provision was motivated by the general lack of affirmative programs designed to uncover fraud or abuse in agencies covered by the Act, and by their tendency to rely instead on complaints. 45/ Although the bulk of OPR's investigations in the past has arisen in response to specific complaints and allegations, the proposed order discussed above contemplates extensive affirmative efforts under the general direction of OPR to discover fraud and mismanagement. It is also a normal part of the activities of OPR and IAS to make recommendations for changes in departmental operations

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44/ See 28 C.F.R. § 0.75(q).

45/ See House Report at 5; Senate Report at 27.

and procedures based on their investigatory and audit findings. 46/

Section 4(a)(4) makes the Inspector General responsible for coordinating with other agencies his agency's activities relating to promotion of economy and efficiency and prevention of fraud and abuse, and to identification and prosecution of participants in fraud and abuse. This provision was included largely in response to concerns expressed by the Justice Department regarding liaison with and cooperation from other agencies in investigating and prosecuting fraud and other misconduct. 47/ The Department believed that the existence of a single official in each agency with overall responsibility for audit and investigation functions would greatly facilitate its activities in this area. This rationale is largely inapplicable to the Department of Justice itself, since intra-Department coordination does not raise liaison problems comparable to those which arise in dealing with outside agencies.

The reporting and informational function described in section 4(a)(5) of the Act will be discussed in section E below.

Section 4(b)-(d) of the Act sets out various additional functions of the Inspector General. Section 4(b) indicates that the Inspector General should insure compliance with GAO standards,

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46/ OPR, for example, was instrumental in bringing about improvements in the organizational structure of the FBI's internal inspection unit and in the FBI's accounting and procurement practices.

47/ See House Report at 5-6, 13; Senate Report at 6-7, 28.

a function that is performed by IAS within the Department. Section 4(c) directs the Inspector General to avoid duplication of effort and achieve effective coordination with the GAO. This function is performed by JMD. Section 4(d) directs the Inspector General to refer possible criminal matters to the Department of Justice. As indicated above, IAS and OPR make appropriate referrals of potential criminal cases.

C. *Powers*

Section 6 of the 1978 Act sets out the principal powers of the Inspector General. These include powers relating to the acquisition of information, including a right of access to all relevant documents and other materials available to the agency, subpena power, and power to acquire personnel and services.

OPR and IAS jointly have information-gathering powers comparable to, or greater than, those of an Inspector General. DOJ Order 2900.1B para. 5(c) directs the heads of all organizational units to provide "full support and cooperation to the Internal Audit Staff . . . including freedom of access to records and employees." In appropriate cases, OPR can also make use of grand juries in investigation. Thus, its information gathering powers exceed those of an Inspector General, since OPR can compel testimony by means of a grand jury, while an Inspector General's subpena power probably does not extend to testimony. 48/

48/ See *Legislation to Establish Offices of Inspector General: Hearings on H.R. 8588 Before the Subcomm. on Governmental Efficiency and the Dist. of Colum. of the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 39 (1978) (statement of John C. Keeney).

The independent employee and services procurement powers of the Inspector General differ markedly from the corresponding arrangements in OPR. As indicated earlier, OPR has a small permanent staff and borrows additional personnel as the need arises. Temporary assignment of personnel to OPR requires the direction of the Attorney General or Deputy Attorney General and (usually) the consent of the head of the normal employing unit. IAS has no mechanism for a short-term increase in its complement of personnel and must rely on the normal budgetary process for increases in its staff.

D. Employee Complaints

Section 7 of the 1978 Act authorizes receipt and investigation by the Inspector General of employee complaints relating to specified types of misconduct, directs preservation of confidentiality by the Inspector General unless he determines that disclosure of the complainant's identity during the course of an investigation is unavoidable, and prohibits reprisals for making complaints unless the complaint was made "with the knowledge that it was false or with willful disregard for its truth or falsity."

The provisions relating to employee complaints in the proposed Department order discussed above are quite similar. OPR is directed to receive and review complaints relating to the same types of misconduct as those specified in section 7(a) of the Act. Confidentiality is required unless the OPR Counsel determines that "disclosure of the identity is necessary to resolve the allegation." Protection for non-FBI Department of Justice employees against reprisal is provided by 5 U.S.C. §§2301(a)(9), 2302(b)(8) (Cum. Supp. 1979), and for FBI employees by 5 U.S.C. §2303 (Cum. Supp. 1979). However, the protection afforded by these statutes seems narrower than that afforded by section 7(c) of the Act, since the title 5 provisions afford protection only when the complainant discloses information which he "reasonably believes evidences" the specified types of misconduct, while section 7(c) prohibits reprisal for disclosure of information to the Inspector General unless the complainant knows that it is false or acts in "willful disregard" of its truth or falsity.

E. Reporting Requirements

Section 5 of the Act requires regular reports by the Inspector General to Congress and to the head of the agency detailing such matters as problems and deficiencies, recommendations for improvements, and progress on the implementation of corrective measures.

One difference between the Inspectors General and current operations in the Department is the absence of provision for regular and comprehensive reporting to Congress by OPR and IAS. The scope of internal reporting to responsible officials within the Department, however, is comparable to the internal reporting done by the Inspector General. OPR makes monthly reports to the Attorney General summarizing all current operations and an annual report reviewing and analyzing the prior year's activities and making recommendations for improvements. IAS makes reports on completed audits to the Attorney General or other appropriate officials, with recommendations for improvements, and monitors compliance with these recommendations. An organizational unit which has been audited is required to submit progress reports to the Assistant Attorney General for Administration on its implementation of corrective measures.

Part IV--Evaluating the Department's Approach and Possible Changes

A. Evaluating the Department's Approach

The 1978 Act sought to improve the performance of federal agencies in four areas: detecting and preventing misconduct; maintaining financial integrity; promoting economy and efficiency; and monitoring administrative problems, deficiencies, and corrective actions. The Department's performance in these areas can be measured, first, in terms of its discharge of the functions necessary to achieve these objectives and, second, in terms of the shortcomings seen to exist in other agencies prior to the 1978 Act.

1. Functions--Efficacy of OPR.

The fact-finding, facilitating, and reporting functions, deemed by the 1978 Act to be instrumental in realizing its purposes, are being performed within the Department, principally by OPR. In assessing the efficacy of the Department's performance of those functions, its ability to detect and prevent misconduct must be emphasized. OPR is the Department's primary mechanism for dealing with matters of personnel integrity, and it is OPR's operations that must bear particular scrutiny in measuring the Department's performance.

The OPR arrangement does not and could not exist elsewhere. OPR has a broader mandate than a statutory Inspector General; it measures the adherence of the Department's lawyers and law enforcement officers to stringent standards of professional conduct that are apart from the obligations imposed generally on federal employees by law and administrative regulations. A determination by OPR that a lawyer or law enforcement officer has failed to comply with those standards cuts deeply, both as a matter of professional standing and because such employees, lacking full civil service protections, are more vulnerable to adverse reports than most employees in government service.

The resources available to OPR to perform its functions exceed those available to any statutory Inspector General. While OPR's Counsel has only a small permanent staff, he can call upon the immense investigative and prosecutorial resources of the Department. He can use the FBI to investigate administrative as well as criminal complaints and frequently he has. 49/ No statutory Inspector General has any comparable resource. Unlike an Inspector General,

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49/ The history of OPR's operations demonstrates not only that the resources available within the Department exceed the resources available to the Inspectors General, but also that it is possible to utilize investigative personnel to investigate complaints against their colleagues. In the U.S. Recording Company investigation, for example, the issue arose whether FBI personnel

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OPR can direct the course of an FBI investigation, follow up on referrals to United States Attorneys and the Criminal Division, and direct grand jury proceedings. 50/

The existence of these resources has permitted a level of investigative activity fully equal to the need. In 1978 298 complaints were received directly by OPR and 305 matters were closed. In 1979, OPR received 401 complaints or other requests for investigation of Departmental employees and closed 349. 51/

OPR's preeminence in discharging the fact-finding function within the Department will soon be matched by its enlarged role in discharging the facilitating function. With implementation of the proposed order, discussed above, OPR will take the lead responsibility for the detection and reporting of waste, fraud, and abuse in the Department's programs and operations.

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could be used effectively to investigate allegations of misconduct against their colleagues within the Bureau. The results of that investigation indicate that FBI agents, operating under OPR supervision, can be used effectively. Moreover, in August 1978, GAO reported favorably on the ability of the Bureau to police its own personnel by virtue of changes made within its internal inspection operations. OPR was instrumental in bringing about improvements in that operation and continues to review and evaluate operations of all the Department's internal inspection units and to recommend changes where necessary.

50/ Technically, OPR could also undertake assignments to conduct prosecutions in the cases it develops. However, since OPR is frequently called upon to investigate alleged abuses of prosecutorial discretion, it has determined that, as a matter of policy, it will not seek authority to conduct a prosecution.

51/ These figures do not include approximately 1,000 investigations conducted by the internal inspection units and reported, on a monthly basis, to OPR. Nor do they include minor misconduct handled at the field level.

The reporting functions discharged by OPR are also significant. As noted above, OPR keeps the Attorney General fully informed of problems within the Department. Reports are made routinely on a monthly and annual basis and more frequently when warranted by circumstances. OPR's annual reports to the Attorney General are disseminated publicly and are available upon request. The dissemination practice is the same as with IAS reports. At his request, Senator Baucus, for example, has been supplied with IAS reports covering several years and has been assured of receiving future IAS reports on a continuing basis.

2. The Department's Response to Inadequacies that Prompted the 1978 Act.

The legislative history of the 1978 Act shows that it was designed to meet shortcomings in the audit and investigation capabilities of various federal departments and agencies. The perceived shortcomings were significant: problems in cooperating with law enforcement agencies, fragmentation and lack of resources, and absence of an independent entity to perform monitoring functions. Those inadequacies do not exist in this Department's mechanism and processes for self-monitoring.

Since OPR and IAS are components of the Department, interagency cooperation obviously presents no problem. OPR itself provides an excellent vehicle for coordination of the activities of the six internal inspection units in the Department.

The internal audit function is effectively consolidated in IAS, with the exception of responsibility for auditing third-party records and performance under contracts and grants awarded by LEAA. However, LEAA's audit performance is itself subjected to internal audit by IAS.

The internal investigation operations within the Department are under the general supervision of OPR, so that even decentralization of these activities presents no serious problem. Indeed, OPR now performs such uniquely effective oversight that consolidating all internal inspection units is most unlikely to add any benefits.

In terms of resources, the Department's internal audit and investigative capabilities are fully adequate. The investigative resources of OPR are Department-wide and are made available in such quantity as is warranted by the needs of a given investigation. The resources available for internal audits are also sufficient.

As to the question of independence, the present structure in the Department achieves at least as much as could be hoped for from an autonomous Inspector General. During more than four years of existence, OPR has functioned completely free of any inhibition in the scope, depth, direction, or any other aspect of its fact-finding functions. The head of OPR has discretion to initiate inquiries, requisition personnel and other resources to carry them through, and determine when they should be brought to a close. Throughout its history, OPR has been given the ity from those made about employees in other agencies. For example, delicate judgments about the exercise of prosecutorial discretion that frequently must be made by OPR ordinarily are not within the province of the Inspectors General in other agencies.

At the same time, OPR must exercise caution when reviewing complaints from targets of an investigation or prosecution lest the powers of its office be turned into a mechanism to hinder or delay the proper course of investigation, indictment, or trial. Inspectors General within other agencies do not ordinarily have to be concerned that their operations may result in an obstruction of justice.

The converse of the Department's emphasis on law enforcement as its principal mission is its lack of major programmatic responsibilities. With the exception of LEAA, the Department does not have responsibility for distributing vast amounts of federal funds. Even when LEAA is taken into account, the Department's annual budget is one of the smallest among the major executive departments. Its program operations do not present the same opportunities for fraud and waste that obtain within other agencies. As a consequence, the Department's focus is primarily on matters of personnel integrity rather than matters of financial integrity.

Congress itself has recognized the unique position of the Department. At the very time it was creating Inspectors General in other executive agencies, it declared that it would be "undesirable to superimpose an Inspector General, who is basically a law enforcement official, on law enforcement agencies." 53/ Of course, a judgment that an Inspector General is inappropriate for the Department does not mean that no one should watch the watchers. 54/ It does suggest, however, that any proposed change in the Department's approach to the monitoring function should take account of the Department's marked differences from other agencies in regard to primary mission and operating characteristics.

2. Consolidating Internal Audit and Investigation Functions.

As has been noted, the internal audit and investigation functions of the Department are less completely centralized than in agencies using the Inspector General model. Consolidation of these functions within the Department could take either of two forms: first, combining IAS and OPR; second, merging IAS and other internal audit staffs on the one hand, and OPR and other internal inspection units on the other hand.

Although IAS and OPR are not now parts of a single entity and although they operate within different lines of authority, they nonetheless mesh closely in their actual functions. Generally speaking, the relationship between the two offices parallels that between an Assistant Inspector General for Auditing and

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53/ Senate Report at 14.

54/ Indeed, by establishing OPR several years before the creation of statutory Inspectors General, the Department demonstrated its independent recognition of the desirability of monitoring its own operations.

units were under consolidated organizational controls.

Within their respective jurisdictions, however, OPR and IAS have Department-wide oversight responsibilities. Although they lack formal organizational control over unconsolidated internal audit or internal inspection staffs, they have much to say about the conduct of operations within those other units. At the same time, the present decentralization of functions may ensure more rigorous oversight and criticism of the other units than if they were merged into IAS or OPR. 57/

3. Reporting.

A final difference necessitated by the Department's character is in the manner of reporting to Congress. Internal investigations within the Department often focus on alleged abuses of investigatory or prosecutorial discretion and may involve on-going investigations or prosecutions. Prematurely reporting such matters externally can threaten the integrity of the Department's law enforcement mission; such reporting should be reserved to the Attorney General.

4. Independence.

It is clear that OPR's counsel should be free from interference in the proper discharge of the functions of that office. The Department now has, and it should have, a senior official

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57/ The present structural arrangements provide a layer of internal review over the reviewers that would be destroyed through a merger of operations. In its first year of operation, OPR requested an IAS survey of the Department's other internal inspection units. OPR has requested that IAS audit the operations of at least one of the other units in each year since.

an Assistant Inspector General for Investigations, in the framework of the 1978 statute. On occasion, when IAS acts under the direction of OPR, the operational relationship comes even closer to the Inspector General model. 55/

Placing control of the audit and investigation functions in one official would not improve the smooth working arrangement that now exists. 56/ Furthermore, the Department has no major, disparate programmatic functions (presenting jurisdictional obstacles to unitary review) that might better be monitored by a consolidated unit. In addition, there is no need for a single official with audit and investigative responsibility to serve as a focal point to cooperate with the Department in investigating and prosecuting fraud cases.

As to the consolidation of all internal audit staffs and of all internal inspection units, at first glance it might seem that there would be some advantage to providing the heads of the IAS and OPR operations, respectively, with organizational control over all internal audit and investigative staffs. There are indications, for example, that the LEAA auditing function could be improved, as well as the internal inspection function within INS, if the

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55/ This latter mode would obtain more frequently under the proposed order discussed above.

56/ Interviews with statutory Inspectors General indicate that the current relationship between internal audit and internal investigation within the Department may be as great as within their own agencies. On balance, the minor administrative advantages that might be achieved (e.g., easier communication between IAS and OPR) are outweighed by the disadvantages (e.g., diversion of OPR management time to more narrow financial and procedural matters).

whose primary mission is internal investigation and whose authority is commensurate with that mission. However, it should be remembered that the mission and authority of this official closely parallel those of the Attorney General. Thus, it may be one thing to recognize the need for such an official; but it is quite a different matter to assert that this official should have investigatory authority and capability paramount to that of the Attorney General. 58/ When it comes to conducting the essential business of the agency, no existing Inspector General has authority that equals, let alone exceeds, that of the head of the agency.

To recognize that as a general matter the Attorney General should have ultimate authority over investigations and prosecutions is not to say that this authority should not be placed elsewhere in an appropriate case. Indeed, this is precisely what the OPR regulation requires: whenever an investigation might be thought to implicate the Attorney General, OPR can obtain necessary authority and resources from either the Deputy Attorney General or the Solicitor General. 59/ The result of this practical arrangement is that the

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58/ The fact that, under the Department's approach, OPR Counsel's prosecutive recommendations are subject to the ultimate decision of the Attorney General does not make his functional independence any less than that of the Inspectors General. Congress has charged the Inspectors General to report violations of federal criminal law to the Attorney General. 1978 Act, § 4(d). The Attorney General, in turn, is charged to investigate and to prosecute such matters as part of his responsibilities as the nation's chief law enforcement official. He must exercise a similar responsibility within his own agency.

59/ If referral to the Attorney General--or to the Deputy Attorney General--would be inappropriate (impliedly, where one or the other were the subject of a complaint), OPR's regulation mandates that the matter be referred to whichever of them would be proper or to the Solicitor General. See 28 C.F.R. § 0.39a(c)(3).

authority of both the Attorney General and OPR to discharge their responsibilities is preserved. In sum, then, OPR and IAS are invested with the substance of independence even though the formalities are different from those that characterize the statutory Inspector General. The autonomy of the two offices has not been challenged, and they have established a practice and tradition of acting with independence.

It has been suggested that, although the necessary degree of independence has been achieved in practice, especially the independence of OPR could be enhanced by enacting a statute specifying in detail its powers and authority. A statutory recital of the OPR mission might accentuate OPR's permanence, but it is difficult to see how it could enlarge its freedom of action.

It has also been suggested that the arrangement might be given greater independence by providing for Presidential appointment of the head of OPR. If the appointment is to be at the pleasure of the President, as the 1978 Act provides with respect to Inspectors General, it is hard to see how any greater measure of independence would be accorded than is now true of numerous Presidential appointees in the Department of Justice who are subordinate to the Attorney General and who are commonly replaced by the President at the recommendation of the Attorney General. If it were suggested that the appointment be for a fixed term of years, the head of OPR would be given different and greater standing than Congress has thought desirable to give to the Inspectors General—a course that does not seem warranted. Thus, it would seem that while the effect of Presidential appointment conceivably could be to enlarge the OPR Counsel's prestige, it would be unlikely to enhance the Office's freedom of action.

A final possibility is to require the head of OPR to report regularly and publicly on activities of the office. Any fear than an Attorney General might interfere, directly or indirectly, with OPR's functions would be preempted by requiring OPR Counsel to report any instance in which the Attorney General declines authority or resources that OPR Counsel requests as necessary to discharge his responsibility.

CONCLUSION

The Inspector General device is but one way to achieve the objectives of the 1978 Act. The Department has been achieving those objectives in its own way. The Department's approach has proved suited to its unique mission as a law enforcement agency. Its performance of the Inspector General functions has been effective and shows no sign of the shortcomings that necessitated the 1978 legislation to achieve effective monitoring in other agencies. Without a clear demonstration that the Inspector General approach is superior to the Department's arrangement, 60/ no dramatic overhauling of the Department's self-monitoring operations is necessary.

60/ The Inspectors General are a new phenomenon within the Federal government. It is too early to tell whether they have been able to meet the high expectations of the legislation that created them. Their performance may well demonstrate that ours is a government of laws and men, that no structure is perfect, and that the talents, competencies, and motivations of the people involved will have much to do with their performance.

I

96TH CONGRESS
1ST SESSION

H. R. 4121

To provide a statutory charter for the Office of Professional Responsibility of the Department of Justice, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 16, 1979

Mr. PREYER (for himself, Mr. FOUNTAIN, Mr. DRINAN, and Mr. WEISS) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To provide a statutory charter for the Office of Professional Responsibility of the Department of Justice, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) title 28 of the United States Code is amended by adding after chapter 35 the following new chapter:

"CHAPTER 36—OFFICE OF PROFESSIONAL RESPONSIBILITY

"Sec.
"551. Organization.
"552. Functions.
"553. Relationship to other departmental units.
"554. Committee on Professional Responsibility.

"§ 551. Organization

"There shall be in the Department of Justice an Office of Professional Responsibility (referred to in this chapter as "the Office") which shall be headed by a Counsel, appointed by the President, by and with the advice and consent of the Senate. The Counsel shall be subject to the general supervision and direction of the Attorney General or, whenever appropriate, of the Deputy Attorney General or the Solicitor General.

"§ 552. Functions

"(a) The Counsel on Professional Responsibility shall receive information or allegations, direct and request investigations, review reports and findings, and make recommendations to the Attorney General or other appropriate official concerning conduct by a Department employee that may be in violation of law, of Department regulations or orders, or of applicable standards of conduct. Internal inspection units within bureaus of the Department shall retain their primary responsibility to receive such information or allegations concerning employees in their respective bureaus and to conduct investigations, subject to reporting requirements of this chapter.

"(b) Any employee of the Department with knowledge of conduct by a Department employee that may be in violation of law, of Department regulations or orders, or of applicable standards of conduct, or to whom such information is presented, shall promptly report such knowledge or information to the Counsel on Professional Responsibility or, if employed by a Department bureau with an internal inspection unit, to that unit unless such a referral would be inappropriate.

"(c) Upon receipt of such a report, the Counsel on Professional Responsibility shall make such preliminary inquiry as may be necessary to determine whether the matter appears to warrant further examination. The Counsel on Professional Responsibility shall refer any matter that appears to warrant examination in the following manner:

"(1) if the matter appears to involve a violation of law, he shall refer the matter to the head of an investigative agency having jurisdiction to investigate such violations;

"(2) if the matter appears not to involve a violation of law, he shall refer the matter to the head of the office, division, bureau, or board to which the employee is assigned, or to the head of its internal inspection unit;

"(3) if referral to the official indicated in paragraph (1) or (2) of this subsection would be inappropriate or if the Counsel on Professional Responsibility elects, he may retain the matter for investigation by his Office or refer the matter with his recommendation to the Attorney General and the Deputy Attorney General or, if referral to both the Attorney General and the Deputy Attorney General would also be inappropriate, to whichever of them would be proper or to the Solicitor General.

"(d) The Counsel on Professional Responsibility upon retaining a matter for investigation by his office may, upon notification to the Attorney General, assign any task force or individual to undertake the investigation and make any other special arrangements that appear warranted, except that the Attorney General may revoke this authorization on a case-by-case basis upon written notice to the Counsel on Professional Responsibility.

"(e) The Counsel on Professional Responsibility shall undertake any investigation of a matter that may be assigned to him by the Attorney General, the Deputy Attorney General, or the Solicitor General, or cooperate as directed with any other organization, task force, or individual that may be assigned by such official to undertake an investigation.

"(f)(1) Any unit or official to whom a matter is referred under subsection (c)(1) or (c)(2) shall timely advise the Counsel on Professional Responsibility of the findings of the investigation and the planned disposition of the matter.

"(2) The Counsel on Professional Responsibility may refer back or may refer elsewhere for investigation, or may investigate himself, a matter if the Counsel believes that a significant question exists as to the adequacy of the prior investigation.

"(3) The Counsel on Professional Responsibility may, on a basis of any findings reported to him or investigation conducted by him—

"(A) recommend to an appropriate division or United States Attorney the prosecution of a Department employee; and

"(B) recommend to the Attorney General or any appropriate supervising official that particular administrative sanctions be taken against a Department employee.

"(4) If any prosecution or sanction recommended under paragraph (3) are declined, the declining official shall state in writing to the Counsel on Professional Responsibility the reasons for declining to prosecute or administer such sanctions.

"(g) The head of each internal investigating unit maintained within a bureau of the Department shall report at least monthly concerning investigations and other activities of his unit to the Counsel on Professional Responsibility in such manner as the Counsel shall prescribe.

"(h) The Counsel on Professional Responsibility shall submit to the Attorney General and the Deputy Attorney General or, if submission to both would be inappropriate, to whichever of them would be proper or to the Solicitor General—

"(1) an immediate report concerning any matter that should be brought to the attention of a higher official;

"(2) a monthly report summarizing all matters referred under subsection (c) of this section during the preceding month; and

"(3) an annual report on the operation of his office and a review and evaluation of the activities of internal inspection units or, where there are no such units, the discharge of comparable duties within the Department.

"(i) If the Counsel on Professional Responsibility conducts or causes to be conducted an investigation of an allegation that the Attorney General may be in violation of law, of Department regulations or orders, or of applicable standards of conduct, he shall, in addition to the requirements of section (h)(1), report the findings of his investigation to the Judiciary Committees of the House of Representatives and the Senate, and to the Counsel to the President.

"(j) The Counsel on Professional Responsibility shall submit recommendations to the Attorney General and the Deputy Attorney General on the need for changes in policies or procedures that become evident during the course of his inquiries.

"(k) The Counsel on Professional Responsibility shall undertake any other responsibilities assigned by the Attorney General, including duties relating to the improvement of the performance of the Department.

"§ 553. Relationship to other departmental units

"(a) Primary responsibility for assuring the maintenance of the highest standards of professional responsibility by Department employees shall continue to rest with the heads of the offices, divisions, bureaus, and boards of the Department.

"(b) Where not otherwise directed by the Counsel on Professional Responsibility, responsibility for investigating an allegation of unprofessional conduct that is lodged against an employee of the Department normally shall rest with the head of the office, division, bureau, or board to which the employee is assigned, or with the head of its internal inspection unit, or, if the conduct appears to constitute a violation of law, with the head of the investigative or prosecutive agency having jurisdiction over the subject matter involved.

"(c) The heads of the offices, divisions, bureaus, and boards shall provide information and assistance requested by the Counsel in connection with reviews or investigations conducted by the Counsel or by any other persons assigned to conduct reviews or investigations and shall keep the Counsel informed of major investigations that they are conducting.

"(d) Employees of the Department may be assigned to the Office of Professional Responsibility on a case-by-case basis to conduct such inquiries as may be warranted upon request of the Counsel on Professional Responsibility and with the agreement of the head of the unit to which the personnel are regularly assigned. Personnel assigned to the Office shall work under the direction of the Counsel.

"§ 554. Committee on Professional Responsibility

"The Committee on Professional Responsibility shall consist of Department officials designated by the Attorney General and shall serve as an advisory body to the Counsel.".

(b) The table of chapters of part II of title 28 is amended by inserting immediately after the item pertaining to chapter 35 the following new item:

"36. Office of Professional Responsibility .... 551".

III

AMENDMENT NO. 1679

Purpose: To establish an Office of Professional Responsibility and Audit within the Department of Justice, and for other purposes.

IN THE SENATE OF THE UNITED STATES—96th Cong., 2d Sess.

S. 2377

To authorize appropriations for the purpose of carrying out the activities of the Department of Justice for fiscal year 1981, and for other purposes.

March 4 (legislative day, January 3), 1980

Referred to the Committee on the Judiciary and ordered to be printed

AMENDMENT intended to be proposed by Mr. BAUCUS (for himself, Mr. COCHRAN, and Mr. KENNEDY)

Viz: At the end of the bill, add the following:

TITLE II—DEPARTMENT OF JUSTICE PROFESSIONAL RESPONSIBILITY AND AUDIT ACT

SHORT TITLE

SEC. 201. This title may be cited as the "Department of Justice Professional Responsibility and Audit Act".

ESTABLISHMENT OF OFFICE OF PROFESSIONAL RESPONSIBILITY AND AUDIT

SEC. 202. (a) There is established within the Department of Justice, under the general authority of the Attorney

General, an Office of Professional Responsibility and Audit (hereinafter referred to as the "Office").

(b) The Office shall be headed by a Counsel General appointed by the Attorney General. The Counsel General shall be subject to the general supervision and direction of the Attorney General, or when appropriate, of the Deputy Attorney General, the Associate Attorney General, or the Solicitor General.

(c) The Attorney General shall delegate to the Counsel General all functions administered by the Attorney General, prior to the date of enactment of this title, through the Counsel of the Office of Professional Responsibility and the Director of the Internal Audit Staff, including the power to issue subpoenas.

(d) The Attorney General may delegate to the Counsel General the functions of any other bureau, office, board, division, commission, or subdivision thereof within the Department of Justice (hereinafter referred to as the "Department") as the Attorney General determines are properly related to the functions of the Office and would, if so delegated, further the purposes of this title.

DUTIES AND FUNCTIONS OF THE OFFICE

SEC. 203. (a) The Counsel General shall—

(1) establish procedures in accordance with section 204 to receive requests for internal audits and inspections;

(2) establish uniform standards for the conduct of internal audits and inspections by internal units with such responsibilities;

(3) establish procedures and format guidelines for reporting to the Office by internal units in accordance with section 207;

(4) submit recommendations to the Attorney General, or when appropriate, to the Deputy Attorney General, the Associate Attorney General, or the Solicitor General, on the need for changes in the standards and procedures that become evident during the course of implementing responsibilities under this title with respect to internal audit and the ethics and conduct of Department personnel;

(5) in consultation with the Attorney General, require procedural changes in the operation of any internal unit with responsibilities for audit or inspection;

(6) in addition to any investigation initiated or ordered under subsection (b)(2), undertake any relevant investigation assigned by the Attorney General, or when appropriate, the Deputy Attorney General, the Associate Attorney General, or the Solicitor General,

and cooperate as directed with any other organization, task force, or individual that may be assigned by the Attorney General to undertake such an investigation;

(7) undertake any other appropriate responsibilities assigned by the Attorney General, including responsibilities relating to the improvement of the ethics and conduct of Department personnel; and

(8) report annually to Congress in accordance with section 208.

(b) With respect to the inspection responsibilities of the Office, the Counsel General shall—

(1) receive and process, in accordance with section 204, information or allegations relating to the conduct of an employee of the Department that is or may be in violation of an Act of Congress, a regulation or order of the Department, or any internal standard of ethics or conduct;

(2) initiate or order, as he deems appropriate, an investigation of any information or allegation received under paragraph (1);

(3) prepare or review, as the case may be, any findings and reports filed as the result of an investigation under paragraph (2), and make recommendations to the Attorney General, or when appropriate, to the Deputy Attorney General, the Associate Attorney

General, or the Solicitor General, concerning such findings and reports;

(4) monitor and evaluate the performance and procedures for inspections conducted by the internal units within the Department;

(5) not later than two years from the date of enactment of this title, establish uniform standards for the administration of disciplinary sanctions for each bureau, office, board, division, commission, or subdivision thereof; and

(6) monitor and evaluate the implementation of such standards for the administration of disciplinary sanctions established under paragraph (5).

(c) With respect to the audit responsibilities of the Office, the Counsel General shall—

(1) conduct audits of each bureau, office, board, division, commission, or subdivision thereof of the Department;

(2) be responsible for necessary followup and implementation of audit recommendations made by the Office or by an internal unit within the Department;

(3) ensure Department compliance with the auditing standards and procedures of the General Accounting Office and the Office of Management and Budget; and

(4) serve as a liaison for the Department with respect to the audit functions performed by the General Accounting Office.

(d) If the Counsel General makes a recommendation with respect to any audit to a Department official and that official declines to implement the recommendation, the declining official shall report in writing to the Counsel General, within thirty days of the receipt of the recommendation, the reason for declining to implement the recommendation. If the Counsel General disagrees with the position of the declining official, the Counsel General may appeal to the Attorney General for implementation of the recommendation.

(e)(1) If the Counsel General makes a recommendation under subsection (d) to the Attorney General, the Attorney General shall report in writing to the Counsel General within thirty days of the receipt of the recommendation, his proposed action on the recommendation.

(2) Any recommendation by the Counsel General to the Attorney General which is not followed by the Attorney General shall be identified in the annual report to Congress under section 208.

(f) The Counsel General shall establish such rules as may be necessary to carry out the provisions of this title.

REQUESTS FOR AUDITS AND INVESTIGATIONS

SEC. 204. (a) The Counsel General shall establish such procedures as may be necessary to receive requests for audits and investigations to be conducted by the Office or by an internal unit.

(b) The procedures shall provide a mechanism for receiving and processing requests by persons employed by the Department as well as persons outside the Department, and shall include provisions to insure the privacy of any such person making a request.

SANCTIONS

SEC. 205. (a) The Counsel General may, on the basis of any findings reported to him, or an investigation conducted by him—

(1) recommend to the Attorney General or any appropriate supervising official within the Department that administrative sanctions be taken against a Department employee; and

(2) recommend the prosecution of a Department employee to the appropriate Assistant Attorney General of a division or the appropriate United States Attorney.

(b) If the Counsel General makes a recommendation under subsection (a) to any Department official other than the Attorney General, and that official declines to implement the recommendation, the declining official shall report in writing to the Counsel General within thirty days of the receipt of the recommendation, the reason for declining to prosecute or administer such sanctions. If the Counsel General disagrees with the position of the declining official, the Counsel General may appeal to the Attorney General for implementation.

(c)(1) If the Counsel General makes a recommendation under subsection (a) to the Attorney General, the Attorney General shall report in writing to the Counsel General within thirty days of the receipt of the recommendation, his proposed action on the recommendation.

(2) Any recommendation by the Counsel General to the Attorney General which is not followed by the Attorney General shall be identified in the annual report to Congress under section 208.

ADMINISTRATION PROVISIONS

SEC. 206. (a) The Counsel General shall be compensated at a rate equal to the rate of basic pay for ES–5 of the Senior Executive Schedule established by the President under section 5382 of title 5, United States Code.

(b) The Counsel General is authorized to appoint such additional staff personnel as he deems necessary, at rates not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of title 5, United States Code, and may procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code.

(c) Upon request of the Counsel General and in consultation with the head of the unit to which the employee is regularly assigned, an employee of the Department may be assigned to the Office on a case-by-case basis to perform such duties as are designated by the Counsel General. Employees assigned to the Office shall work under the direction of the Counsel General.

(d) Personnel employed in connection with contracts, property, records, and unexpended balance of appropriations, allocations, and other funds available in connection with the functions delegated to the Counsel General under section 202(c) which, prior to the date of enactment of this title, were delegated to the Counsel of the Office of Professional Responsibility and the Director of the Internal Audit Staff shall be made available to the Office and the Counsel General. Nothing in this title shall affect the classification or compensation of any such personnel.

(e) Any reference in any other Act of Congress to the Office of Professional Responsibility or the Internal Audit Staff of the Department shall be deemed to refer to the Office of Professional Responsibility and Audit.

(f) On the day after the date of enactment of this title, the functions, powers, and duties of the Office of Professional Responsibility and the Internal Audit Staff shall lapse.

RESPONSIBILITIES WITHIN THE DEPARTMENT

SEC. 207. (a) The heads of each bureau, office, board, division, commission, or subdivision thereof shall provide information and assistance requested by the Counsel General in connection with audits and investigations conducted by the Office or an internal unit, and by any other person assigned to conduct audits or investigations.

(b) The head of each internal unit with responsibilities for inspection or audit shall report monthly to the Counsel General. Each report shall include notification of initiation of any investigation or audit, and shall conform with the procedures and format guidelines established by the Counsel General under section 203(a).

REPORT TO CONGRESS

SEC. 208. (a) On or before September 30 of each year, the Counsel General shall report to the Congress on the following:

(1)(A) With respect to the inspection responsibilities of the Office, the number and a brief description of each allegation of employee misconduct received by the Office, a description of the manner in which such allegation was handled, and the final disposition of each such allegation.

(B) The information required under subparagraph (A) shall include an identification with respect to the unit or Office which received the allegation and performed the investigation, if any.

(2) With respect to the audit responsibilities of the Office—

(A) a listing of each audit initiated or completed within the reporting period by the Office or internal unit; and

(B) a summary of the recommendations by the Office and the actions taken pursuant thereto.

(b) In addition, the Counsel General shall include in such report—

(1) a description of any significant problems, abuses, and deficiencies in the policies and procedures which have become evident during the course of any investigation or audit;

(2) a recommendation for action that may be taken by the Office or by a bureau, office, board, division, commission, or subdivision thereof to correct such problems, abuses, or deficiencies;

(3) a summary of the recommendations submitted in any previous annual report under this section upon

which corrective action has not been completed, with an explanation of the reasons action has not been completed;

(4) a description of any recommendation for administrative sanctions or prosecution made by the Counsel General to the Attorney General under section 205(c) which is not followed by the Attorney General; and

(5) a description of any recommendation with respect to any audit made by the Counsel General to the Attorney General under section 203(e) which is not followed by the Attorney General.

(c) If the Counsel General conducts, or orders to be conducted, an investigation of information or an allegation that the Attorney General may be in violation of an Act of Congress, regulations or orders of the Department, or of any internal standard of conduct, he shall report the findings of his investigation to the Committees on the Judiciary of the House of Representatives and the Senate upon the completion of the investigation.

(d) The Congress shall have access to the results of each audit completed by the Office or an internal unit.

(e) No later than three years from the date of enactment of this title, the Counsel General shall submit to the Committees on the Judiciary of the House of Representatives and the Senate—

(1) an evaluation of the procedures and standards for administrative sanctions and prosecution established under section 205;

(2) a comprehensive evaluation of the implementation of the provisions of this title; and

(3) specific legislative recommendations designed to remedy any problems or deficiencies in the implementation of the provisions of this title.

APPROPRIATIONS

SEC. 209. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

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DEPARTMENT OF JUSTICE AUTHORIZATION OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE AND EXECUTIVE OFFICE FOR THE U.S. TRUSTEE

MONDAY, MARCH 17, 1980

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 1:00 p.m., in room 2228, Dirksen Senate Office Building, Hon. Dennis DeConcini (acting chairman), presiding.

Present: Senator DeConcini.

Senator DECONCINI. The Senate Judiciary Committee will come to order. Today's authorization hearing will focus on the Office for Improvements in the Administration of Justice and the Executive Office for the U.S. Trustee.

Our first witnesses today will be Professor Maurice Rosenberg, Assistant Attorney General, in charge of the Office for Improvements in the Administration of Justice.

Our second witness is Richard L. Levine, Director, Executive Office for U.S. Trustees.

Mr. Rosenberg, please proceed. Your full statement will appear in the record at the conclusion of your oral testimony. You may highlight it.

STATEMENT OF MAURICE ROSENBERG, ASSISTANT ATTORNEY GENERAL, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE, ACCOMPANIED BY HARRY SCARR, ADMINISTRATOR, FEDERAL JUSTICE RESEARCH PROGRAM

Mr. ROSENBERG. Thank you very much, Mr. Chairman. I am glad for the opportunity to appear before you and put on the record comments and answers to questions with regard to the work of OIAJ. I have with me this afternoon, Dr. Harry Scarr, a colleague in OIAJ, who is the Administrator of the Federal Justice Research Program.

Senator DECONCINI. Welcome.

Mr. ROSENBERG. The Office was created by Judge Griffin Bell, when he was Attorney General, as one of his earliest actions in office. He was fortunate to secure as the head of the Office Professor Daniel J. Meador, who served in that capacity, as you know, Mr. Chairman, from early in 1977 until last August, when I succeeded him. That verb may overstate my situation as his follower. It is a great privilege to be in this Office which I regard as a tremendously important one in the advance of work on improvement in the administration of justice.

I have worked in this vineyard for quite a number of years, more than 25. I would say that the creation of the Office by Judge Bell was one of the most important developments in that 25-year peroid.

The Office has three principal missions, one of which is to assist the Department of Justice in the production of research materials and information in aid of its objectives. It also serves as what Judge Bell called a "think tank" for the Department of Justice, generating and developing ideas to the point of either legislative enactment or administrative implementation.

The Office has 20 professionals and 13 support personnel. Of the 20 professionals, 5 are nonlawyers; they are social scientists. I believe it may be unique in the Department of Justice in that respect, that is to say, in the number of nonlawyer professionals whose services it avails itself of.

Besides servicing the needs of the Department of Justice in the research and development area, the Office also gives the Executive branch a basis for an informed judgment about problems that affect the administration of justice, principally through the Federal courts, but extending more broadly.

The Office's third mission is to attempt to improve the administration of justice by the ideas that it generates, and that includes State as well as Federal initiatives, or State and Federal initiatives where a combined effort is necessary in order to make progress. We work in that regard with many other agencies that are plowing in essentially the same field. One of these is the Federal Judicial Center. Another is the National Center for State Courts, and there are many private as well as governmental agencies with whom we cooperate quite actively.

The aggregate of work we do—as distinct from our objectives—falls into three groups. We have the projects and programs that directly advance the goals of the Department of Justice in its operational aspects. We have initiatives that are designed to improve the administration of justice other than by court reform. Finally, we are interested in court-related improvements. I will just illustrate briefly a few of these.

As an example of activities that are designed to advance the mission of the Department of Justice, last month we finished a study report that the Department was charged to do by the Congress on whether an Inspector General, or someone performing an Inspector General-like function, would be useful in the Department of Justice. OIAJ had the principal responsibility for making the study and producing the report which was sent over to the Congress and which has been the subject of testimony in recent days.

We in OIAJ are also carrying the ball for the reform of the Federal Criminal Code. We are doing that through the services of Ron Gainer, a Deputy Assistant Attorney General and people who work in the Office with Ron. He is perhaps the most consistently active person on the reform of the Criminal Code of anybody in the executive branch and is probably as knowledgeable as anybody in Government about it. This work on the code is also a Department-advancing initiative.

Under the heading of improving the system of justice by other than court initiatives, I might mention our work in implementing the Dispute Resolution Act of 1979, seeking alternatives other than courts for the resolution of what might be called homely disputes. In addition, I would mention our class action and small business access reform bill which is now in OMB clearance, our work on the final judgment rule, and our work on the Magistrates Act of 1979 together with the regulations that have been issued under it.

I won't extend the record by listing other activities that fall in that second category, that is, improving the administration of justice by means other than direct improvement in the operations of the courts, but will give you two examples of our work in the last area, that is, court-related projects.

One is in developing and working on the idea of a court of appeals for the Federal circuit, which I think my predecessor, Dan Meador was chiefly responsible for conceiving and moving along to the point where the Senate has now adopted it. Another major activity has been in connection with the work on judicial tenure and fitness legislation—a proposal, as you know, that has cleared the Senate and is now awaiting action on the House side.

We have cooperated with the Federal Judicial Center in a number of undertakings, one in connection with getting court-annexed arbitration procedures established in three districts. The Federal Judicial Center is now evaluating the way in which those three districts are coping with the court-annexed arbitration procedure. A report is due about the first of May, evaluating the experience with those projects.

We have also cooperated with the Center in a variety of other activities such as in national rulemaking, and also with regard to local rules.

I just want to conclude by saying that the particular focus of OIAJ as it addresses problems of court improvement is the executive's perspective. That is to say, we are trying to study the courts simply as one user, but as their largest user. The Department of Justice and the U.S. attorneys offices have in their charge over half of the cases in the Federal courts—100 percent of the criminal cases and, in 1979, 36 percent of the civil cases.

So, the Department of Justice is obviously deeply concerned in how the courts run. Our concern is in the first instance as actual litigators. But we widen out from that perspective and become interested in how the State courts as well as the Federal work. The two systems learn from one another. It is therefore important to be sure that the State systems are innovating and are keeping track of the way in which new procedures and new initiatives work out in the State courts.

The second point about our perspective is that we are the exclusive agency of the Federal Government that deals with the administration of justice in both the State and Federal courts in a substantial way. I offer one example. The OIAJ supports the Council on the Role of Courts which has been in existence for about a year and a quarter now and is studying very intently the question: What is the present and future role of courts in American society? We are not limiting our concern to Federal courts alone but are looking at State courts as well. We are heading toward a national conference in 1981 and the publication of a group of papers which we think will be helpful and influential.

Finally, we seek to cooperate and coordinate our activities with other agencies that are concerned with improving the administration of justice. We work closely, as I have said before, with the Federal Judicial Center. If you had to epitomize the Federal Judicial Center's view of some of the same problems that we are concerned with, I suppose you would say that the Federal Judicial Center is concerned with how the Federal system operates from the point of view of the Federal judges.

We are concerned with the broader question of how the administration of justice fares today in American society, with particular accent on the Federal courts, but our concern is whether the whole apparatus of justice is accessible to people; whether it is accessible at costs that people can afford, and so on. And, of course, we are interested in seeing to it that the courts run efficiently and effectively so that the important business of the Federal Government that finds its way to the courts can be handled with dispatch and correctly.

I haven't said anything about the Federal justice research program. I conclude with remarks about it. The program was authorized at about $2 million a year at the time of the creation of OIAJ, but since the first year it has been funded only at a level of $1.7 million. It has done important and effective work with its modest budget. The program has given OIAJ a capacity to channel research energies into areas that count; that count not only from the point of view of the interest of the Department of Justice but from the point of view of improving the administration of justice for the citizenry more broadly.

The existence of FJRP, with its funding capacity—that is to say its contracting capacity has allowed us to mount a number of action-oriented research projects such as the ones on sentencing practices and on determining the impact of legislation on courts' workload. These are attended to very closely throughout the country. I believe that FJRP is one of the operating arms of the Department of Justice that is tremendously important to the realization of its function.

I thank you, Mr. Chairman. I will be very glad to do what I can to answer questions.

Senator DECONCINI. Mr. Rosenberg, thank you for a very fine presentation. I appreciate the work that you and your staff do. We are pleased to have an opportunity to work with you. There are a couple of things that I would like to discuss with you; perhaps you can give us a little insight.

White-collar crime is, as many people realize, a growth industry in the United States. Tens of billions of dollars are made each year through crimes such as embezzlement and bankruptcy fraud and land fraud. New crimes such as computer fraud are also on the increase. This is a problem about which I have both great personal concern and some knowledge. My home state of Arizona has been a target of many land fraud schemes, bankruptcy fraud and a variety of other fraudulent schemes.

What new approaches to this problem have your Office and the Department developed, if any?

Mr. ROSENBERG. We have begun to develop new approaches to it. Within the Department generally there is now a task force which is reporting to the Deputy Attorney General and consists of a contingent from the Criminal Division. There is also representation from OIAJ on the lead committee. It has developed a rather extensive plan for getting at the very questions about white collar crime that you have mentioned.

We have and have had now for a period of months in the Office a preliminary proposal which we are considering giving out for bids to contract a large study on white-collar crime. With the advent of the departmentwide entry into research in that field through the task force that is reporting to the Deputy Attorney General, we want to mesh the work that we are doing on this preliminary proposal with the large amount of work and planning that has now been done by the departmental task force.

So, I can tell you that the matter is very much under consideration in the Department. This Office is in direct collaboration with the Criminal Division and the Deputy Attorney General's group to develop a request for bids that will answer questions of interest.

Senator **DeConcini**. In this regard, how are these programs designed to assist States, municipal governments? Is that under consideration?

Mr. **Rosenberg**. I am sure that any kind of description, any kind of map of white-collar crime is going to tell us that there is out there a lot of white-collar crime which is under the jurisdiction of the State and local authority and not the Federal authority. As you know, defining white-collar crime is a difficult job but the task force I referred to, in the briefing book that it has developed, has listed 600 criminal activities that qualify under their definition as white-collar crime. Many of these 600 are illegalities that the States and localities will be primarily interested in.

Senator **DeConcini**. Is this the task force through which your Office is designing a research project? Is that the same task force that you are making reference to in your statement?

Mr. **Rosenberg**. No, there are two of them. One, as I say, is under the Attorney General's direct initiative. The Criminal Division started looking closely at white-collar crime and, through a group which has now been expanded to a task force reporting to the new Deputy Attorney General, is proceeding to look into white-collar crime. It is in the preliminary stages. The first meeting was held just 10 days ago, on March 5. Now we are working with that task force.

Prior to that, we had in OIAJ decided that white-collar crime was an area where we would try to get good research done. We have gone forward in OIAJ to start to delineate some of the main elements——

Senator **DeConcini**. That is what you are talking about in your statement?

Mr. **Rosenberg**. Yes.

Senator **DeConcini**. Of your designing a research project?

Mr. Rosenberg. Yes. That is the one.

Senator **DeConcini**. When do you think that will be put out for bid or for consultation fees?

Mr. **Rosenberg**. I can say that what we are going to do now is to coordinate our activities with the task force activities. I assume that if it is decided that the best way to go on this is via a bid—that is an invitation, a solicitation of bids—that we will do so in very short order. I would think within the next month or 6 weeks, on that order.

Senator DECONCINI. Is there some reason you do not have the ability or staff or resources to do this internally?

Mr. ROSENBERG. Yes. This is a very large-scale endeavor which requires a lot of work out in the field and away from home base. Now as I said we have a total, when we are at full strength, of 20 professionals. Our total budget for the Office is a bit over $1 million. If we were to attempt to do a project which is now budgeted at about a half million dollars—that is the proposal we are thinking of—you can see that we would be deploying a very large proportion of all the available resources we have.

Senator DECONCINI. Did you say how long it would take to do the project once it is——

Mr. ROSENBERG. Dr. Scarr tells me 12 to 18 months.

Senator DECONCINI. Quite some time. So you are talking about perhaps a couple of years before you would have the results available to do much with it; is that right?

Dr. SCARR. Well, the presumption would be, Senator, for an 18-month project, yes; the results should be available at the end of that time period.

Senator METZENBAUM. You are talking about a couple of months now before you put it out, right?

Dr. SCARR. Right.

Senator METZENBAUM. So we can't expect anything——

Dr. SCARR. Now, what we hope to do with the project, one of the things we have been looking for, in effect, is a set of policy guidelines that the task force can provide in order to tell the program what kinds of empirical information would be of most use to it and what avenues we can most effectively explore. That is the other reason why we want to be sure to coordinate closely with them.

Senator DECONCINI. Yes.

Dr. SCARR. We work with several sections in the Criminal Division anticipating the project described here. But in all candor, our scope is expanded.

Senator DECONCINI. Is that as rapidly as you think that can be done?

Dr. SCARR. It depends on, I would imagine, the resources that would be available to apply to the project by any group, by us or by a firm that would bid. You couldn't get anything in less than a year would be my candid judgment, by the time that you designed investigative instruments, questionnaires, interview schedules, et cetera. Trying to find sources to gather information from this area is very sensitive, as you know. It is just not like going out and only interviewing the man on the street. It simply will take time to crank it up. I would say 12 months would be the earliest anyone could expect any kind of systematic portrait to begin to emerge.

Mr. ROSENBERG. As far as the kickoff, I think I will report directly to Deputy Attorney General Judge Renfrew your interest and your questions here and see whether there is some way of coordinating the requests for proposals with the present state of development of the ideas of the task force to the end that we can get out sooner than the month or 6 weeks that I mentioned.

Senator DECONCINI. Yes, sir. I would appreciate that. Mr. Rosenberg, I am not suggesting that I want to tell you or Judge Renfrew how to operate. It is just the matter of time and my concern.

I also can appreciate the difficulty pointed out by Dr. Scarr as to time restraints. But, as we wait, each year, we have organized crime gobbling up another $50 to $100 billion. Anything that the Department can do to assess and evaluate what we might do for law enforcement, I think, is a very beneficial step. I appreciate your sensitivity toward this area and trying to expedite it.

In your prepared statement, Mr. Rosenberg, you indicate that the OIAJ has had a major role in behalf of the Department in commenting on legislative proposals for handling complaints of disability or misconduct on the part of Federal judges during the 95th and 96th Congress.

This issue provided a great deal of discussion in the Senate prior to the passage of S. 1873, the Judicial Conduct and Disability Act, last October. But I do not recall any comment from the Department with regard to S. 1873. Can you discuss the Department's position on the Senate-passed bill?

Mr. ROSENBERG. Prior to S. 1873, the Department supported Senator Nunn's bills on this subject of judicial unfitness, and I believe, Senator DeConcini, you joined in cosponsoring some of those.

Senator DECONCINI. Correct.

Mr. ROSENBERG. The Department, through the Attorney General, had testified in support of the Nunn bill. As you know, S. 1873 drops the provision of earlier bills for removal of judges in the event they are found to be unqualified by reason of conduct or condition. A question arose whether the Department would give its support to S. 1873, in those circumstances.

The Office for Improvements in the Administration of Justice looked into the matter. The Department's position is that we will support S. 1873 with the hope that some strengthening features may be added to it as it goes through the legislative process. I understand that on the House side there will presently be hearings, I believe, on March 31, on the bill or on the general subject, perhaps on S. 1873, as well as on the bill that Mr. Kastenmeier has introduced. I expect to testify at that time and would testify to the effect that I have just stated. That is, that we could support S. 1873. We hope for modifications that will strengthen it.

Senator DECONCINI. One of those modifications would be to include the original removal provision?

Mr. ROSENBERG. I don't believe that we think there is any political prospect on the House side of getting that. I think we will not tilt with windmills. We will indicate the continuation of our interest in that subject without insisting on it.

Senator DECONCINI. But you do support the removal provision. although you are not going to insist on it; is that correct?

Mr. ROSENBERG. I think that the fair answer is that we believe it better not to press our earlier position in the present situation. So, we simply have asserted that our position is that S. 1873 offers a viable alternative

I would say, and I think that this is clear enough, if S. 1873 is enacted, with strengthening amendments, and if it preforms for a few years, we will then know whether a removal sanction is needed or not. If it turns out that S. 1873 works well without a removal sanction, then I am sure that the Department would not continue to insist upon the removal sanction. If S. 1873 proves ineffective then we could revisit the question.

Senator DECONCINI. What type of historical data does the Department have in its possession requiring or as relating to abuses in the past and problems of the judiciary?

Do you have any statistical data that you are aware of, for the record?

Mr. ROSENBERG. We ourselves at OIAJ are not the place in the Department where complaints against judges arrive. So, anything I know about it is secondhand.

There are two places in the Department which receive complaints about judges on a regular basis. One is the Criminal Division, and the other is the Office for Professional Responsibility. Complaints have been received in both those places, the Office of Public Intregrity in the Criminal Division and the OPR. I would only be guessing if I tried to recollect out of my memory how many complaints have been received in the last number of years in either of those places. But Mr. Kastenmeyer's staff in the House has been briefed formally on the answer to that question. I am sure that the information could be made available to you, Senator.

Senator DECONCINI. Fine. Thank you.

Many of the subjects and projects which are mentioned in your statement appear to overlap with the jurisdiction of the Federal Judicial Center.

In a recently published interview in The Third Branch, January 1980, you indicated that there are areas where the OIAJ's work reinforces that of the FJC and vice versa. In the interview you stated that the interests of the Federal Judicial Center are different from those at the Department of Justice.

Would you comment on the mandate of each of these organizations.

Mr. ROSENBERG. Gladly, Mr. Chairman. I was on the committee that drafted the legislation that led to creation of the Federal Judicial Center, under appointment from then Chief Justice Warren. As I recall the purpose of that legislation and of the creation of the Center was twofold. The first purpose was to provide a resource within the Federal judicial branch that would see to the advance of research and understanding of the operation of the judicial system so that the Federal judiciary could perform its functions with more efficiency and effectiveness.

The second purpose was to provide a way of educating and orienting Federal judges and their support personnel. I believe both the research for judges and the education for judges and support personnel purposes define pretty well the missions of the Federal Judicial Center. They are Federal-judge oriented. Their board of directors is exclusively made up of Federal judges, with the Chief Justice of the United States as chairman. Their interests center on the question: How can we make the Federal courts operate better from the point of view of the Federal judges, to make the Federal judges' work not easier, but simply more effective? How can they perform more effectively?

Our role, by contrast, is to substitute in a way for the missing Ministry of Justice in this country, to have a look at the Federal courts and their place in the administration of justice, along with the State courts, and to make suggestions that will, I believe, serve two main constituencies. One is the Federal Government as a litigator in the Federal courts. I have already implied our client, the U.S. Government, accounts for more than half the cases in the Federal courts.

The second constituency we represent is the citizenry at large. We are trying to improve their access to justice whether in the court or outside the court, Federal or State. That is why we are so interested in the Dispute Resolution Act and the alternatives that it provides, and why we have worked so hard on arbitration and other nonjudicial process mechanisms and procedures for resolving disputes.

In short, we bring the perspective of the executive branch to bear on these problems, while the perspective of the judges is represented by the Federal Judicial Center. I think that's the essence of the difference between our approaches and our missions in this regard. We work together very closely, as I said, but the Federal Judicial Center does not deal with State problems as we do. They don't deal with a lot of the problems that involve legislation. They can't. They don't have the mandate to deal with legislative initiatives and legislative proposals.

That leaves a lot of the field unoccupied. We move in that area very comfortably. But certainly we cooperate closely with them. We worked with them on arbitration, as I said, on rulemaking, on many other matters. We use each other's research product. We confer regularly. As a matter of fact, we have a meeting on Thursday of this week, with five of them and five of us due to exchange views and discuss matters of common interest.

Senator DECONCINI. Mr. Rosenberg, does your office have avilable, or put together, data or information on what the costs of particular litigation are in our legal system?

For instance, have there been any studies regarding what it costs to prosecute organized-crime cases or criminal embezzlement cases or bank robbery cases, or to defend the Government?

Do you focus in on studies regarding the cost of litigation?

Mr. ROSENBERG. We do have a project ongoing now called the civil litigation research project. It is designed to answer questions very similar to the ones that you asked, both for Federal and State litigation. This is the largest single contract we have ever awarded. It is with a consortium of the University of Wisconsin and the University of Southern California. They together have gotten contracts approaching $2 million to study this subject, civil litigation, with a heavy emphasis on the cost of litigation.

In the Department, there is also a project now responsive to a congressional mandate on case management. That case management project will, if our recommendations are followed, result in making available information on energy and time cost that can be converted into answers to the questions you were asking.

Senator DECONCINI. Thank you, Mr. Rosenberg. I have no further questions now. We will submit several to you which you can answer in due time.

Thank you very much.

[The prepared statement of Mr. Rosenberg follows:]

PREPARED STATEMENT OF MAURICE ROSENBERG

Mr. Chairman and Members of the Committee: I am pleased to appear before the Committee today to discuss the purpose, goals, and accomplishments of the Office for Improvements in the Administration of Justice (OIAJ).

The Office was established in the Department of Justice in February 1977 as part of the Office of the Attorney General (28 CFR § 0.6). It was created as the result of a decision by then-Attorney General Griffin Bell to restructure and upgrade the former Office of Policy and Planning, which had been primarily concerned with criminal justice matters. The new Office was given a broad mandate and authorized to pursue a range of programs and projects relating to the entire justice system.

The Office is headed by an Assistant Attorney General and, under the direction of the Attorney General, is responsible for developing ways to improve the general operation of the civil and criminal justice systems and to enhance citizen access to justice. Because of the Office's broad responsibilities, its programs and projects relate to the work of state and local justice systems while giving special emphasis to the needs and operations of the federal system. The Office's creation is an unprecedented commitment by the Executive Branch to devote the resources of the Department of Justice to the continuous and systematic support of the entire justice system.

To carry out its mission, the Office has a staff of 20 professionals, including attorneys and persons trained in social research, assisted by law clerks, social science interns, and other supporting personnel. OIAJ works closely with other units in the Department, other federal agencies, the courts, Congress, and private organizations in formulating and reviewing measures to improve the justice system. The specific projects undertaken by the Office fall generally into three categories: developing and supporting the enactment of legislation to improve the justice system; formulating recommendations for improvements in the policies and practices of the Department of Justice; and devising, financing, and overseeing research efforts and projects that implement the goals of the Office or the Department. The work of OIAJ relates closely to the Attorney General's priorities of encouraging reforms in the overall system of justice and encouraging the use of research and demonstration projects to address the potential of specific proposals for systemwide improvements.

The Office administers the Federal Justice Research Program (FJRP), through which it contracts for research on aspects of the civil and criminal justice systems related to the projects and goals of OIAJ and to other concerns of the Department. The Program provides an action-oriented research capability to study and assess problems in the administration of justice, with a view to developing sound information as a basis for relevant legislative and administrative initiatives.

The Federal Justice Research Program is used to procure research by contract. Major procurements under the program typically are awarded competitively through the use of requests for proposals. This process accounts for approximately 80 percent of the funds obligated under the Program. Contracts also may be awarded through a small awards program, which funds short-term projects by individual investigators that are designed to provide empirically useful data and analytical answers to policy questions that are fairly narrowly defined. Specific research projects that have been funded by FJRP are discussed below in relation to the general activities of the Office for Improvements in the Administration of Justice and the informational needs of the Department. Contracts previously funded by the Program have proven valuable in providing otherwise unavailable data of high reliability on which to base policy decisions concerning improvements in the administration of justice.

The work of OIAJ is conducted primarily within the framework of two-year agendas adopted in 1977 and revised in 1979. Projects and programs of the Office focus on four major goals.

(1) To assure access to effective justice for all citizens through more effective courts and justice system personnel, through improved procedures in civil litigation, and through non-judicial mechanisms for the settlement of many disputes.

(2) To reduce the impact of crime on citizens and the Courts through substantive reforms in the federal law and procedural reforms in criminal cases.

(3) To reduce impediments to justice unnecessarily resulting from separation of powers and federalism. Efforts to this end include coordination of the efforts of the three branches of the federal government to identify and address the needs of the justice system, providing more effective federal assistance for state courts, and suggesting reallocations of federal and state authority.

(4) To increase and improve research on problems in the administration of justice through the Federal Justice Research Program.

During its first three years of operation, the Office has developed several legislative measures that have been acted upon by Congress. The most recent bill to become law is the Dispute Resolution Act, which passed the Congress on January 30, 1980, and was signed by the President on February 12, 1980 (Pub. L. No. 96–190). This measure creates a resource center in the Department of Justice for the development of innovative means of non-judicial resolution of minor civil disputes and provides a seed-money grant program for the establishment of alternative dispute resolution centers. The Office is now working to implement this program. Although OIAJ will not be involved in the day-to-day operation of the Dispute Resolution Center, it will continue to play a significant role in its policy direction.

In 1979 Congress enacted legislation developed by OIAJ to improve the standards and procedures for the appointment of federal magistrates and to increase their jurisdiction (Pub. L. No. 96–82; 93 Stat. 643). With the consent of the parties, magistrates now have power to make binding decisions in civil cases and, when authorized by the district judges, in criminal misdemeanor cases. Congress also passed the Justice System Improvement Act of 1979 which contained, among other things, a legislative proposal drafted by OIAJ to create an independent Bureau of Justice Statistics. The creation of the Bureau represents the culmination of a half century effort to establish such an agency to improve statistics about crime and justice.

During the 95th Congress, the Office helped obtain passage of the Court Interpreters Act which provides interpreter services in criminal and civil cases brought by the United States for persons who do not speak English or whose speech or hearing is impaired. OIAJ also had a role in the enactment of legislation that provides employment protection for jurors and increases federal juror and witness fees.

OIAJ's efforts for other measures have helped stimulate Congressional interest in them to the point of hearings or floor action. Among them are measures authorizing experimental use in the federal system of court-annexed arbitration on a mandatory basis to resolve certain types of civil cases involving money damages; limiting the exercise of the diversity of citizenship jurisdiction of the federal courts; converting the Supreme Court's appellate jurisdiction entirely to a certiorari basis except in three-judge court cases; creating a Court of Appeals for the Federal Circuit by merger of the Court of Claims and the Court of Customs and Patent Appeals; and implementing a group of significant housekeeping improvements in the justice system. In addition, OIAJ has drafted a bill that substitutes statutory actions for class damage suits now brought under Federal Rule 23(b)(3) and improves access to the courts for small businesses. The bill is now in the process of clearance by the Administration.

The Office has cooperated with congressional staffs and other units of the Department of Justice in the development of several other legislative measures. One of OIAJ's major projects has involved coordinating the efforts of the Department to assist the Judiciary Committees of Congress in producing a comprehensive reform and recodification of the federal criminal law. On the civil side, the Office coordinated the drafting of amendments to the Federal Tort Claims Act to substitute the United States as defendant in suits brought for injuries resulting from common law or constitutional torts committed by agents of the government acting within the scope of their employment or under color of their office. During the 95th and 96th Congress, OIAJ has had a major role on behalf of the Department in commenting on legislative proposals for handling complaints of disability or misconduct on the part of federal judges. In addition, OIAJ has participated in drafting the FBI charter and, in cooperation with the Office of Legislative Affairs, has played a major role in developing a Departmental position on a variety of proposals concerning the award of attorney fees to a party who prevails in litigation against the government. OIAJ has testified on behalf of the Department on a legislative proposal to establish a Court of Tax Appeals to review appeals in tax cases from the federal district courts and the United States Tax Court, and has prepared testimony on a bill clarifying a litigant's standing to sue a local or state government or the federal government.

Besides these legislative efforts, the Office has undertaken a group of projects relating to the internal policies and practices of the Department of Justice. A substantial proportion of this work has pertained directly to the Department's law enforcement responsibilities. A prime example is the Office's 1978 Speedy Trial Act study which involved the gathering and analysis of data from 20 federal districts on the impact of the Act on civil and criminal cases. The report of this study served as a basis for Departmental recommendations for amendments to the Act.

Other Office activities related to effective law enforcement include a leading role in the Attorney General's Task Force on the Use of Deadly Force which is

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concerned with analysing current practices and proposed changes; drafting a proposed Statement of Principles of Federal Prosecution to rationalize the decisionmaking process of federal prosecutors in such areas as decisions to prosecute, selection of charges, plea agreements, non-prosecution agreements in return for cooperation and participation in sentencing; and assisting the Criminal Division in developing materials for the U.S. Attorney's Manual concerning appropriate prosecutorial conduct in grand jury investigations.

Many of the Office's projects relating to the Department's law enforcement efforts have received important help from the Federal Justice Research Program. Through FJRP, the Office has collected information on resource utilization in representative U.S. Attorney offices and is cooperating in the development of a case weighting system that can be used to improve the allocation of resources to all U.S. Attorney Offices. It has conducted an extensive study of current sentencing practices to provide information for use in developing a rational federal sentencing system; and it has examined federal habeas corpus review of state convictions in order to identify factors that influence the final disposition of these cases in federal courts.

At the request of the Criminal Division, the Program has awarded contracts for research projects to determine the disposition of cases referred by federal authorities for state and local prosecution, and to assess the incidence and impact on appellate case outcome of release of convicted defendants pending appeal. Also, FJRP has funded a study to compare shifts in crime trends with concomitant changes in the demographic composition of the population in order to project future crime trends. In close cooperation with the Criminal Division and the Office of the Deputy Attorney General, OIAJ is designing a research project to assess how current policies and practices affect white collar crime. The Office also has conducted extensive empirical research on the sources and distribution of handguns to criminal offenders and the incentives for using handguns in different types of criminal violence, and has made a comprehensive review of all state and local ordinances dealing with handguns. In addition, OIAJ assisted the General Accounting Office in structuring an extensive survey of cases affected by the exclusionary rule.

Some Office projects have been concerned with the effective operation of the Department in other ways. In an effort to improve coordination and management of government litigation, OIAJ undertook a study, completed during the Spring of 1979, of government relitigation practices and recommended modifications in Internal Departmental procedures. During 1977 and 1978, the Office contributed staff time to a Department-wide management study that made recommendations for revised internal procedures for policy development and implementation. In 1978, OIAJ conducted a comprehensive study of the Department's library system and guided a task force in recommending and implementing improvements; the Department's research facilities have been substantially upgraded as a result of this study. In early 1980, the Federal Justice Research Program funded a Seminar on the Role of the Attorney General, which considered proposals concerning Departmental organization and procedures to enhance the independence of the Attorney General. In recent months, the Office has been participating in a new study and report to Congress on measures the Department is taking to implement the Speedy Trial Act. In response to a request to the Department from Congress, OIAJ recently conducted a study and prepared a report for the Department concerning the performance of functions similar to an Inspector General's activities by the Department's Office of Professional Responsibility and Internal Audit Staff.

In addition to its legislative and Department-related activities, OIAJ has designed or financed a broad array of research efforts and demonstration projects relating to long-term needs of the justice system. These activities have been made possible by the existence within OIAJ of the Federal Justice Research Program. A major example is the staff support and research assistance that the Office and the Program are providing to the Council on the Role of Courts, an advisory group composed of outstanding judges, academics and practitioners that is conducting a two-year study of the nature of the business of state and federal courts and their place in contemporary American society. The purpose of the Council is to produce and publish research studies on the role of courts. The Council's goal is to provide criteria and standards which legislators and judges can utilize in determining what types of dispute are best handled in courts and what types are better handled by non-judicial methods.

The value of the Federal Justice Research Program can be seen in the variety of topics on which it has funded empirical research. These include studies: to determine comprehensively the costs of civil litigation for the parties involved and for the courts; to develop a method for evaluating the impact on the federal system of proposed substantive legislation or changes in procedural rules; to assess the extent of discovery abuses that occur in civil litigation and the sanctions imposed in two federal district courts; to determine the effect that legislation substituting new statutory actions for class damage suits under Federal Rule of Civil Procedure 23(b) (3) might have on Department of Justice resources and the federal district courts; to assess the benefits and limitations of simplified pleadings and proceedings employed experimentally by the California Economical Litigation Project; to evaluate a six-month experiment on the use of Volunteer Special masters to aid the processing of civil cases commenced in the Southern District of New York; to ascertain the views of members of judicial disciplinary commissions and of judges regarding the effectiveness of the commissions; and to survey the amount and categories of federal funding that has gone to the state courts over the past ten years. The Federal Justice Research Program also enabled the Office to fund a conference on proposed discovery rules changes in 1978 which produced an influential report.

A major area of concern for the Office in its long-range justice system improvement activities is the efficiency of novel dispute resolution mechanisms, such as Neighborhood Justice Centers and arbitration. Soon after the Office was created it planned and, in collaboration with LEAA, established pilot Neighborhood Justice Centers in Atlanta, Los Angeles, and Kansas City, Missouri, to facilitate and encourage the settlement of minor disputes. The experience of these Centers is evidence that alternative forums can be effective in settling a broad range of minor disputes. OIAJ has also assisted three federal district courts in implementing experimental arbitration procedures for certain types of cases pursuant to local rule. A formal evaluation of the arbitration projects is scheduled to be completed in May by the Federal Judicial Center.

During the past three years the Office has cooperated in planning and preparing a series of interbranch seminars. These bring together leading representatives of the Congress, the Courts, and the Executive to exchange ideas on the needs of the judicial system and how best to meet them.

During recent months, the Office has begun a number of new projects which are now in various stages of early development. These initiatives include: development of proposals to make litigation of modest claims affordable; development of a method for identifying cases of differing complexity and of rules of procedure that are calibrated to the elaborateness of the case; examination of the implications of increasing size and bureaucratization of the federal court system on the quality of the judical process; development of measures to improve the handling of complex scientific and technical questions that arise in cases that come before the courts and devising means of resolving scientific disputes bearing on public policy questions that government must address; codification of the major judicially- created doctrines relating to the final judgment rule and its exceptions; and providing assistance to the Department of Health and Human Services in designing and supervising empirical research on state experience with alternative mechanisms for handling malpractice claims.

Attached to this statement is a breakdown of the dollar and personnel figures in our pending authorization request to facilitate comparison with other fiscal years.

OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE

Administration Request—Fiscal Year 1981/82

The Office for Improvements in the Administration of Justice is requesting a funding level authorization in Fiscal Year 1981 of $1,326,000, 33 permanent positions, three full-time equivalent of other positions, and 36 workyears.

[Fiscal years]

	Appropriated (basis)		President's budget (estimated)		Authorization request (estimated)	
	1979	1980	1981	1982	1981	1982
Permanent positions	36	32	33	33	33	33
Full-time equivalent of other positions	3	3	3	3	3	3
Work years	39	35	35	36	36	36
Amount (thousands)	$1,334	$1,196	$1,326	$1,326	$1,326	$1,326

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FEDERAL JUSTICE RESEARCH PROGRAM

Authorization Request—Fiscal Year 1981/82

The Federal Justice Research Program is requesting a funding level authorization in Fiscal Year 1981 of $2,190,000.

[Fiscal years]

	Appropriated (totals)		President's budget (estimated)		Authorization request (estimated)	
	1979	1980	1981	1982	1981	1982
Permanent positions						
Full-time equivalent of other positions						
Work years						
Amount (thousands)	$1,700	$1,700	$2,190	$2,190	$2,190	$2,190

Senator DECONCINI. Mr. Levine, we are pleased to have you here. Our next presentation is from the Executive Office for U.S. Trustees. We are pleased to have Mr. Levine here, on behalf of the Department of Justice.

I read parts of your statement. It is very detailed, and explains a great deal of information for the committee. I was impressed with the work that is being done in the various pilot districts. There are always startup problems with a program as big as the U.S. Trustee program, which handles matters as complex as bankruptcy.

I have been pleased to hear favorable reports on the first 5 months of your operation. You and the Attorney General are certainly to be commended for your initial efforts in getting the U.S. Trustee program on its feet. This Senator will follow with interest the development of the program over the next 4 years as we approach the date when we consider whether it has been a success and whether it should be extended or modified.

Rather than you reading your entire statement, I would prefer touching on some of the problems you brought out in your statement. If you would like to just give a brief summary, and then we will ask a few questions.

STATEMENT OF RICHARD L. LEVINE, DIRECTOR, EXECUTIVE OFFICE FOR U.S. TRUSTEES

Mr. LEVINE. Thank you very much, Senator.

I understand we are on a very tight time schedule this afternoon. So, I will try to summarize even the summary I would otherwise have given.

I am, of course, intimidated to be here because you, of course, were present at the birth of the Bankruptcy Code, so you probably know more about it than most.

Highlighting briefly the points that may not have been made fully in my statement are the following.

First of all, the reason we are asking for authorization not only for 1981, but for 1980 as well, for a supplemental, is that the original request was erroneous. The 90 positions we have cannot do the job that you and the other Senators and Congressmen intended that we do. I interpret that job as making the U.S. Trustees system work the best it can so that when the test, the comparison comes, prior to 1984, you can have had the best system. With 90 people, we can't do it.

So, what we are asking for now is only enough positions and dollars to bring us up to where we should have been. For example, there is not a penny in the present budget for anything for evaluation. No positions to hire anybody to do evaluations. There is no money to contract for evaluation.

As of this moment, I have done quite a bit on evaluation myself, which takes me away from other projects. I have tried to educate myself. We have had meetings with the National Bankruptcy Conference and other groups, but with respect to any qualified expertise, there is no money to do anything. With respect to—we are also trying to reduce our areas of involvement, not increase them. This budget is not to aggrandize any U.S. Trustee. It began, as I say, to bring us up to where we should have been.

For example, the statute was not clear as to whether the U.S. Trustee might properly undertake the noticing functions in particular districts. We have decided we will not do that; we are not asking for money to do that. The courts can do that. I hope they will do that efficiently. In many areas we are at their mercy, because we call the 341 meetings of creditors, but the court has to process some of the paperwork. So, we are trying not to duplicate what the courts are doing.

We are having a significant problem in some areas with respect to the fee structure in the act. We can pay private trustees $20 per no-asset case. I have statistics on that. I might add, our office and the U.S. Trustees to whom I should give credit, are efficient enough that we have statistics on the number of bankruptcy filings usually 1 week after the end of the preceding month.

We have already had 26,000 bankruptcy cases filed in the pilot districts from October 1, 1979, to the end of February 1980.

[See following letter with respect to filings since February.]

APRIL 10, 1980.

HON. DENNIS DECONCINI,
Subcommittee on Appropriations for State, Justice, Commerce and Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR DECONCINI: Since I appeared before you at the authorization hearing, this office has accumulated further statistics on the number of bankruptcy filings in the pilot districts. Specifically, we have been able to determine the number of filings for the six-month period from October 1, 1979 (the first date the new Bankruptcy Code became effective) until March 31, 197[illegible].

Those figures show that the total filings were 32,644; 26% of these were joint filings (husband and wife), which in past years were counted as two filings. Therefore, for the first six months of this fiscal year, the number of debtors in bankruptcy proceedings in the pilot districts is 41,131. This compares with 30,467 for the first six months of the prior fiscal year. From the point of view of the workload of this office. I should also point out that the total number of Chapter 11 cases filed is 680, compared with 563 at this same time last year.

I hope this information is of use to you.

Yours truly,

/s/ Sager for RICHARD L. LEVINE, *Director.*

Mr. LEVINE [continuing]. I learned yesterday, to my surprise, more than 90 percent of those cases are "no-asset" cases. It takes just as much work to process a no-asset case as an asset case. You can have a case with millions of dollars of assets and still be a no-asset case in that there is no money available to creditors because the assets are either exempt or because the assets are subject to a security interest.

But the bottom line is that the paper processing and the attention which must be given to those cases are significant. For $20 a case, we cannot ask a private trustee to do in those cases even as much as they used to do under the old code.

So that is an example of a problem. The number, 90 percent, I might add, surprised me. We have to do as much work on those as in an asset case such as the things that have to be reported to the court. We have had some trustees refuse to serve for $20. We have that particularly in the western areas, the Dakotas, for example, where for $20 the carfare or the mileage isn't going to be picked up.

Other problems, very briefly: We are having trouble getting people to serve on creditors' committees. We only have one person in the entire country performing full-time attorney duties in any of the offices. The U.S. Trustees are doing their own legal work. They are sitting up until 2 and 3 in the morning, writing briefs.

They should occasionally write briefs and they should know the law, but I don't think it was ever the thought that they should spend all their time doing legal research and not being able to administer their offices.

So, what I am talking about is basic positions just to bring us up to where we should have been. I am talking very basically.

I had some other points, but I think you get the gist. I have talked with members of your staff. I think they get the gist. I think I will stop now with the prepared statement.

Senator DeConcini. Mr. Levine, is the problem with nonasset cases and the low fee of $20—is it something that you feel we ought to address prior to the pilot project coming to an end in 4 years, and consider raising that to $60 or $80 or something?

Mr. Levine. Well, the Department, of course, has not yet established a formal policy on that, especially because that money might wind up, depending upon what you are talking about, coming out of appropriated funds.

As you are aware, the executive branch has its own procedures, so I can't comment directly on your question. I can say that it is a signicant problem both in our district and in the nonpilot district.

I do know, though, that in our districts, working 15-hour days, and 7-day weeks which they have been—I do require time reports of our professional staff so I can confirm that they are in fact working the hours my eyes and ears tell me they are. The staffs of the U.S. Trustees. can sometimes fill in the gaps when panel trustees quit.

But it is a very severe problem and becoming more so. Our budget was prepared on the assumption that there would be as many bankruptcy cases this year as last year.

We have, as I indicated, 26,000 cases now which is five-twelfth's of the year. And, 6,000 of those cases are joint petitions. They count as one, but they are two people, two bankrupts. So, you might say accurately that the real number of bankruptcy filings for five-twelfths of the year, and right now, is 32,000. Five-twelfths of last year was 25,000.

And, when we can't ask people to work for $20 apiece, that is just in the chapter 7 no-asset cases, I do say that my personal opinion is that that situation has got to be looked at very closely. I am not prepared today to express a policy on behalf of the Department, but it is of great concern.

Senator DECONCINI. Do you anticipate expressing a policy or a request prior to the end of the 4-year study?

Mr. LEVINE. I don't know, Senator. We will obviously address the issue at the Department, but I can't tell you whether or not and when we will formally address an opinion on that as compared with chapter 11's. The 11's should be changed immediately, and that does not affect public moneys.

Senator DECONCINI. You lay out the need very specifically for the increase in staff, for a staff of 167 people. Will the Office of the U.S. Trustees then be able to fulfill the functions intended for it under the Bankruptcy Code or will we be looking at another additional request for an increase next year?

Mr. LEVINE. Well, I believe the request we have made now is reasonable. It is the minimum level of providing acceptable service. By way of example, the U.S. Trustee in Boston has a staff of seven. That includes secretaries. That includes analysts. That includes everything. With those seven people, which includes himself, he services all the bankruptcies in Maine, New Hampshire, Rhode Island, and Massachusetts. He has one office.

If a creditor in Bangor wants information, that creditor flies down or waits for the U.S. Trustee to visit there.

The number of filings in that particular trustee's district, especially in the chapter 11 areas, are immense. Filings this year are up 700 percent, in New Hampshire. I am talking about just chapter 11's. Those are smaller numbers.

They are up 75 percent in Maine.

In Massachusetts they are about even. There are now 48 chapter 11's that he and his staff of two professionals and an Assistant U.S. trustee are supposed to be taking care of, on top of supervising the standing trustees in the 13's and approximately 1,100 chapter 7 cases.

So, when we talk about numbers, we are talking minimum numbers. I could tell you similar horror stories around the country.

Senator DECONCINI. With this 167, is it fair to say that Congress will be able to discern whether the approach being implemented in the pilot districts has an advantage over the approach being used in the non-U.S. Trustee districts?

Mr. LEVINE. The answer to your question is that we think it is a reasonable number, that it would give Congress a much better opportunity to do that, but remember the budget is based on the same number of filings as last year.

At a meeting yesterday of the U.S. trustees, one U.S. trustee reported that he is so swamped that his office is 4,000 docket cards behind. Now a docket card isn't critical, but it is an important part of the office. The reason he is behind is he is spending his time on the chapter 11's, making sure that the creditor's committees can take over the case so the Government can bow out. That is the major role we see in chapter 11's, making sure of this, plus appointing the creditor committee. That takes time. It means calling 20 people. They won't serve. They don't know what a creditor's committee is.

In the past, creditor's committees were voluntary. Now if you call a creditor on the phone the conversations run, "I am the U.S. trustee." The creditor then says, "Well, what's that? What is a bankruptcy? I am not in bankruptcy."

It is the kind of conversation that takes a long time. We can do it by writing, but in many cases, in a big chapter 11 case, you have got to to have a creditor's committee formed within the first 48 hours or 24 hours. It is just the paper processing.

So, in answer to your question, the 167, which includes one lawyer in every office and no more than one lawyer, and maybe that's not enough, should give us the minimally acceptable level that at least we can continue to run on a fast track and maybe reduce those days to 12-hour days, and the weeks to 6-day weeks.

Senator **DeConcini**. Well, I sympathize and appreciate the effort you and your staff are involved in. I am a little overwhelmed by the story you tell us just how burdensome this is in the pilot district and in fact your people are obviously being put upon more than was intended by Congress and I am sure more than was intended by yourself and your immediate supervisors.

I would hate to see us not provide the necessary funding for additional personnel this year, or even next year and go through this project and not be able to make a realistic judgment. I think it would be a real travesty of taxpayers' money and effort if either the non-U.S. trustee system or the U.S. trustee projects were to fail for inadequate funding.

I am concerned from what you tell me that you are not prepared to say, because you don't know, whether or not next year you won't need another 90 employees to try to carry out the mandate we have given you.

Mr. **Levine**. That's right.

Senator **DeConcini**. I have no further questions.

[Pause.]

Senator **DeConcini**. Based on the caseload increase that you are experiencing over last year, can you make any projections and submit them to us of increased personnel that you may need if that growth continues?

Mr. **Levine**. Well, I think at this point I have a problem with that, Senator. Right now we need these positions, as I say, just to keep even. I think we are not going to have enough information yet, to know how many incremental personnel the current level of bankruptcies is going to cause us to need.

I think we don't have the experience yet. I don't think we are going to get it. We know how much we need just to keep even, you know, the one lawyer per office, the one office in Bangor so creditors can have someone to talk to.

Senator **DeConcini**. Well, if the caseload grows next year equal to what it has grown this year over last year, can you make projections of what you think you will need to keep abreast of that kind of a growth?

I think economically, we might not be too far off to assume that it is not going to get better.

Mr. **Levine**. Let me do this. Let me promise you to give you the best answer, in writing, I can. I can't answer your question directly right now.

Senator DeConcini. Fine. I can appreciate that. I am just interested in trying to prepare myself for what we are looking at next year in light of the economics of today and the fact you are having this tremendous growth.

Mr. Levine. Let me just assure you of one thing. Whatever we do with the numbers, we are very mindful of not trying to duplicate functions that could, within what I think Congress intended in the statute, overlap with that of the court.

That is one thing we are trying to avoid in all areas.

Senator DeConcini. Of course, some of that is trial and error.

Mr. Levine. Yes; and some courts are more or less willing or cooperative than others. So, there are various problems.

Senator DeConcini. I thank you very much.

Mr. Levine. Thank you very much, Senator DeConcini.

[The prepared statement of Mr. Levine follows:]

Prepared Statement of Richard L. Levine

Mr. Chairman and members of the subcommittee, I am pleased to have the opportunity to appear before you in support of the FY 1980 supplemental and FY 1981 authorization requests for the United States Trustees.

The various offices of United States Trustees were created by the Congress in the Bankruptcy Reform Act of 1978 and began to exercise their duties on October 1, 1979. They were established as part of the reform of the bankruptcy process which Congress mandated. The responsibilities of the United States Trustees in administering bankruptcy cases have been extensive. Based on figures from July 1, 1978 through June 30, 1979, the 18 federal districts in which United States Trustees have administrative responsibility accounted for 27 percent, or over 60,000, of the 225,000 bankruptcy cases filed in this country last year. Although there are no detailed figures for the exact amount of money involved in these cases, it would be a fair assumption that because the United States Trustees' districts include large metropolitan areas, such as New York City, Los Angeles, Chicago, Boston, Birmingham, Denver, Wichita and St. Paul/Minneapolis, the amount of money involved is probably significantly greater than 27 percent of the total amount of money involved in bankruptcy cases.

The latest statistics available from the Administrative Office of the U.S. Courts, for the Fiscal year ended June 30, 1977, show that in the pilot districts the funds realized in liquidation cases were more than $70 million, and $11 million in Chapter XIII cases; Plans of Arrangement in Chapter XI's paid more than $49 million to creditors. These figures do *not* include assets administered by trustees, receivers, or debtors-in-possession in Chapter cases but not turned over to creditors, such as the cash handled in operating a business. There are no statistics available to measure that, but based on my own experience those figures for the pilot districts should be over $4 billion.

The United States Trustees are part of an experiment designed to terminate on April 1, 1984, unless Congress determines otherwise.

In the 5½ months in which the United States Trustees have been operating, they have already been widely praised for relieving Bankruptcy Judges of many of the administrative burdens involved in bankruptcy cases. United States Trustees have appointed committees of creditors in each Chapter 11 bankruptcy, which for the most part are business bankruptcies. They have worked together with those committees, particularly in those parts of the country where there have not been a tradition of significant creditor involvement, in order to begin to build a tradition of creditor involvement in bankruptcy cases. They have in addition selected panels of individuals to serve as trustees in individual cases. At all times, the goal of the United States Trustees has been to insure less governmental involvement and more significant involvement by creditors and by the private trustees appointed in cases. This has not been without a significant cost in terms of the diminished time and energy available to make the kind of decisions Congress entrusted to each United States Trustee.

The current fiscal year resource levels of 90 positions are proving inadequate to maintain a minimal acceptable service level. Indeed, several Bankruptcy

Judges have expressed grave concern as to whether the United States Trustees can fulfill the role intended by Congress with the present budget. I have testified on some of the dangers to the program of the current levels of appropriations before the Appropriations Subcommittees of the House and Senate as to the specific problems created by the present budget, and with your permission, I will not take your time rehearsing them with you, unless you have specific questions, or unless you desire a copy of that testimony.

The tasks of the United States Trustees are many. For instance, a responsibility which the United States Trustees take very seriously is the statutory mandate to appoint committees of creditors in Chapter 11 cases, a function which previously no one had the responsibility to do, not even Judges. In order to convince at least 7 persons to serve on a committee, the United States Trustee or member of his staff must telephone sometimes as many as two dozen creditors in order to get them interested in the case. This does not include the time spent in educating them as to how to function as a creditors' committee. Incidentally, the United States Trustee does not always use the telephone to assemble creditors' committees, but, Mr. Chairman, you and the members of the committee might be interested to know that in most significant Chapter 11 cases, it has been the custom for year past, and is in my opinion a valid need, for creditors' committees to begin operating usually within 48 hours of the filing of a bankruptcy petition. This is because once a petition is filed, the debtor must immediately adjust his finances as he operates during the bankruptcy, and this adjustment may seriously affect creditors.

The United States Trustees have the responsibility for monitoring fees claimed by professionals. They have the responsibility of examining the propriety of discharging debtors from bankruptcy. Because only one U.S. Trustee in the entire country has a full-time attorney, we have not appeared in as many fees or discharge hearings as we would like. The Trustees have been very active in moving for the appointment of trustees or examiners in Chapter 11 cases in order to protect creditors.

The U.S. Trustees of course have the responsibility for appointing individuals to panels from which a private trustee must be appointed in each case. For some jurisdictions, it has been difficult to convince persons to serve as trustees, because of the $20 limitation which was set by law as payment in so-called "no-asset" cases. (These are cases where there are no funds to distribute to creditors, a state of affairs often not discoverable until after the trustee has invested substantial time and effort.) So far the U.S. Trustees have been able to convince persons to serve, but with greater and greater difficulty. Fee problems have also arisen because of the low percentage available for appointees in Chapter 11 cases.

Another problem area which is developing involves Chapter 13 cases. In these cases, U.S. Trustees supervise the work of so-called "standing trustees," who receive weekly payments from debtors and then distribute the funds to creditors. In a district such as Alabama, for instance, the amount of funds handled in a single year by a single standing trustee can exceed $7 million. Because of some legal disputes now developing concerning the method of paying standing trustees, together with questions about the appropriate payments which a debtor must make, there is a risk that some standing trustees may resign, leaving the burden of administering these cases on the U.S. Trustees. Even if the standing trustees do not resign, the responsibility of insuring that they are reviewing every plan filed by a debtor, that they are adequately advising the courts as to the appropriateness of a plan, and that they are properly handling the funds entrusted to them, is significant.

Although creditors, attorneys and debtors frequently need to consult with the United States Trustees, we have only one regional office (the District of Kansas and Colorado has one office in Kansas and one in Colorado) and no branch offices. That means that a creditor or debtor in Bangor, Maine who wishes to consult with the United States Trustee must fly to Boston, or wait for the U.S. Trustee to come to Bangor, and it also means that a bankruptcy case filed in Bangor cannot be acted on by the United States Trustee until the mails favor him with notice of the filing. This has led to some delays in establishing meetings of creditors and the like.

Mr. Chairman, the present budget is impeding the ability of the United States Trustees to actually make decisions in cases. The exhaustive and the exhausting hours which the Trustees and their staffs have been expending will harm this program before we have the opportunity to prepare any reasonable kind of evaluation. The present staff also impedes our program from representing a realistic kind of test; the job is now being done, but that is at the cost of many 15-hour days and 7 day weeks. At some time the 15 hour days and the 7 day weeks are not going to be able to be sustained, and when that happens, the administration of bankruptcy cases in these pilot districts will suffer.

The request which we are making, Mr. Chairman, is to avoid a breakdown of the program, and the number of positions which we are requesting should accomplish that. The requested positions will enable decisions in the field to be made more speedily, and more responsively. The requested dollars will enable the office to commence a realistic evaluation program, and to be able to supervise its case loads. The original 1980 budget was prepared and presented to the Congress prior to initiation of the Program and before there was any experience with it. We are now feeling the consequences of this, one which the Judges and the bar have frequently commented on.

With respect to the budget of the Executive Office, we have the same kind of problem. You will notice that we are requesting only 10 additional positions for the central office, as compared with 67 for the field.

A major function of the Executive Office is to provide coordination to the United States Trustees; this includes obtaining space and equipment for the U.S. Trustees in the field, processing of personnel actions, and the implementation of fiscal and budgetary controls. We will have only one attorney to answer any inquiries of law, either from the United States Trustees in the field, from me, from other agencies of the government or from the Congress. We are seeking one person each to be responsible for the needs of the field offices in standard areas: budget, procurement, personnel, space and fiscal controls. The office has one Director, one Deputy Director, one Administrative Officer and one Director of Management Systems, whose responsibilities include helping the United States Trustees establish and maintain working offices and develop and implement methods to keep track of the several thousand cases for which they are responsible, and to coordinate the evaluation of the entire program which Congress will need before April 1984.

We will contract for the evaluation which is so critical to the Congress before it makes its decision in April 1984, since we do not have the personnel to do the evaluation in-house. We have initiated contact with the Administrative Office of the U.S. Courts in order to insure that the gathering of statistics is not accompanied by a duplication of effort. The evaluation is very important, and as soon as we have been authorized the funds we are requesting we will commence the evaluation.

The Bankruptcy Reform Act was generally thoughtful, and has created a system which can work. Whether the system will be worth preserving in 1984 is too early to determine, but with the resources now being requested, the system will at least represent a test, the results of which Congress can weigh seriously.

That concludes my prepared statement. I shall be pleased to answer any questions you or other Members of the Subcommittee may have.

Senator DECONCINI. We will adjourn, subject to the call of the chair.

[Whereupon, at 2:03 p.m., the hearing was adjourned, subject to the call of the Chair.]

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DEPARTMENT OF JUSTICE AUTHORIZATION
CIVIL RIGHTS DIVISION

WEDNESDAY, MARCH 19, 1980

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, in room 2228, Dirksen Senate Office Building, Washington, D.C., commencing at 9:50 a.m., Hon. Birch Bayh presiding.

Present: Senators Bayh and Simpson.

Senator BAYH. The committee will now come to order.

OPENING STATEMENT OF SENATOR BAYH

Senator BAYH. This year begins the third year the Judiciary Committee has taken an extensive look at the total programs and activities of the Department of Justice, an agency with a great deal of authority over many aspects of American life, from influence on business and prices with antitrust to crime control with the FBI and to the protection of our rights by the Civil Rights Division. It is my view that these annual sessions provide an important opportunity for the Senate and the House of Representatives to examine how the Congress legislative intent is being carried out by the Department as well as to determine what further needs to be done to protect the lives and liberty of all Americans.

Today, once again, we meet to hear from the Civil Rights Division, the section of the Department of Justice formed in 1957 to protect and defend the ideals of justice and equality for all persons. Theirs has not been an easy task: at times the Division has lacked the support needed to carry out its functions, at others the lack of funds has severely hampered the Division's activities. Three years ago the committee heard evidence showing that the Division was grossly underfunded and understaffed, operating in 1978 at what was found to be 1973 levels. I and other members of this committee questioned whether such a budget could maintain the activities necessary to protect the basic civil rights of all Americans. The committee then felt the record justified major increases and authorized those outlays for fiscal year 1979. Unfortunately, the appropriations committee ignored the findings of this committee leaving the Division no choice but to cut back many programs to the detriment of our fellow citizens. This error was compounded for fiscal year 1980 by the Office of Management and Budget who overlooked the documented needs of the Division; once again an inadequate budget was sent to this committee. The committee did its duty by maintaining an authorization level that would allow the Division to act to protect our civil and constitutional rights. If the appropriations committee had followed suit this long litany would have ended; such was not to be the case, once again leaving the Division underfunded and understaffed. This year I am sure this situation will be ended.

I believe that one of the Congress' top priorities should be to ensure that our civil rights and liberties are preserved. Much of the burden of this activity falls on the Civil Rights Division, since the Government is often the only one with the ability to act when individuals are unwilling or unable to take those efforts to protect themselves. For more than 25 years, the division and many of us in the Congress, have been laboring to make our dream of equality for all Americans a reality. We have made much progress. The legal rights and remedies sought 25 years ago are for the most part law. The simple dignities prayed for 2½ decades ago, are now commonplace. The Division has concerned itself throughout this time with many areas, including voting, housing, education, and employment, to protect the rights of our most helpless citizens be they racial or ethnic minorities, prisoners, or the institutionalized. In the past the injustices were so blatant, so obvious that each was easy to identify and attack as a separate problem. We are learning now these are not easy problems to solve.

Today, despite this progress, we still see massive discriminatory barriers placed in the path of many of our citizens. This is especially true in housing where a black family has a 85 percent chance of being discriminated against while seeking a home. This is not caused by the use of such devices as "white" or "colored" real estate advertisements now: it is more subtle, it is steering, it is redlining, that help maintain the separate but unequal nature of our neighborhoods. It is this type of discrimination, the far less obvious but just as deadly variety, that the division must now move to help end.

It is my view that we have much left to do. I look to the Civil Rights Division to take the lead. It must again actively pursue the cause of equality; it must use its awesome power to insure our basic rights are guaranteed throughout the land.

With the 1981 budget, the Division, I feel, has finally moved to correct the funding situation. The division is asking for fiscal year 1981 funds totaling $16.9 million, approximately the same level authorized for the present fiscal year. In 2 years we have moved from funding the Division at 1973 levels to 1980 levels, I feel this is a very important development and a welcome one.

We are here, of course, to have an overview of the Civil Rights Division of the Department of Justice which, in my judgment, is the heart of the Department of Justice. We have an outstanding Assistant Attorney General who is charged with overseeing this responsibility, and I think he carries this duty out very well.

We are glad to have Assistant Attorney General Days with us. I see he has Mr. John Huerta here with him and Mr. Jim Turner. We appreciate you gentlemen being here.

Why don't I just cease and desist, Mr. Days, and let you proceed.

STATEMENT OF DREW S. DAYS III, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, ACCOMPANIED BY JOHN E. HUERTA, AND JAMES P. TURNER, DEPUTY ASSISTANT ATTORNEYS GENERAL

Mr. DAYS. Thank you, Mr. Chairman. It is always a pleasure to be before the Senate Judiciary Committee.

What I would like to do, since my full remarks are entered into the record, is make a very few brief comments and then open myself up to any questions that you or other members of the committee may have.

In the 3 years since becoming the Assistant Attorney General, I have attempted to make the Division a more effective component of the civil rights enforcement effort. In that respect I have been motivated primarily by a desire to continue the attack upon blatant forms of discrimination of the 1960's and 1970's, while preparing to address the more subtle types of discrimination predominant in our society today.

As a general matter, my goal has been to increase the access of minorities in center cities to jobs, schooling, and housing in suburban settings, to foster the economic mobility of women, to provide for reasonable accommodation and integration of the handicapped, and to enable the non-English-speaking to participate in voting, education, and other public rights and opportunities.

As you know, we are requesting $16,989,000 and 454 positions in fiscal year 1981 to carry out this program. During that fiscal year we intend to focus attention upon improving three areas: criminal prosecutions, coordination of the Federal title VI effort, and administrative services.

In the criminal prosecution area we have been working harder and harder each year on increasing more difficult cases, and yet our backlog has remained relatively constant. We hope, with the requested additional resources, to be able to reduce our processing time by 25 percent, as well as focus more effectively on widespread violations of criminal civil rights statutes.

Our projections envision, of course, a continuing growth in the activity of the U.S. attorneys in criminal civil rights prosecutions.

In my prepared testimony, I have supplied three recent examples of close coordination between my staff and the U.S. attorneys' offices.

With regard to title VI coordination, we are seeking additional resources to improve our performance in a program that has traditionally been the most underfunded of all the Civil Rights Division's responsibilities. During fiscal year 1980, we had only 11 positions for monitoring, coordinating, training, and developing compliance and enforcement programs for the entire $125 billion in title VI programs administered by 30 Federal agencies.

I believe that we have streamlined our procedures over the past 3 years and have developed computerized monitoring techniques, described more fully in my testimony, that will insure our achieving significant progress in title VI coordination in the coming year.

We are also asking for increased resources for administrative services to improve our litigation support system. Perhaps I shouldn't be boasting, but I believe that in 3 years we have moved in the Division from horse and buggy procedures in this regard to a system of computerized docket control, document retrieval, and data analysis that is the most advanced of any litigating division in the Justice Department. We want to do even more ambitious things that will improve our ability to litigate major, complex cases in highly professional, efficient, and cost-effective ways.

I address three other areas in some detail in my prepared testimony: land use, Federal enforcement, and voting rights. I would be happy to go into more detail with respect to those areas, but perhaps in the interest of time it would be appropriate for me to stop now and entertain any questions that the Chair may have.

Thank you very much.

Senator BAYH. Thank you, Mr. Days.

We will put your statement in the record.

On the Voting Rights Act, the section 5 guidelines, are you of the opinion that they're adequately funded to do that job? We have added new burdens there, and I know your authorization is above what it was last year in your budget request, but I think we have a responsibility to make certain here in this oversight hearing to see that you have the resources necessary to implement the provision of law as far as the rights of citizens to vote.

Mr. DAYS. Well, Senator, let me make several comments in response.

First: I am pleased to say that if all goes right today, the Federal Register will reflect the fact that the section 5 guidelines have been approved by the Attorney General for publication and public comment, and they will be distributed to all the jurisdictions that we think can benefit from having this type of information. Some 3,000 copies are going to be sent out, as well as cover letters, to indicate to submitting jurisdictions what the changes are and what responses we would like from them in terms of some of the changes that have been made.

Those guidelines reflect not only changes in our procedures, but changes in the state of the law, since the earlier guidelines were promulgated and disseminated.

In terms of resources, of course, we can always use additional resources, but I need not remind the Senator of the fact that I am here to defend the President's budget and that we also are in pretty austere times.

Recognizing those realities, we have tried to increase the effectiveness of the voting section with the resources we have and any additional resources we might be able to acquire. For example, as of last September we have a reorganized section 5 unit. It took 9 months for us to go through that reorganization. My special assistant worked almost full time on that assignment.

What we have done is upgrade the skills of the people in that unit. We have augmented it in certain ways. I think what we have developed is a staff that can deal with much more sophisticated submissions, can do it more effectively, and can do it in a way that is much more consistent with the requirements of the law. So while we are not perfect in that regard, I think what we have done has significantly increased our ability to deal with these problems.

I have also instituted a number of procedural changes in the way that we deal with these problems, so that submissions don't languish in our office. For example, there was a practice of seeking submissions, and once the submissions came in, if we could not discern from the submissions whether there was a compliance with the Voting Rights Act, we would ask for more information. If we got no response to the more-information letter, the matter just sat in our offices, sometimes for years.

We no longer do that. My position is that we ask for information within the 60-day period, and if we don't get it in a timely fashion, we object to the change and then leave it to the jurisdiction to try to figure out how to deal with our objection.

Senator BAYH. Mr. Days, I appreciate the analysis of what you're doing to cope with a difficult situation. I guess maybe, is it possible to answer the question yes or no; that is, do you have the resources to implement that important section?

Mr. DAYS. No, we don't.

Senator BAYH. You don't.

Mr. DAYS. We're doing, I think, the best we can with the resources made available to us.

Senator BAYH. We'll take a look at that, then, to see what needs to be done, because I don't know of any area of the whole subject of civil rights that ought to be given priority treatment, than the right of our citizens to vote. That's sort of the cornerstone for everything else that happens in our society.

We passed S. 10 in the Senate, and a somewhat different version H.R. 10, passed the House, of the Civil Rights of the Institutionalized Persons bill. If that legislation is sent to the President, would you recommend that he sign it?

Mr. DAYS. Excuse me?

Senator BAYH. If S. 10 is sent to the President, would you recommend that he sign it?

Mr. DAYS. If all things go the way I expect they will, absolutely. It is something that we have worked on, as you know, Senator, for 3 years. I would be surprised if I ever were to recommend against the President's signing it. I think it's a very important piece of legislation.

Senator BAYH. I appreciate the contribution you have made in our efforts to pass S. 10 in the Senate.

Is the passage of that bill going to unnecessarily increase your burdens? Are you going to have the resources necessary to deal with that? Some of our colleagues in the Senate were concerned that this was going to be another big cost as far as the Federal Government was concerned.

Mr. DAYS. We have never anticipated a great additional cost for the Civil Rights Division. I testified before this committee before, at least on two occasions, that what we see S. 10 and H.R. 10 permitting us to do is shift into a much more coherent mode in terms of developing our litigation program.

At the present time we are limited to intervening in cases or serving as amicus and we tend to be at the mercy of existing litigation. We get calls and letters all the time from Federal judges wanting us to participate in their cases. I am really defenseless in that respect because I can't say that we have our litigation program and we make a very coherent decision about how we're going to use our resources. I think with the authority, we can shift away from going into other people's cases, by and large, and select cases where we think the United States can be most effective in developing the law and be the most helpful in protecting the rights of institutionalized persons.

I think that shift will mean that we will gradually be able to move resources away from being on the sidelines and being the main event at some of these lawsuits.

Senator BAYH. I would assume the lawsuits that ultimately are brought can be handled much more effectively because you will have control over the way in which the Justice Department gets involved in these cases.

Mr. DAYS. Absolutely.

Senator BAYH. The impact of S. 10, as far as dealing with the critical problems for a minimum investment of money and time, would be to have a more efficient prosecutorial effort.

I must say, I think we improved the bill to the extent that we emphasized the need to try to settle any charges voluntarily without having to go to court. The very presence of the Justice Department, the Attorney General, and you, as Assistant Attorney General, utilizing all efforts to conciliate these matters voluntarily before the Justice Department formally came in, would probably result in State action, the kind that should happen. Thus, having the States act would involve expenditure of less moneys, if this all works the way we want it to work.

Mr. DAYS. I think that's right.

In addition to that, Senator, of course, we have spent a lot of time litigating threshold questions, not going to the merits, but litigating on whether we can intervene or whether it's appropriate for us to be a friend of the court and so forth.

With S. 10 and H.R. 10, we won't have to litigate those threshold issues in the same way that we did. To follow up on your observation about the legislation and its improvement, again I think, as I testified, those additions really embody procedures that we in the Justice Department are quite comfortable with and have been following on our own since we became involved in this area of litigation. We do it in other areas as well. Title VII is the first example of the negotiation and prior notice process which in so many instances avoids protracted and very expensive litigation.

Senator BAYH. I had an interesting experience Monday, where there was a luncheon involving about 500 or 600 senior citizens. I was sort of moseying around among the tables shaking hands with some of the folks and visiting and getting some of the problems that we all have relayed to us when we're out with our constituents.

One of the elderly gentlemen came up to me with an extensive account of the passage of this legislation in which he had underlined several of the items. I thought: Oh, boy, here we go. It's going to be on how I destroyed State's rights. Interestingly enough, he said: You know, when my chapter of senior citizens meets, I'm going to read this to them and let them know what's happening here. Apparently, they have a particular institution up there where a lot of the senior citizens are treated in a very terrible way, and here were some folks that really saw this bill as a way to improve the quality of life for those seniors who have given so much to so many of us. That was a most rewarding experience.

I appreciate your being here. If I have any other questions, I will submit them to you for written responses. That will save your time, because we know how busy you are.

We appreciate the fact that our distinguished friend and colleague from the great State of Wyoming is here. He is very busy.

Senator Simpson, it's good to have you here this morning. Do you have any questions or comments you want to make?

Senator SIMPSON. First, Mr. Chairman, thank you very much for your courtesy. I enjoy my work with you on the Judiciary Committee. Although even old ATO brothers do not always agree on the issues of the day, I have been treated with great fairness. I appreciate it very much.

And you, Drew, I have had some good visits with you about various things. I have enjoyed that. You have been very helpful to me in my term here, even though again, as I say, you and I don't agree on certain things. I admire your zeal and your enthusiasm and the way you pursue the things you believe in. I mean that sincerely.

I have enjoyed some good visits with you about S. 10 and about various other matters. I see you as a very able person.

One of the things, I guess, that we all bring with us when we come here is something very simple—we bring our past. You have brought that to your job. I bring that to mine.

One of the jobs I held in my early days in public life was to serve as a member of the Park County Zoning and Planning Commission. That was the ghastliest job I ever had, in any public function. I learned there what hell was. We would go to public meetings and they would say zoning is a Communist plot, that land use planning is a phoney definition—"we know what you're really doing." Then we were told that the reason we were zoning this area or another area was because we wanted to change the use of it, that then we were all going to buy a piece of it, and then we were all going to sell it and make a mint. We would go through that at public hearings.

It is the most volatile, the most emotional, the most extraordinarily irrational area that you will ever enter, if you enter it—I don't know that the Congress will allow you to enter it, but that's where you're going. You are going into the deepest thickets—and, of course, you know this; you don't need some freshman Senator from Wyoming to tell you that. You're very astute.

You are going to touch off a powder keg when you start saying the Federal Government will somehow enter the fray with regard to zoning on the local level, land use planning on the local level. They're very different. People can't even get the distinction clear in their mind of the difference between land use planning and zoning. Zoning is just one method of carrying out a land use plan, but you won't ever explain that to anybody.

Limited development rights is another way of carrying out a land use plan, but you won't get anybody to understand that either.

So if there is any area that I know of that is held to the breast of local communities, even more than local schools and all those other things that are very important, it is land use and zoning.

I guess I have got to ask why a guy with your skills and abilities and limited resources, with so many fires to put out in your jurisdiction, what disturbing evidence would lead you into this? You have pressed the big red button.

I think you're off on one that will have your Department reeling if you continue it, and it won't be coming from the right wing or the left wing. It will be coming from people who say: Wait a minute; you have really, really done it now. What in God's name can you be doing in this area when there are, and always have been, a tremendous number of decisions on zoning and planning that uphold the right to discriminate against people because of wealth and income or whatever. Those things have always been there.

Well, I'm not here to cover you up with stuff, but I should love to uncover why you are proceeding in an area which is going to be a battering experience. It will be, and it won't come from here. It will come from right down at the local level. You'll have plenty to do in every way.

Well, enough, for a while anyway. I have a couple more questions. Could you, Drew, tell me?

Mr. DAYS. Certainly. Senator, as you know, I responded to a question from you in the form of a letter on February 21, 1980, in which I attempted to give you and your staff some background on what the Department had done in this area and what we were presently doing, and why we thought what we were doing was completely consistent with the Fair Housing Act and other legislation enacted by this Congress to get at discrimination in housing.

As I indicated in my letter, the Department has been involved in five cases, even before I got to the Department, in this area. The city of Black Jack is perhaps one of the best examples of that, where several courts have held that the way in which the city went about using its zoning authority violated the Fair Housing Act, that the practices were designed and had the effect of precluding the movement of minorities into a suburb of St. Louis.

We were involved in *Kennedy Park Homes* v. *City of Lackawanna*, which was outside of Buffalo, where the same thing was concluded. I won't go on.

While the Attorney General's remarks with respect to our land use litigation program gained a great deal of media coverage and discussion, what he was essentially doing in his remarks was ratifying a course of action that had been underway before I got to the Department, but I would like to think increased in its impetus and its momentum since I became Assistant Attorney General.

As I have indicated in my letter, we do not see ourselves as having a roving commission to attack zoning decisions throughout the country. What we're doing is following the law as we read it, and I think we read it correctly, in terms of evaluating the totality of circumstances with respect to certain land use practices, in trying to determine whether the consequence of all those practices and the attendant circumstances lead us to believe there has been a violation of the Fair Housing Act.

Let me give you a very recent example. I mention in my prepared testimony our suit against Chickasaw, Ala. That was a case in which we challenged a practice of Chickasaw, which is a suburb of Mobile, of limiting access to public housing to residents of the community. Well, while Chickasaw, Ala., is 100 percent white, in a county that is 32 percent black, it has never had a black resident since 1945, except for a few brief weeks when a black family attempted to move into the community and was run out by terrorists, by bomb threats, and bricks thrown through car windows and so forth.

A Federal district judge, Judge Hand, sitting in Mobile, concluded on March 7 that we had proven a violation of the Fair Housing Act. I think that was the right decision; I'm proud of the fact we filed that suit, and I'm proud of the judge for the conclusion that he reached, because I think it's absolutely consistent with the intent and language of the Fair Housing Act.

The Fair Housing Act was designed to open up opportunities and to break through the arbitrary and sometimes intentional limitations upon the movement of minorities.

Why I'm doing this is very simply answered, Senator Simpson. It is that I see discrimination in this country as being not a series of discreet problems, but one problem. It is very common for people who want to find a quick fix with respect to school desegregation to say, Well, let's not bus the children around; let's open up housing for people so that we can increase the integration in neighborhoods, and then we can have neighborhood schools and have integrated schools at the same time. Of course, in order to do that, there have to be housing opportunities available. They are, by and large, not that way in this country.

It's not merely economics. I think there are enough studies that demonstrate that when one equalizes and accounts for differences in economic conditions, the prevailing consideration appears to be racial; that is, poorer white people than black people somehow get to the suburbs, and black people remain in center cities. That cannot be explained, therefore, by simply an economic analysis. There's something more going on there.

If we talk about providing better jobs so minorities can buy better houses, well, the jobs are moving to the suburbs and minorities have difficulties following the jobs—and I can go on and on. It really is of a piece, if you will, Senator Simpson, and I see my responsibility as being attacking, wherever I can, pieces of that problem, so that we can with some confidence say that we're doing what this Congress expected us to do by enacting the laws that we're required to enforce.

Senator SIMPSON. Well, I hear what you're saying; I assure you I do, but I would think with so many areas of entry, for you and your Department, into the field of where you can really do certain very appropriate and visible things, things that are needed and have been needed to be done for decades, for you to divert yourself into this is almost like crashing your head into a wall. That's the way I feel.

Mr. DAYS. It's not a diversion, Senator. When I say that we have a coherent program, I mean that we are bringing significant title VII cases, we're dealing with voting rights, we're dealing with school desegregation and other educational problems. Obviously we can't do everything at the same time with the same amount of energy and with the same degree of allocation of resources.

I have not, for example, said we're going to file no more title VII cases, but we're going to deal merely with land use; that's not the way I operate. I have tried to use the resources in a way that makes the most sense.

I think, rather than bringing a suit against a trailer park for discriminating in their rental of lots to minorities, it is more effective in the long run to deal with some of these land use problems, because the impact is much more significant.

Senator SIMPSON. That may be. I think, though, what you're going to find when you get into it is that people involved in local land use planning and zoning, both black and white, are going to be totally offended by this attempt on the Federal level to come into an area which is the most sensitive in the United States of America, and not because it is set up and rigged for racial discrimination. That's not the reason. The reason is the guy who doesn't want a cattle feedyard next to his residence. You're really headed into an area which is fraught with the fact that often those people are either appointed by the county commissioners or they are elected on the local level, with public hearings at every step of the proceeding. In fact, the only way you get a local ordinance passed is to have about three layers of public participation, where, again, blacks and whites and Spanish and all come in and express themselves on land use planning and zoning.

I guess I know you, and seeing this entry into the situation, and reading Ben Civiletti's comments in public, which I do—and I have come to know him—well, I have to scratch my less than hirsute dome to understand why it is that you wish to broaden yourselves into an area which is just going to batter some of the good things that I think have come about through your Department and through the Attorney General's office in general. I just don't see why you want to take this one on for some Don Quixote shot into the windmill, where I think you're going to destroy some of your effectiveness in other areas. I guess that's what I'm saying.

Mr. DAYS. That may be, Senator, but I really don't think that's going to be the case. I am confident in our ability to explain the cases that we file and to get across to people what it is that warrants the Federal Government's participation in this type of matter.

An other way of explaining our participation has to do with the already very large presence of the Federal Government in land use questions. This Congress has authorized Housing and Urban Development and the Veterans' Administration and a number of agencies to turn over millions and millions of documents, literally, to communities in order to open up housing opportunities. Many communities have willingly accepted those moneys.

It seems to me that there's a quid pro quo for that money. If communities are accepting funds to diversify land use and to open up opportunities for poor people and minorities, and don't comply with their assurances when they accept that money, I think it's incumbent upon the Federal Government to either take the money back or get some type of compliance. I understand that to be the wish of Congress and not something that I created out of folklore.

Senator SIMPSON. Well, I am one who hopes the Congress will always support the Department of Justice appropriately through its funding methods and everything else, and that's why I would hope that you would stay away from an issue which is going to light little fires all over that floor that you don't need if you're going to get on with your central mission.

Now, I do have a couple of specific questions.

What, in your mind, is the legal theory which the Department is applying in its suits against government alleging civil rights violations because of land use ordinances specifically? I want to know what you feel the constitutional test is and also what you feel the statutory test is, and whether you agree that a discriminatory effect, as shown by statistics, should not be enough by itself to bring that kind of litigation.

Mr. **Days.** As you indicate, there are two ways, at least two ways to go about addressing land use practices. One is a constitutional approach, and the case law teaches us that in order to sustain a constitutional attack, we would have to show intent or purpose to discriminate.

Now, I think the Supreme Court has recognized that the whole question of intent of governmental bodies as opposed to individuals is a very complex one and a very difficult one. If one looks at the Supreme Court decisions, one is admonished on the one hand not to try to probe the intent of the legislative body; on the other, one is told that in order to prove a constitutional violation, they have to have some showing of intent.

I think that facial inconsistency is explained by the way the Supreme Court has recognized that circumstantial evidence and certain types of statistical showings, and the totality of the circumstance, can point toward constitutional intent. It is not the smoking gun in which someone on the zoning commission gets up and says, I don't want blacks, or I don't want Indians, or I don't want Hispanics in our community, and everyone else on the board stands up and gives applause to that statement and it's recorded in the minutes for everyone to read. That's not the type of intent the Supreme Court has required to make a constitutional case in this area.

The Arlington Heights case is, I think, the guidance that we use in that respect.

When one proceeds under title VIII, I think the case law indicates that there is a lesser standard than the constitutional standard. There is no need to show constitutional purpose or intent to discriminate.

One can begin by looking at the impact of certain practices, but that's the beginning of the inquiry, not the end. One has to look at the impact and then analyze a variety of considerations: When was it done; what were the attendant circumstances; what appears to be the governmental interest; are there reasonable alternatives to satisfy the governmental interest without the type of impact that the practice has with respect to minorities. Once that analysis has been carried out, if there is a disparate impact, if there appears to be no government justification for it, and if the impact is essentially segregative, then the courts have held that's a violation of title VIII.

There is a schizophrenia in the case law up to this point, in the sense that courts talk about impact or effect, while at the same time there is some intimidation that effect alone cannot carry the day. That's what we believe the law to be.

You go into a community and you see that there's a 3-acre zoning requirement and there are no blacks; that's not, in our way of thinking, a justification for filing a suit. We would have to look at the attendant circumstances. So as I said in my letter to you, we don't think that land use practices that have a discriminatory effect or disparate impact are, per se, violative of the Constitution or of title VIII.

Senator SIMPSON. Let me just ask that question in the record so we have it.

Do you agree, then, that an ordinance that has a discriminatory effect may be legal if there is no intent to discriminate, and the ordinance is rationally related to some legitimate purpose?

Mr. DAYS. Certainly, if there is no intent to discriminate; that is one of the considerations. I am not certain that I am prepared today to tell you what the standard is in terms of the level of government justification. What the courts seem to be looking at is, for example, the nature of the impact, not merely that there is a disparate impact, but how effective has it been in precluding certain groups from participating in housing opportunities in a community. Chickasaw is a good example.

Senator SIMPSON. Who would have the burden of proof in that situation?

Mr. DAYS. Well, I would think once we showed a disparate impact and showed questions about the attendant circumstances, the burden of going forward would be with the jurisdiction; that is, with the community.

But we would continue to have the burden of proof. We would have to ultimately show by some civil standard that there was a violation of the Fair Housing Act. So I don't see the burden shifting to the community, the burden of proof shifting to the community under these circumstances.

Senator SIMPSON. The burden of going forward would?

Mr. DAYS. Yes.

Senator SIMPSON. An interesting distinction in itself.

Just a couple more——

Mr. DAYS. Well, not a distinction that I created.

Senator SIMPSON. Yes, I know.

Mr. DAYS. It's one I read about when I was in law school.

Senator SIMPSON. In your response to my letter you said—I can't remember the reasons—that you could not furnish me a list of investigated communities. I would appreciate it if you could please supply to the committee and for the record a list of the communities that the Department has investigated and the reasons why they were selected, including the manner in which each of those communities was brought to your attention. I'm sure you don't go out with your net looking for them. We would like to know what gave rise to them coming on the list and why you believed they might be illegally discriminating, what were the questions and the information that was asked or required of them, what was the time and the manpower involved for each of those investigations within those communities, what was your factual basis for concluding that some were not improperly discriminating, whereas obviously some were. I think those are very important things for us to consider in the legislation.

They are not thrown out to harass or to be cute. I need to know those things before I can intelligently deal with the legislation.

Mr. DAYS. I would be glad to cooperate to the extent that I can under Department policy. We certainly want you to understand as fully as possible what we're doing and why we're doing it, and I will try to be as responsive as I can to any questions that you pose.

Let me just say as an interim response that we have been working more and more closely with HUD each day in order to strengthen the way in which HUD carries out its responsibilities, and to the extent that HUD has had difficulties in getting compliance with agreements that communities have made under the Community Development Act, for example, that has been one of the considerations stirred into our determination of how we should allocate our resources.

So we are trying to work as a government in carrying out the laws that you and your colleagues enacted.

[The material referred to above appears in the appendix.]

Senator SIMPSON. I might ask, too, do you believe that a community, through its elected local government, must make housing available to low and moderate income people? Is that a function of the municipality in this day and age?

Mr. DAYS. In a freestanding way, no, that's not a responsibility, but as you know, under several Federal housing programs, communities do make that commitment. The problem has been that they have made the commitment and never complied in any way.

Senator SIMPSON. In the Dunkirk case, I just wanted to touch a moment on the complaint and then I'll wind down here.

You use a phrase "requiring the defendant to take all appropriate affirmative actions to correct the effects of its past discriminatory practices, including affirmative steps that will lead to construction in Dunkirk of an appropriate number of units of low and moderate income housing, locations" and so on.

What is that definition of "affirmative actions" and "affirmative steps"? What is the local community to expect to have to deal with when these are the types of cases that are coming?

Mr. DAYS. Well, obviously what the community is going to have to do will turn on the evidence that we put into the record and the court's evaluation of it, of the case that we make. In the Dunkirk case, what we are alleging is a systematic effort on the part of city officials to frustrate what would otherwise have been a perfectly acceptable housing project that would have been available to minorities and would have provided housing for them in that community.

We see in our investigation of that case the type of frustration of perfectly acceptable and perfectly legal efforts to provide additional housing that is violative of the Fair Housing Act. If we're successful, if the court accepts our contention, we would expect the court to direct the municipality to take whatever steps are necessary to undo the actions that were taken in the past to frustrate this construction. More than that, I can't really say because it will get into very specific types of remedies once we're successful.

Again, let me talk about Chickasaw. If you recall, there were no blacks in the community and, consequently, no blacks in public housing. What the judge has ordered, among other things, is that blacks who apply within 90 days after his order will be treated as though they had applied March 5, a year ago. So in terms of their opportunity to be considered for public housing in Chickasaw, they will have gained 1 year's seniority, if you will.

The judge felt that under the circumstances, that was an appropriate remedy. I don't know whether you can call that affirmative or passive or whatever, but it's an effort to undo the effects of the discrimination that the court found.

That's really what we're talking about. We're not talking about communities reaching out, at least in terms of our litigation, to do all kinds of things they have never done before—unless they have taken Federal money and have committed themselves to doing that. We're talking about remediation, Senator.

Senator SIMPSON. I understand that, and I guess that is one of the puzzling and troubling things to me—not that it dampens my enthusiasm about my work; I enjoy that. It is always the horror stories that we hear about.

I don't doubt for a minute why you want to come back to Chickasaw. That's bad business and it's repugnant to me if those things are happening; but while we deal with the Chickasaws, we deal also with Des Moines and Cheyenne and Seattle. That's what always happens in this game.

One man, one vote came from Alabama on some things that happened down there that were repugnant to me, but it affected, you know, the county commissioners in Flathead County, Mont. Nobody had that in mind, and that's what I'm talking about. If we could somehow pinpoint the impact of a law that now impacts totally on America because it's Federal legislation. I guess that's what I will have to see if I can't help change in my time here.

Mr. DAYS. I respect your concerns and the concerns of other Members of the Congress, because there is always a question of about how the executive branch is going to carry out authorizations that are given by the Congress to the Attorney General or to the President. We welcome the oversight; we welcome the criticism if the Congress thinks we're doing things improperly; but I am confident that we will continue to work well within the limits of the Fair Housing Act and consistently support the overall objectives of that act and other acts that have to do with fair housing.

Senator SIMPSON. Well, back to that complaint, and then I promise I'll stop.

That complaint on the Dunkirk case also states that the city's actions had the purpose or effect of perpetrating residential segregation. The disjunctive is used, implying that effect alone would be enough. Nowhere else in the complaint is it stated that the city's laws or applications of laws or how it performed was intended to discriminate on the basis of race or national origin.

Do you have any comment on that?

Mr. DAYS. That's just the way we plead them, Senator.

Senator SIMPSON. OK.

Mr. DAYS. We make a practice of filing relatively short complaints.

Senator SIMPSON. Notice pleading is the name of the game.

Mr. DAYS. Yes, and, of course, when we file lawsuits, in many instances there is prior notice to the respective defendants of our investigation and the types of things we're looking at. So it doesn't come as a total surprise to a community when we file suit.

Senator SIMPSON. Is the complaint, in your mind, consistent with your statement in the testimony, that you do not consider restrictive zoning and so on, per se, unlawful?

Mr. DAYS. I believe it is.

Senator SIMPSON. When are such laws legal, in your view?

Mr. DAYS. When are they legal?

Senator SIMPSON. Yes.

Mr. DAYS. I find it difficult to generalize. I would have to say that in some cases they are legal. If you want me to tick down the criteria that I discussed——

Senator SIMPSON. Feel free, if you could, to just add that to the record at your convenience. I would appreciate having your thoughts on that, when you believe laws like that are legal.

Mr. DAYS. Well, Senator, we do not go around giving certificates to communities in this regard——

Senator SIMPSON. I'm aware of that.

Mr. DAYS. We go on a case-by-case basis and we analyze the circumstances. Where we decide not to file, I suppose one could conclude that we determined there was an adequate basis to allege a violation of the Fair Housing Act.

As you know from your experience on the zoning commission, there are hundreds of considerations that swirl about zoning decisions or land use decisions. I can talk about the general criteria, but I don't think I could say to you that a 3-acre zoning requirement is legal when x, y, and z are present, and illegal when they're absent. I'm not in a position to do that, nor am I in a position to do that with any other type of litigation that we file, title VII cases or voting cases, but I would be happy to take a shot at it.

Senator SIMPSON. Yes, take a shot at it. I don't ask for a treatise, nothing out of some hornbook for me.

Mr. DAYS. I was hoping that my letter to you, Senator, would have got at some of this, but apparently not.

Senator SIMPSON. No; there are some omissions there from the questions.

Mr. DAYS. Fair enough.

Senator SIMPSON. One further question.

Do you believe that a law that might be intended to discriminate on the basis of income or wealth would be illegal, especially in the zoning area, such as that this particular area will have no homes less than $100,000 as certified by the contractor and the building inspector? What do you think about laws like that?

Mr. DAYS. Well, I think that communities, as a general matter, have a right to make decisions of that kind.

I think it was before you came to Congress, Senator Simpson, that there was an earlier version of the fair housing amendments which attempted to get at discrimination with respect to economic class. My recollection is that the Department, while not taking any firm position on that issue, raised questions about the constitutionality of pushing the Fair Housing Act to that extent.

So it has not been our position, and it has never—we have never come before the Congress and asserted that we were seeking that type of expansion of the Fair Housing Act. It is not the thrust of our litigation. I would think communities have, as a general matter, the right to make those types of distinctions.

Senator SIMPSON. I appreciate it very much, and I appreciate your patience while I deal with some serious ambivalence in my own mind about where we're headed, wanting to get there, but wondering about the resources of your Department, about how many people are going to be directed in this area, when there are so many other things that seem to require such critical attention by your Division, and then to get out into this area of local land use, local planning, local zoning. I have seen it already in the nuclear business, with regard to emergency planning. Should the Feds do that or the local communities? Boy, guess who wins that one? The local communities say, "You can't tell us about that."

Maybe we will come back to—what is the phrase in the obscenity statutes—"contemporary community standards" or something like that, where we will have to deal with it on an individual basis. You indicate that. You're indicating special consideration of the facts at that local level and the pattern, the past, the history.

I thank you very much. The chairman has indicated that he has been called to another meeting, so I thank you for appearing and presenting your testimony. Thank you for your patience while I unburden myself, and I will look forward to visiting with you on this issue as we get further into it.

Thank you very much.

Mr. Days. And on any other issue, Senator.

[The prepared statement of Mr. Days follows:]

Prepared Statement of Drew S. Days III

I welcome this opportunity to describe the activities of the Civil Rights Division and our plans for fiscal year 1981. In the three years since I became Assistant Attorney General we have attempted to make the Division a more effective component of the civil rights enforcement effort. We have directed our resources not only to eradicating the traditional and blatant violations of our civil rights laws, but also the more subtle and equally pernicious ways in which equality of opportunity is denied individuals because of their race, sex, national origin, or handicap. Today the struggle to enforce our civil rights laws takes place without the benefit of widespread and sympathetic public attention to the problem. The problems of inflation and unemployment, to name just two, have overtaken civil rights in the minds of many as our most critical domestic problems. But civil rights violations continue to occur. The mission of the Civil Rights Division is as urgent and challenging as it ever was.

Since taking over the leadership of the Civil Rights Division, I have been motivated primarily by a desire to continue to attack the blatant forms of discrimination of the 1960's and 1970's while preparing to address the more subtle types of discrimination predominant in our society. When I took office I found that most of the Division's efforts were concentrated on the traditional civil rights problems.

Through a combination of transferring some responsibilities to U.S. Attorneys and reducing our involvement in other areas, I am working to achieve a balance among the issues I consider most important. My goal is to increase the access of minorities in center cities to jobs, schooling and housing in suburban settings, to foster the economic mobility of women, to provide for reasonable accommodation and integration of the handicapped, and to enable the non-English speaking to participate in voting, education and other public rights and opportunities. Each of our programs is being shaped with these priorities in mind.

You have already received the Division's officially transmitted authorization request calling for a funding level of $16,989,000 and 454 positions. I will take this opportunity to summarize what those resources will enable us to do. Naturally, I will be happy to respond to your questions.

I described to you last year during your consideration of our authorization request plans for a reorganization of the Division. I am pleased to report that this reorganization has been implemented for nearly a year with much success. I believe that Division leadership has improved and employee morale and attorney productivity have been increased. Furthermore, we have worked closely with the United States Attorneys offices across the country so that they assist in many areas of our responsibility—particularly in criminal prosecutions.

At the same time, our newly developed management information systems have permitted us better to monitor case activity, attorney productivity and case impact. Through our newly designated team of Special Counsel for Litigation we have been able to proceed effectively with the management of complex major cases. For example, one Special Counsel for Litigation has directed the team of attorneys working on the litigation challenging police practices in the City of Philadelphia. On February 25 we filed with the United States Court of Appeals for the Third Circuit a notice of appeal of the district court's order dismissing the case. Another has directed our litigation challenging racially discriminatory practices in the real estate appraisers industry. We have settled the case with each of the defendants. Still pending is an appeal by an intervenor appraiser who was dissatisfied with the terms of our agreements with the defendants.

During fiscal year 1981 we intend to focus primary attention upon improving three areas—criminal prosecutions, coordination of the federal Title VI effort and administrative services.

Criminal prosecutions.—During the past two years the Criminal Section has been attempting to develop evidence sufficient to justify indictment in more difficult cases than were previously being taken to the grand jury. Our overall rate of successful prosecutions has more than doubled since the early 1970's. However, our backlog has remained fairly constant.

For example, it takes about one year on the average to take a typical police brutality prosecution from receipt of the complaint through trial. We would like to reduce this time by 25 percent. We plan to establish task forces to deal with widespread violations in urban areas as well as those affecting specific groups of victims such as Hispanics in the Southwest and far west. We will direct four additional positions—including two more attorneys—to this effort.

Three recent cases illustrate our successful cooperative effort with the United States Attorneys in criminal prosecutions. Sentencing occurred on January 21, 1980 in *U.S.* v. *Alford* and *U.S.* v. *Price* (W.D. La.). The defendants had pled guilty to violating 18 U.S.C. 1584 by holding undocumented Mexican aliens in a condition of peonage. The victims were chained in an effort to keep them from leaving Alford's chicken farm where they were required to work to pay off debts allegedly owed to Alford. In *U.S.* v. *Gerhardt*, (S.D. Ohio) officers of the American White Socialist Party were convicted on a number of charges including conspiracy to bomb a school building in violation of 18 U.S.C. 241. The school involved was attended by the daughter of the district court judge who had ordered the desegregation of the Columbus schools. In *U.S.* v. *Otherson* (S.D. Cal.), on January 29, 1980 a district court judge found border patrol agents Jeffrey Otherson and Bruce Brown guilty of a conspiracy to violate 18 U.S.C. 242. The defendants were charged with the deliberate abuse of illegal aliens. Pursuant to a plea agreement, the misdemeanor counts against each of these two defendants were submitted to the court decision on the transcript of the prior trial, which ended in a hung jury, in exchange for the dismissal of another count. The sentencing of Brown and Otherson was set for March 12.

Coordination and review.—Our coordination of the federal Title VI enforcement effort has traditionally been the most underfunded of all of our responsibilities. For fiscal year 1980 we have had only eleven positions for monitoring, coordinating, training and developing compliance and enforcement programs for the entire $125 billion in Title VI programs administered by 30 Federal agencies. We propose to direct 14 additional positions to the Office of Coordination and Review. Most of those will be equal opportunity specialists with the expertise to carry out these varied responsibilities.

In the past, the level of staff resources directed to the coordination function has mandated a staggered, rather than an across the board approach to contact with funding agencies. Under prior practices, an agency was identified and an evaluation survey of its Title VI program undertaken. This analysis would lead to detailed recommendations, adoption of which would be negotiated with the agency and formalized with a Memorandum of Understanding. Because of the limited staff, agencies would have to be evaluated serially rather than simultaneously. Now, the time consuming interagency surveys and negotiated Memoranda of Understanding are being de-emphasized in favor of specifically focused impact studies to be followed by Assistant Attorney General Directives and other appropriate orders for remedial action. Illustrative of this approach is the detailed set of 27 recommendations for improvement of its Title VI program which was transmitted in February to the Small Business Administration with timeframes for implementation.

The Office has now taken across the board action to effectuate generally the requirements of the DOJ coordination regulations. The disbursing agencies have all been notified of the need to amend their regulations to provide for the establishment of specific timeframes for compliance reviews and complaint handling, centralizing the civil rights decision making functions and other specifics. An assessment of all agencies' bilingual provision of services and their data collection systems is also being conducted. Direction is being given in the requirements of data collection and how to develop model enforcement structures.

It is important to reference the impact on coordination workload of the preliminary findings of a recent GAO survey of all federal agencies on Title VI coverage. As many as 15 agencies in addition to those currently coordinated indicated in response to this survey that they administer programs covered by Title VI. This will require the initiation of contact, analysis of programs and technical assistance by coordinators and attorneys.

Our Office of Coordination and Review has had a number of noteworthy successes in the past year. A Task Force established to review the Title VI enforcement activities of the Labor Department's Employment and Training Administration made recommendations that resulted in the adoption of a detailed enforcement plan and proposed revisions of Labor's Title VI regulations. We provided, by directive to all federal agencies, guidance on the requirements for the collection of characteristics data from applicants for benefits under federally assisted programs.

The Memorandum of Understanding signed with the Department of Housing and Urban Development will result, we believe, in significantly improved Title VI enforcement by that agency. In response to the stepped up "all agency" enforcement initiative, proposed specific Title VI guidelines and enforcement plans from several others are in the division pending comment and approval. These examples illustrate that despite severe constraints on its resources, our coordination effort has been effective in improving throughout the government the enforcement of Title VI.

Administrative Services.—Our request for increased funding for Administrative Services will enable us better to use technological support in our docket maintenance and litigation support. When I joined the Division we lacked a central docket system and the dockets maintained by the litigating sections had no Division-wide consistency. The methods of retaining data varied, the kind of data retained was different from section to section, and the information was updated in varied time periods. We have now developed a centralized docket system through the use of the computer and gained the ability to store and retrieve information on our case docket by reference to designated dates, the Federal district court or U.S. Attorney district involved or the geographic location. Additionally, we have just created a computerized docket of Title VI complaints, by agency, to help improve our Coordination and Review operations.

More recently we have also begun to increase the use of computers for litigation support. We are increasing our ability to index and retrieve documents in cases with massive records, do statistical analyses of evidence received in computerized form, convert large lists of numerical information into graphic form and access the computerized data banks now maintained by numerous governmental agencies and private industries. All of these improvements in our ability to use computer technology skillfully will help us to bring stronger cases, improve the focus and cohesiveness of large complex cases and move cases more expeditiously.

In addition to these three specific areas where our increased resources will be directed, we look forward in fiscal year 1981 to expanding other priority activities.

Land use practices.—Our General Litigation Section, formed through a merger of the Housing & Credit & Education Sections, will focus on cases involving municipal land use decisions which have segregative effects on housing and the relationship between the effects of such decisions and school attendance patterns, particularly in northern and western school districts. There have been discussions recently in the news media regarding our litigation in this area including, I believe, some misunderstanding of our activities. I wish to reassure the Committee that these litigative activities do not indicate that we consider restrictive zoning and other land use practices per se unlawful under any of the laws we enforce. Rather, their legality depends upon all of the pertinent facts and circumstances concerning the purpose, effect and justifications for the acts and practices in question.

On March 5, 1979, suit was filed under Title VIII in *United States* v. *Public Housing Authority of the City of Chickasaw* (S.D. Ala.), challenging a public housing authority's requirement that a person be a prior resident of a virtually all-white municipality in order to qualify for public housing. On March 7 of this year the district court judge struck down the housing authority's residence requirement. The court's order prohibits the granting of preference to residents of Chickasaw and requires the defendant to advertise its policy of nondiscrimination, provide compliance reports to the Justice Department and for 90 days give black applicants priority for housing over anyone who has applied since the suit was filed. Since the initiation of the current programmatic initiative in this area, the Civil Rights Division has brought four cases challenging such practices. On October 5, 1979, the United States moved to intervene as a plaintiff pursuant to Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2 and Title VIII of the Civil Rights Act of 1968 in *Angell* v. *Zinsser*, 473 F. Supp. 488 (D. Conn. 1979). Our motion for leave to intervene was granted on October 23, 1979. The case charges the city of Manchester, Connecticut with an historic pattern of exclusionary zoning policies and practices with the purpose and effect of adversely affecting the opportunity for black and Hispanic persons to obtain housing in the town.

On February 13, 1980, suit was filed under Title VIII in *United States* v. *City of Dunkirk* (W.D. N.Y.) charging that the city has prevented the construction of low and moderate income housing in predominately white areas. On February 26, 1980 we filed a motion to intervene as of right in *Lummi Indian Tribe* v. *Hallauer* (W.D. Wash.) charging the Washington State Department of Ecology and the local defendants with violating Title VIII by preventing construction of a sewer by the Lummi tribe. On March 7, 1980 we filed suit against the city of Birmingham, Michigan charging that the city has pursued a policy and practice of preventing the development of racially integrated low-income housing in violation of Title VIII. We do hope to file additional cases in this area during 1980 and 1981.

Federal enforcement.—I have directed our Federal Enforcement Section to expand its docket of cases involving discriminatory allocation of public services. In the employment area the section will increase its emphasis on sex discrimination cases while continuing its efforts to confront discrimination against blacks, Hispanics and other minorities. This section was created during our 1979 reorganization through a merger of the former Employment program and the litigation component of the Federal Programs Section. We believe this has provided the framework to coordinate our attack on the related problems of employment discrimination and discriminatory provision of services by state and local governments.

In a recent case handled by our Federal Enforcement section in cooperation with the Equal Employment Opportunity Commission a consent decree requires the Lee Way Motor Freight Company to pay $2,740,000 in back pay to approximately 82 individuals as part of a settlement of a 7½ year old employment discrimination suit. The suit charged among other things that the company and two defendant international unions, the Teamsters and Machinists, had engaged in a pattern and practice of hiring and promotion discrimination against blacks and Hispanics in violation of Title VII of the Civil Rights Act of 1964 and Executive Order 11246. *United States & EEOC* v. *Lee Way Motor Freight, et al.* In September 1979 a district court judge ruled in our suit against the New York State Police that its written entrance examinations and physical performance examinations were not valid and had served to limit employment opportunities for minorities and women. The court's order set hiring goals of 40 percent minority and 10 percent female entry level hires. *United States* v. *State of New York*, 21 Empl. Prac. Dec. ¶3314 (N.D.N.Y. 1979).

Voting rights.—We will emphasise enforcement of minority language requirements and also stress an attack on the at-large method of election in jurisdiction where this method effectively excludes minorities from the political process. Our involvement in enforcement of the minority language provisions is illustrated by *United States* v. *City and County of San Francisco, et al.* (N.D. Calif.) a suit filed by the United States Attorney charging that the defendants failed to take reasonable steps to provide adequate bilingual materials and assistance to Chinese and Spanish speaking voters. As a result of the suit the city has been required to institute major reforms. In *U.S.* v. *San Juan County* (D. New Mex.) we challenged the at-large method of electing the county's three commissioners on the grounds that it prevents the Navajos, who comprise approximately one-third of the county's population, from having equal access to the county government. The United States' motion for a preliminary injunction is pending.

In addition, the reapportionment that will occur in the wake of the 1980 census will lead to an increased number of submissions pursuant to Section 5 of the Voting Rights Act. We may receive as many as 1500 during the early part of the 1980's. I am very pleased in that regard to report to you that I expect the Attorney General to approve newly revised guidelines for our enforcement of Section 5 in the very near future. They should be ready for publication within two weeks.

Section 5 of the Voting Rights Act of 1965, as amended in 1970 and 1975, 42 U.S.C. 1973c, requires that certain states, counties, cities, school districts, and other political units (primarily in the South and Southwest) submit to the Attorney General (or to the United States District Court for the District of Columbia) any changes in voting procedures, practices, or standards for a determination that such changes do not have the purposes and will not have the effect of discriminating on the basis of race, color, or membership in a language minority group. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 were first published on September 10, 1971, 36 FR 18186. The procedures explain the preclearance requirement, the Department's internal procedures, the submissions process to be followed by affected jurisdictions, the information required by the Attorney General to evaluate proposed changes, and the standards utilized in reviewing such changes. They also inform other interested persons of how they can be notified of submitted changes and comment upon them.

The Section 5 procedures do not impose new requirements on the affected jurisdictions. Rather, they provide guidance on compliance with the requirements imposed by Congress. The procedures allow the preclearance requirements of Section 5 to be more easily understood, facilitate the preparation of submissions without legal counsel, and enable the submission process to operate more expeditiously than it otherwise would.

Other priority consideration.—Our Special Litigation Section's work has involved intervention and amicus participation in cases involving conditions of confinement in prisons, jails, juvenile facilities, mental health and mental retardation facilities and nursing homes pending congressional consideration of S. 10 and H.R. 10. We now anticipate enactment of the legislation, passed last month by the Senate and awaiting conference committee action, which will permit the Attorney General to initiate suits to vindicate the rights of involuntarily institutionalized persons. Concurrently, we will expand the Section's docket of cases involving rights of the handicapped. Through our Appellate Section, we will continue to participate as an amicus curiae in major private civil rights cases in the Supreme Court and many such cases in the Courts of Appeals, to take a strong role in supporting the Department's legislative and agency counselling functions and to address significant district court cases. Finally, the Division has been working for several years with the State Department to investigate allegations of human rights violations in the United States which have been submitted to the United Nations or other international organizations. This last year the Division assisted the State Department in successfully responding to broad scale allegations of human rights violations by the United States.

We were able to show that the United States has effective procedures and standards for resolving individual disputes raising questions of deprivation of civil and human rights. Our function in this regard is to review the facts, investigate if we have jurisdiction, refer allegations to the appropriate federal agencies, and advise the State Department as to the status of any investigations or proceedings. Through these reviews, and with the help of an international law consultant whom I have retained to advise me in this area, I am attempting to bring awareness of international human rights norms to our domestic civil rights enforcement programs. We plan for the Division to become involved in human rights cases when appropriate.

CONCLUSION

I have attempted in this summary of the Civil Rights Division's activities to suggest the broad range of ways in which we involve the federal government in the protection of civil rights. I am deeply committed to the idea that this extensive federal role is appropriate and necessary. If we do not have vigorous leadership for the protection of individual rights and the rights of our minority populations from the federal government, we cannot realistically expect other levels of government and private individuals to exercise such vigor. Our funding authorization request for fiscal year 1981 will enable us to enhance our staffing resources in much needed ways while continuing other activities at least at their current levels. I will be glad at this time to respond to any questions you have on the matters I have raised or others related to the Division's work. Thank you.

Senator SIMPSON. Thank you. I appreciate that.

The Chairman has informed me that a number of organizations have asked to have statements included in the record, and without objection they will be inserted at the end of these hearings.

That concludes the hearing.

[Whereupon, at 11:47 a.m., the committee adjourned.]

APPENDIX

Questions of Senator Simpson to Drew Days

January 30, 1980

Drew S. Days, III, Esquire
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D. C. 20530

Dear Mr. Days:

In connection with the Judiciary Committee's consideration of the Department of Justice's 1980/1981 budget requests, I wish to obtain the following information regarding the Civil Rights Division's study of the impact of local zoning and land use laws on housing patterns:

1. Which communities are being studied, and under what specific legislative authority is this study being conducted?
2. What information has been sought, and obtained, from each community being studied?
3. How many attorneys, and other professional staff, are currently assigned to this project? Please identify the senior staff attorney in charge.
4. How many attorneys, and other professional staff, do you anticipate assigning to this project during the next fiscal year?
5. Has the Department of Justice filed any lawsuits based upon this study? If so, please furnish copies of the complaints, and all motion papers filed in connection therewith.
6. Does the Department of Justice plan to file any cases challenging the legality of any state or local zoning or land use law during 1980, or 1981. If so, please furnish me with all relevant data.

In light of the time constraints of the Congressional Budget process, I would greatly appreciate a complete response within 21 days. This material should be directed to the attention of my Minority Counsel, Joel C. Mandelman.

Thank you, Drew, for your anticipated cooperation and assistance in this matter.

Best regards,

Sincerely,

Alan K. Simpson
United States Senator

AKS:jmt

Responses of Drew Days to Questions of Senator Simpson

United States Department of Justice
WASHINGTON, D.C. 20530

ASSISTANT ATTORNEY GENERAL

Honorable Alan K. Simpson
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Attention: Joel C. Mandelman
Minority Counsel

Dear Senator Simpson:

This is in response to your letter of January 30, 1980, requesting information concerning the Civil Rights Division's investigations of exclusionary land use practices. I will address your questions in the order set forth in your letter.

1. The following statutes authorize the Attorney General to initiate civil litigation to challenge land use practices or other actions by local governments which adversely affect housing opportunities available to racial and national origin minorities: (a) Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act), 42 U.S.C. 3613, 3617; (b) Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2, which authorizes the Attorney General to intervene in private actions seeking relief from denials of equal protection of the laws under the fourteenth amendment; (c) the Housing and Community Development Act of 1974, 42 U.S.C. 5309(c), 5311(b); (d) Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1; and (e) the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1242(g).

In the years prior to the programmatic initiative in this area to which the Attorney General and I have recently called attention, the Civil Rights Division had brought five (5) cases challenging these kinds of practices (this figure does not include traditional cases of exclusion or internal segregation by public housing authorities), and a sixth such case was about to be filed but was rendered unnecessary by a last-minute change in the prospective defendant's position. On January 17, 1969, the United States intervened as a plaintiff pursuant to Title IX, supra, and Title VIII, supra, in Kennedy Park Homes v. City of Lackawanna, 436 F.2d

108 (2d Cir. 1970), certiorari denied, 401 U.S. 1010 (1971). On June 14, 1971, suit was filed under Title VIII in *United States* v. *City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *certiorari denied*, 422 U.S. 1042 (1975). On April 27, 1973, suit was filed under Title VIII in *United States* v. *City of Parma*, 374 F. Supp. 730 (N.D. Ohio 1974); *trial of this case was completed* in late 1979, and the case is presently under submission to the district court. On April 18, 1978, suit was filed under Title VIII in *United States* v. *City of Sault Ste. Marie* (W.D. Mich.), alleging that the defendant's refusal to supply water and sewer lines to a housing project built by an Indian tribe on tribal trust land was racially discriminatory; this case was subsequently resolved by a consent decree which enabled the project to go forward. On July 20, 1978, suit was authorized under Title VIII in *United States* v. *Village of Milford* (S.D. Ohio), to challenge the defendant's denial of a pre-annexation sewer tie-in for a federally subsidized apartment project; however, it was unnecessary to file this suit because Milford changed its position within a week of being notified of our intention to file suit, and agreed to all the relief which we would have sought from the court in the particular situation in question. Finally, on March 5, 1979, suit was filed under Title VIII in *United States* v. *Housing Authority of the City of Chickasaw* (S.D. Ala.), *challenging a public housing authority's requirement* that a person be a prior resident of a virtually all-white municipality in order to qualify for public housing; trial of this case was completed in early 1980, and the case is presently under submission to the district court.

Pursuant to the current programmatic initiative in this area, the Civil Rights Division has recently brought three (3) additional cases challenging these kinds of practices. See answer to question 5, *infra*.

At any given time, the Civil Rights Division is conducting a large number of investigations of possible violations of all the laws which it is our responsibility to enforce. Some of these investigations result in litigation; the majority do not. At the present time, we are conducting a number of investigations which may or may not result in litigation in the subject matter area of your request for information. In this, as in other subject matter areas, we are most reluctant to identify the particular subjects (individuals or governmental units) of our investigations. There are several reasons for this.

First, many investigations do not disclose any violation of the law or result in any action being taken by this Department. Yet the existence of an investigation by this Department, if known to other parties, can create an unwarranted inference that a violation of the law has occurred, and can also generate inquiries to the subject of the investigation from other parties. Both of these eventualities can lead to unfair and burdensome consequences to the subject of the investigation. In this connection, it should be emphasized that restrictive zoning and other land use practices are not *per se* unlawful under any of the laws cited *supra*; rather, their legality depends upon all of the pertinent facts and circumstances concerning the purpose, effect, and justifications for the acts and practices in question. Second, the investigations which we are pursuing are in various stages of completion. Some are at a very preliminary stage, and may be abandoned even prior to any contact with their subject(s); some have progressed to the stage of detailed data requests to their subject(s), but these also may not ultimately result in any finding of discrimination or other unlawful action. Until all of the facts have been evaluated, it is very difficult to predict which, if any, of our current investigations will lead to litigation. Third, I believe that the rest of the information contained herein adequately addresses the subject matter of your inquiry without the necessity of identifying the subjects of our investigations.

Notwithstanding the foregoing, there are situations where, despite our efforts to proceed discreetly, the fact of an investigation becomes generally known merely as a result of our presence in an area and our inquiries of subjects of investigation and other individuals. Three such areas in which it has become known that we are conducting an investigation into land use practices and other subjects within the scope of our jurisdiction are the Hartford, Connecticut, Kansas City, Missouri, and Rochester, New York metropolitan areas. There are a number of other areas where investigations in varying stages are currently underway.

2. In those instances where an investigation progresses to the point of a request for information from the subject(s) of the investigation, information requested and obtained from the subject may include, for example, the background and legislative history of land use regulations; land use planning and other pertinent studies; records relating to applications for approvals, variances, and other pertinent actions by governmental bodies with authority in the area; information concerning current developable land, existing and planned housing stock, and pertinent demographic data; and records of dealings with local, state, regional, and federal authorities relating to pertinent funding and other matters having an impact on housing.

3. and 4. Our investigations in this area are in most cases carried out under the supervision of our General Litigation Section, whose chief is Robert J. Reinstein. The forty-four (44) attorneys in that section work on a variety of matters in the areas of education, housing, and credit, and at any given time have a number of different assignments for which they are responsible. Perhaps half of these attorneys have worked to one degree or another on one or more investigations or cases involving land use practices over the past several

months; the portion of their time devoted to supervising investigations or conducting litigation in that subject matter area, or other subject matter areas, varies widely from individual to individual.

As is implicit in preceding portions of this response, the subject of exclusionary land use practices is an ongoing portion of the investigative and litigative workload of our General Litigation Section, and our programmatic initiative in this area does not consist of one particular study or one particular investigation. In our FY 1980 budget submission, we estimated 2.91 attorney workyears on housing cases involving municipal and other public agencies. (This category includes traditional cases of exclusion or internal segregation by public housing authorities, which do not fall into the subject matter area presently under discussion.) We are currently considering raising the estimated figure for this category for FY 1981 from 3.00 attorney workyears to something in the neighborhood of 7.00 attorney workyears. It should be emphasized, however, that these kinds of figures do not necessarily, and frequently cannot, reflect with great accuracy either the actual manner in which we function, or our actual ability to plan the allocation of our resources. This is so because we deal with a large number of different kinds of cases; because the outcome of investigations cannot be predicted in advance and the categories in question include both investigations and cases; and because we have ongoing litigation responsibilities the timing and exercise of which are frequently beyond our discretion, control, or forecasting ability.

5. Since the initiation of the current programmatic initiative in this area, the Civil Rights Division has brought three (3) cases challenging the kinds of practices under discussion. On October 5, 1979, the United States moved to intervene as a plaintiff pursuant to Title IX, *supra*, and Title VIII, *supra*, in *Angell* v. *Zinsser*, 473 F. Supp. 488 (D. Conn. 1979). Our motion for leave to intervene was granted on October 23, 1979; a copy of our motion papers and complaint in intervention is attached hereto. On February 13, 1980, suit was filed under Title VIII in *United States* v. *City of Dunkirk* (W.D. N.Y.); a copy of our complaint is attached hereto. Finally, we either have moved or shortly will move to intervene as a plaintiff pursuant to, *inter alia*, Title IX and Title VIII in *Lummi Indian Tribe* v. *Hallauer* (W.D. Wash.); a copy of our motion papers and proposed complaint in intervention is attached hereto.

6. We do hope to file additional cases in this area during 1980 and 1981. As indicated above, a number of investigations are currently underway. There are no cases at this writing which have been authorized but not yet filed.

I hope that you will find the information contained in this letter to be responsive to your request.

Sincerely,

Drew S. Days III

Drew S. Days III
Assistant Attorney General
Civil Rights Division

Prepared Statement of William L. Taylor

My name is William L. Taylor and I am Director of the Center for National Policy Review, a foundation-funded civil rights law group based at Catholic University Law School. I also serve as Chairman of the Compliance and Enforcement Committee of the Leadership Conference on Civil Rights (LCCR), a group which monitors the performance of departments and agencies in carrying out their duties under federal civil rights laws and as counsel for minority children and school boards seeking the desegregation of public schools through the courts. I appreciate the Committee's invitation to provide information relevant to the authorization request of the Civil Rights Division of the Department of Justice.

My testimony will be limited to one important aspect of the Division's work--the initiation of law suits in federal courts to seek redress for the unlawful segregation of public schools by race and to the Division's distressing failure to carry out its statutory responsibilities in this area.

As the Committee knows, the Department of Justice has been granted authority under various statutes, including Titles IV and VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974, to initiate civil proceedings in federal courts whenever complaints or other information come to its attention indicating unlawful segregation of public schools. The Department's duties under these laws, always a major responsibility, took on added importance after Congress passed a series of riders to appropriations statutes cutting off the other major avenue of federal redress for denials of the constitutional right to equal educational opportunity. These riders, known as the Esch, Byrd and Eagleton-Biden Amendments, collectively have had the effect of prohibiting the Department of Health, Education and Welfare (HEW) from exercising its authority under Title VI to terminate funds to racially dual school systems wherever a remedy for this unconstitutional condition would require busing.

When the last of these riders was enacted in December, 1977, a group of minority parents went to federal court to challenge the constitutionality of the amendments on grounds that they violated the Fifth Amendment by directing HEW to continue federal subsidies to school districts which persisted in denying the equal protection of the laws. The plaintiffs, whom I represent as one of a group of counsel, hoped that the Justice Department would join in the effort to declare the amendments invalid, for the Attorney General had already advised the President that there were substantial doubts about their constitutionality. The Justice Department, however, chose to defend the constitutionality of Eagleton-Biden and the other amendments on grounds that are highly pertinent to the purposes of these hearings.

In enacting these amendments, Justice lawyers said Congress was not manifesting any hostility to school desegregation or seeking to cut off federal remedies for denials of constitutional rights; rather Congress was saying simply that it preferred the Justice Department to handle such matters through litigation in federal courts instead of authorizing HEW to terminate funds. The constitutionality of the amendments could be saved, Justice argued--and this is the key part--because the Justice Department would take up the slack by accepting referrals from HEW under Title VI and by bringing law suits under Title VI and other provisions of the civil rights laws.

"It does not seem logical," the Justice lawyers said in their own elliptical fashion, "that OCR and the Civil Rights Division will be any less vigorous in their efforts to desegregate the schools simply because they must make those efforts in another forum." Moreover, there was nothing in the statutes "which promises to delay imposing a remedy on schools found to be unconstitutionally segregated."[1]

At the same time, the Civil Rights Division was justifying its authorization request to this committee, as it has again this year, by referring to the increased burden it would face in prosecuting cases previously handled by HEW.

On January 31st of this year, the U. S. Court of Appeals for the D. C. Circuit, agreeing with the Justice Department, held that the anti-busing amendments are not unconstitutional on their face. But the Court's opinion contained an important caveat. If the amendments were not be be deemed unconstitutional as applied, "the Department is under a strict obligation to avoid delay." The Court added that "[t]o avoid constitutional doubts, we must proceed on the assumption that Congress intended the Department of Justice to act with the greatest dispatch."[2]

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[1] Brief for Appellees, Brown v. Califano, (No. 78-1864), pp. 41-42.

Of course, in the two years that it has taken for this case to be decided, the Justice Department has had ample opportunity to deliver on its pledge to the court and to the Congress to save the amendments from unconstitutionality by taking up the slack left by ending HEW's fund termination authority. What has the Civil Rights Division done?

It appears that seven cases have been formally referred by the Secretary of HEW to the Attorney General for suit after findings that Title VI violations had occurred and could not be settled through negotiations. Of these seven cases referred, the Justice Department has filed only one suit, in Marion County, Florida. While this record is poor enough on its face, it may be even worse than it appears. One reason why HEW has not referred more cases, I am advised, is that it has acceded to a Justice Department request that even after violations have been established and negotiations have failed, a case not be formally referred until Justice Department lawyers review the files and decide whether they want the case. Thus, the number of uncured violations may be substantially in excess of the seven cases formally referred.

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[2] Brown v. Califano, ___ F.2d ___ (No. 78-1864, D.C. Cir., January 31, 1980) Slip Op. 25.

One of the seven cases involves extensive racial segregation in the public schools of Flint, Michigan. That case was referred to the Department of Justice, after findings of violations made by an HEW administrative law judge who had conducted a full hearing, on June 13, 1978. Almost two years later, the Department of Justice has failed to take any action or even to give any public accounting of the reasons for this extraordinary delay.[3]

A second case of great importance involves the public schools of Chicago. After a lengthy investigation, HEW found that the rigid segregation of Chicago schools was caused by massive violations committed over a period of years by school officials. When extensive efforts by HEW to negotiate a settlement broke down, Secretary Harris referred the case to the Attorney General on October 29, 1979. Justice lawyers already had been closely involved with the investigation and had detailed knowledge of the violations that HEW had documented. Thus, Assistant General Days was able to say when the case was received that he anticipated Justice action within 90 days. The 90 day period expired several weeks ago without the filing of a suit and there is no indication of when, if ever, the Justice Department intends to act. Chicago is a major test of the Department's will to enforce the law. If Justice does not act and act soon, its statements to the courts that it could handle HEW's Title VI responsibilities without any loss of time and effectiveness can be properly characterized as nothing less than blatant misrepresentations.

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[3] The HEW investigation of segregation in Flint began in 1968. Thus, a full generation of students has gone through the Flint schools and been deprived forever of the constitutional right to equal protection of the laws.

The default of the Justice Department on cases referred by HEW unfortunately tells only part of the story. The Department has an obligation not only to handle HEW referrals pursuant to Title VI, but to mount its own enforcement program under other sections of the law. Nowhere is enforcement more needed than in urban systems in the North and West. Although the Supreme Court's decision in Brown v. Board of Education is now more than a quarter of a century old, it was only in 1973 that the Court spelled out the remedial obligation of school systems that were not governed by segregation statutes but that had engaged in segregative practices.[4] While most Southern systems have come into basic compliance with Brown and put the divisive problems of segregation behind them, many Northern and Western systems have yet to take the first step to desegregate. In some of these systems, large ones such as Chicago, New York and Philadelphia, as well as small ones such as River Rouge, Michigan, black and white children can complete their entire public school careers without ever coming into contact with a child of a different race.

During the Nixon Administration, there was open hostility expressed at the highest levels to enforcement of the civil rights laws. But the Carter Administration has professed a determination to enforce the laws including those that prohibit segregative practices in the public schools. Thus it may surprise some to learn that in the three years since the incumbents at the Department of Justice took office, they have filed only one case against illegally segregated school systems in the North and West. This, in fact, was a consent decree entered just last month after a desegregation plan was negotiated with the public school system of South Bend, Indiana.

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[4] Keyes v. School District No. 1 of Denver, 413 U.S. 189 (1973).

What is the justification for this extraordinary default in the Executive Branch's obligation to take care that the laws are faithfully executed? While Justice officials will undoubtedly want to speak for themselves, there are a few things I imagine they would offer in mitigation. One is that the Department has not been entirely inactive on the subject of illegal school segregation. It has monitored Southern court decrees, reopened cases where there has been noncompliance, pursued the prosecution of a handful of Northern cases initiated by previous Administrations and, as intervenor or friend of the court, supported the efforts of private plaintiffs to secure desegregation orders in places such as Columbus, Dayton, St. Louis and Cleveland. The Department has also worked on some of the newer issues of in-school segregation such as the misuse of tests to misclassify children as mentally retarded. While these efforts are commendable, they are no substitute for the Department's obligation to take independent action to enforce the law.

Second, the Civil Rights Division could conceivably plead a lack of adequate resources. It is true that the preparation of a Northern school case is a complex undertaking, involving extensive investigation and efforts to devise suitable remedies. It also appears to be the case that in the merger of the Education and Housing Sections of the Civil Rights Division into a General Litigation Section, there was a loss of personnel. But resources is hardly the whole answer. Delay is engendered by bureaucratic procedures which require extraordinary paperwork justifications and a complex series of clearances before a case is filed. Moreover, during the period in which Justice was able to deal only with South Bend, private lawyers for rights groups, working with far less resources, were able to prepare and prosecute a number of complex Northern school suits. In any event, if the Division needs additional resources, it should ask for them.

Third, apparently anticipating an attack on its poor record of prosecuting Title VI cases that HEW has referred, the Civil Rights Division's authorization request asserts (p. 28) that "there are no legal restrictions precluding such exercise of discretion by the Attorney General in offensive cases."[5] I gather that this means that if the Attorney General decides that he does not wish to file a case referred by HEW (even after findings of discrimination by the Secretary, a full hearing and a decision by an administrative law judge), he is completely free to abstain from action. This is an issue that ultimately may have to be decided by the courts. I would point out, however, that we have had enough recent experience with abuses of federal power justified by assertions of unfettered prosecutorial discretion that such claims should be treated with the utmost skepticism. And, in this particular context, the contention that the Attorney General is free to jettison HEW referrals directly contravenes the Department's representations in court that it would handle Title VI without any loss of time or effectiveness.

In short, Mr. Chairman, I believe that the Justice Department's abdication of its duty to enforce constitutional and statutory requirements for school desegregation is inexcusable.

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[5] "Offensive" cases (those brought by the Department) are distinguished from "defensive" cases (those brought against the federal government) where the authorization request asserts mysteriously (p. 27) that "[o]f course, the Attorney General's discretion...is severely limited by practical considerations." While I have no quarrel with Justice's need to defend cases brought against HEW by discriminating school systems, the general proposition is troubling. What it appears to mean is that if someone sues a federal agency, such as HUD or HEW, no matter how justified the claim, the Attorney General is impelled to defend the agency. Civil rights groups have been seeking for years a pledge by the Justice Department that suits against federal agencies for failure to protect the rights of citizens will not be automatically defended if Justice investigations find the claim meritorious. But Justice continues to defend such suits, relying on technical defenses even where it is clear that the plaintiff has been the victim of gross injustice.

I realize that not everyone agrees that breaking down the racial barriers deliberately imposed in public schools is an indispensable step toward providing poor minority children with an opportunity to make a decent life for themselves and to healing the scars that racial isolation has imposed on all of us, white and black. But the issue posed here transcends one's views about school desegregation. Congress has been much concerned recently about the impact of misguided actions of bureaucrats upon those who are subject to federal regulation. My testimony suggests that power can be abused not only by the improper excercise of authority, but by the failure to carry out responsibilities which the Constitution and Congress have entrusted to the Executive branch. When such an abdication victimizes even one group in our society, the rights of all of us are in peril.

Prepared Statement of Arthur S. Flemming

Mr. Chairman and Members of the Committee, I am delighted to appear before you today on behalf of the United States Commission on Civil Rights to share with you our observations about the Civil Rights Division of the Department of Justice.

As part of its civil rights oversight responsibilities, this Commission periodically reviews the Department of Justice's civil rights enforcement and coordination activities. In the past several years, through hearings, Enforcement Effort studies, and annual reports, we have evaluated the Civil Rights Division's efforts in a number of areas, including employment, credit, and housing discrimination, federally assisted programs, Indian issues, and voting rights.

There have been some very positive recent developments at the Department of Justice affecting the work of the Civil Rights Division. For example:

1. **The Department has made it possible for the Division to make far better use of the Department's resources.**
   - **In about 35 United States Attorney's offices, units have been designated to handle civil rights cases, including cases of police misconduct.**
   - **As a result, the Civil Rights Division can refer some violations of civil rights laws to those units, while concentrating itself on cases which may be more likely to set legal precedents or clarify significant civil rights issues.**

2. The Civil Rights Division is focusing increasingly on systemic problems. For example:

   - In the area of housing the Division informs us that it is concentrating on exclusionary zoning and land use practices.
   - The Division is coordinating some of its investigations of patterns of school segregation with investigations of housing discrimination by simultaneously examining segregated school districts and factors which may have contributed to residential segregation, such as local housing policy and exclusionary zoning requirements.
   - The Division filed its first suit aimed at the systemic elimination of police misconduct in a city police department.

3. The Civil Rights Division is coordinating its work with that of other Federal agencies.

   - The Division is developing joint investigations with agencies such as the Departments of Health, Education, and Welfare, and Housing and Urban Development.
   - The Division is working with the Department of Housing and Urban Development to obtain referrals of alleged civil rights violations under the Community Development Block Grant program.

- The Division is working with the Department of Labor with the end in view of playing a more active role when litigation rather than administrative enforcement is appropriate in dealing with alleged employment discrimination.

4. The Civil Rights Division has embarked upon a systematic approach for bringing litigation under Title VI of the Civil Rights Act of 1964. Beginning with 40 communities, the Department is looking at municipal services assisted with Federal funds to determine if, for example, sections of the community where minorities reside are provided services that are inferior to what is provided in other sections.

   - This approach will also serve to promote understanding by both public and Federal officials as to what Title VI requires in the way of nondiscrimination in federally funded services. Widespread lack of understanding of this aspect of the law was one problem which we found repeatedly in cur 1975 report on Title VI enforcement.

5. The Civil Rights Division is working to provide leadership and direction to Federal agencies for the enforcement of Title VI, as required by Executive Order No. 11764.

- The Division is requiring agencies to have their Title VI regulations in order, with appendices specifying the federally assisted programs covered by Title VI.
- It is providing training and technical assistance to agencies to help them improve their data collection, complaint processing, compliance reviews, and enforcement actions.
- The Division is computerizing complaint statistics, to enable the elimination of duplicate investigations.
- The Division is requiring Federal agencies to eliminate defects in their Title VI programs. Rather than engaging in protracted discussions with civil rights officials about these defects, the Division is now bringing uncorrected problems directly to the attention of agency heads.

6. The Civil Rights Division is working toward the coordination of Government civil rights information systems. In addition to computerizing complaint statistics, it is also:
   - Taking a leadership role in getting agencies to collect data which measure whether federally assisted programs are reaching intended beneficiaries without discrimination based on race, sex, national origin, or age.
   - Developing a sophisticated management information system for its own caseload.

It is too early to assess the impact of these new developments. We feel that they should result in some improvements in that they will lead to a more effective use of existing resources.

We recognize that this is a difficult period for considering the need for additional resources in any area of Government. Nevertheless, we believe that it would be unrealistic for the Nation to look to the Civil Rights Division for vigorous and effective leadership on a Government-wide basis without giving consideration to the workload that confronts the Division. If the Division is unable to cope with the workload effectively, it will not only result in a continuing denial of equal opportunities in such areas as employment, housing and education, but it will also invite an increasing number of law suits against the Government. The handling of these lawsuits is costly. Furthermore, they can lead to court ordered remedies which can also prove to be very costly.

The following are a few of the factors which illustrate the need for additional resources.

- In the past few years there has been an increase in the Department's authority in such areas as equal credit, and age and handicap discrimination. There has also been an increase in the Department's authority as a result of the trend to include specific provisions for equal opportunity in new Federal programs.

- EEOC is now referring increasing numbers of State and local employment discrimination cases to Justice as a result of its effort to clear up its backlog. If EEOC is to do more than merely transfer a problem to the Department of Justice, it is imperative that the Department have the resources to handle these cases appropriately.

- Section 5 of the Voting Rights Act of 1965 requires the Department of Justice to approve many State plans for congressional redistricting as well as many local reapportionment plans. One of the primary purposes of the decennial census is to collect data for reapportionment. Thus, when data from the 1980 census become available many jurisdictions will submit plans for Section 5 review, greatly increasing demands on the Civil Rights Division's resources.

- The recent decision in Brown v. Califano makes clear that the Esch and Eagleton-Biden antibusing amendments place heavy demands on the Civil Rights Division's resources. In the Brown case the constitutionality of those amendments, which restrict HEW's ability administratively to require transportation remedies in school desegregation cases, was upheld. The plaintiffs had argued that the amendments precluded the desegregation of public schools and placed the U.S. Government in the position of supporting unconstitutional practices in violation of the fifth amendment. The Court of Appeals disagreed and found that "apparently effective avenues for desegregation" were available to the Government to achieve desegregation, focusing primarily on HEW's ability to refer appropriate cases to the Department of Justice for litigation. This will not prove to be an "effective avenue" if the Civil Rights Division does not have the resources it needs in order to handle the cases that are referred.

- The underfunding of Title VIII fair housing enforcement continues to be a major problem. In June 1978, I testified before this Committee concerning the proposed amendments to Title VIII. In the conclusion of my testimony I stressed the Commission's concern about the level of appropriations for fair housing. Our concern extended to the budgets of both the Department of Justice and Housing and Urban Development. The zoning and land use cases which the Department of Justice is focusing on are time-consuming and expensive to develop. Bringing such cases is essential, however, to fair housing in this country and it would be unfortunate for the Department's efforts to be thwarted because of lack of resources.

While it is too early to assess the results of the Civil Rights Division's new initiatives, it is clear that the Division is working to expand and strengthen its approach to civil rights enforcement and to reinforce its role as leader of the Government's efforts to combat discrimination. We hope that Assistant Attorney General Days and his associates will have the support of this Committee in their endeavors.

Prepared Statement of Elaine R. Jones

I want to thank the Committee for giving us the opportunity to present the views of the NAACP Legal Defense and Educational Fund, Inc., on the Proposed Authorization for the Civil Rights Division of the Department of Justice. The Legal Defense Fund has, since 1940, been the primary organization involved in litigation in the area of civil rights. Its program has included cases dealing with school desegregation, employment discrimination, racial discrimination in health and other social services, and the protection of the constitutional rights of the incarcerated.

I would like to direct my remarks to the Department's role in coordinating Title VI of the 1964 Civil Rights Act, and to the Division's request for 14 additional positions for the Office of Coordination and Review.

I. Background

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, prohibits discrimination on the basis of race, color, or national origin by any program receiving federal financial assistance. In 1965 the Attorney General was given authority, limited in nature and still largely unused, to coordinate enforcement of Title VI.

In its authorization request the Civil Rights Division describes with candor the failure of federal departments and agencies to enforce Title VI. It notes that on repeated occasions the federal government has been sued successfully for its failure to meet its congressionally mandated Title VI responsibilities. The Civil Rights Commission has conducted a series of studies which have reached similarly bleak conclusions. Our own experience with Title VI enforcement has been equally unfavorable.

(a) Health

Studies have shown that health care is not delivered on an equal basis. A case now pending before HEW is illustrative. In Orleans Parish La., which includes the city of New Orleans, 33% of the population is black. In New Orleans itself, the population is 45% black. Three hospitals, Mercy, Southern Baptist, and Hotel Dieu, which are located in minority areas, render inadequate services to the surrounding black community. Until the mid to late sixties, each of these hospitals served only whites. In 1978, blacks only constituted a minute proportion of these hospitals' admissions — 7% of the admissions at Southern Baptist, 9% at Mercy, and 10% at Hotel Dieu. All told, these three hospitals account for 40% of all white admissions amongst the sixteen hospitals in New Orleans, but only 4% of the black admissions.

When looked at in terms of direct federal programs, i.e., Medicare and Medicaid, the picture is even more bleak. Blacks constitute 23%

of the SMSA and 35% of the Medicare/Medicaid eligible persons in Orleans Parish. But Medicare admissions to these three hospitals are almost totally white. In 1978, blacks made up only 4% of the Medicare admissions to Mercy and Southern Baptist hospitals, 14% at Hotel Dieu. All three hospitals depend on Medicare admissions for a significant proportion of their reimbursements. In 1978, Medicare admissions were as high as 36% of all admissions at Mercy, 33% at Hotel Dieu and 23% at Southern Baptist.

HEW hearings were held last year about this situation *In the Matter of Mercy Hospital, Southern Baptist Hospital and Hotel Dieu Hospital*, HEW Docket No. 78-VI-7, 78-VI-8, 78-VI-9. Proceedings are still pending. Even so the case took 4-5 years to develop; the trial lasted seven weeks over a three month period. If HEW does take action against these three hospitals for discrimination, its only available remedy is the termination of federal funds. The effect of a fund cutoff would not necessarily be to stop the discrimination; it might only terminate needed funds for health care for other indigent individuals. These hospitals have been receiving federal money for years and discriminating throughout. It is time for the Justice Department to step in and enforce federal law in this area. It must be given both the wherewithall and the directive to do so.

Another area of discrimination in health care in which LDF has been active and in which the enforcement efforts of the Justice Department is sorely needed is in challenging the relocation and closing of hospitals that deliver medical care to low income, minority people. This is a nationwide problem; hospital closing and relocations have occured or are occurring in New York City, St. Louis, East St. Louis, Memphis, Gary, Indiana, Chicago and Wilmington. Our first case was in Gary, Indiana. There pretrial discovery alone took two years and the work of four lawyers. The cost of that case, including expenditures and lawyers' time, is in excess of $200,000.

In both the Gary case and in another LDF case, Lupe Guerra et al. v. Bexar County Hospital District (W.D. Tex. 1980), the Justice Department participated as either amicus curiae or intervenor. Indeed, in Guerra, a case in which the judge ruled against us on factual grounds, the Justice Department took the lead in the litigation and, in our opinion, did an excellent and professional job. As a result of its involvement the Justice Department has become aware of the widespread problems in this area and the complexity and expense of these cases. It has sufficient expertise to bring these cases in the future, if it were provided the necessary resources. Groups like LDF simply do not have the money or the staff to address these problems on a nationwide basis.

Justice Department litigation of particular cases, however, cannot by itself end the pattern of default by granting agencies. In 1974, for example, a health planning act, the National Health Resources Development and Planning Act of 1974, specified that local non-profit agencies, called Health Assistance Agencies, were to review all proposals for reduction or increase in facilities and services by institutions delivering health care. In addition, state agencies were designated to review the findings of health assistance agencies and to make final plans regarding those recommendations. The Health Assistance Agency and the state agencies receive continuing federal financial assistance to perform their functions and are thus subject to Title VI. As late as 1976, however, no regulation had been promulgated by HEW to set forth the responsibilities of those agencies or the agencies delivering health care. Only a result of litigation in the case NAACP v. Wilmington Medical Center, did HEW for the first time set a standard for the determination of Title VI violations.

(b) Social Services

The provision of social services is also covered by the strictures of Title VI. The problems of discrimination are no less common in these areas. For example, a GAO report and a subsequent hearing held by this subcommittee in 1973 found discriminatory practices and outright segregation in nursing homes in Atlanta, Birmingham, Detroit, and Baltimore. HEW has taken no action in this area.

Similarly, a complaint was filed with HEW in the late sixties concerning racially segregated orphanages in North Carolina. In 1973, such segregation still existed in that state and in orphanages, day care centers and maternity homes in Tennessee. A Freedom of Information Act request in 1976 obtained documents from HEW which revealed that no remedial action had ever been taken.

The scope of the problem is revealed by the only reported decision dealing with this issue, Player v. State of Alabama, Dept. of Pensions and Security 400 F. Supp. 249 (M.D. Ala. 1975), a case in which the Justice Department participated as a litigating amicus. In that case, the court found that the state agency, which was the major source of referrals to the child-care institutions in the state, maintained a policy of referring black children only to all black homes or to the very few integrated ones. In 1970 HEW prodded the state agency into making efforts at civil rights compliance. The state agency merely decided to treat an unsubstantiated declaration of nondiscrimination by a home as sufficient to establish compliance. No HEW monitoring efforts were made however, and, the court subsequently found a continued pattern of discriminatory referrals by the state agency.

II. The Department of Justice's Legal Authority

Effective enforcement of Title VI cannot be achieved without implementing the administrative remedy mandated by Congress in 1964. Litigation by the Civil Rights Division is necessarily cumbersome and time consuming, and can only deal with a handful of cases. The resources of private litigants are even more limited. Even where Civil Rights Division litigation would be possible, the judicial process cannot be invoked, in the Department's view, until and unless the same federal agency which failed to bring about administrative relief is willing to refer the matter to the Department of Justice. The litigation of individual cases, moreover, is largely inadequate to deal with a systematic failure by the granting agency to establish and enforce appropriate substantive standards.

The failure of federal agencies which administer federal grants to police Title VI compliance by their own grantees is, we believe, a problem which cannot be solved within those specific agencies. That failure results from several circumstances widely present and likely to persist. (1) The personnel in the granting agencies are largely if not exclusively concerned with what they regard as the primary mission of the agency. If the agency exists, for example, to fund the construction of hospitals, then its employees naturally regard their role as a success if it results in such construction. Under this set of circumstances Title VI is at best considered irrelevant; at worst it is considered an obstacle to achieving that primary mission. (2) Agency personnel tend to regard themselves as engaged in joint activity with their grantees. In the event of a Title VI attack on the right of a grantee to funds for an approved project, they tend to identify with the interests and attitudes of the grantee. (3) Independent of these competing considerations, there is no particular reason to expect that top agency personnel, chosen for their expertise in housing, health, etc., will have great sympathy for Title VI enforcement, or a sensitivity to the policy and evidentiary problems involved in Title VI enforcement. (4) Individual agency employees may be seriously concerned about Title VI enforcement. But their promotion and even tenure in the agency depends on the good will of superiors generally with very different values. Vigorous administrative enforcement might well please the Congress of the Civil Rights Division, but it could easily doom the career of the responsible official.

These considerations fully support the decision, first made in 1965, to give the Attorney General responsibility for coordinating the Title VI enforcement activities of all federal agencies. The number of personnel presently available for this task within the Civil Rights Division is certainly insufficient, and needs to be increased.

Merely increasing the Division's staff by 14 positions will not, by itself, solve the underlying problems. There are literally tens of thousands of granting agency employees already affected by Title VI; a few dozen Department of Justice employees cannot exercise any great influence over a bureaucracy unless they have an extraordinary degree of direct control over Title VI enforcement. General experience with inter-agency coordination has demonstrated the enormous jealousy with which each agency guards its prerogatives against intrusion by another; for this reason an employee of the Department of Justice, however motivated will have a particularly difficult time "coordinating" enforcement at, for example, the Department of Education. When a major dispute finds its way to the higher levels of a granting agency yet another difficulty will arise; a Secretary or Assistant Secretary is likely to regard himself or herself as "outranking" anyone in the Civil Rights Division, and thus entitled to disregard the Division's position.

Under these circumstances it would, we believe, be inappropriate for this subcommittee to authorize 14 additional positions merely in the hope that the Division's good intentions will prevail. Problems in Title VI enforcement, no more than in any other area, will not be resolved merely by increased expenditures. The subcommittee should insist, as part of the process of authorizing these new positions that the President delegate to the Department of Justice the authority which it needs to make a substantial impact.

Because of the difficulty and novelty of the problems facing the Civil Rights Division, we believe it is essential that it be provided with a wide array of legal tools with which to work. We would specifically urge that the Executive Order conferring coordinating responsibility upon the Attorney General be amended to include additional authority in the following seven areas.

(1) Authority to Direct Referral of a Case for Litigation.

At present the Department maintains that it cannot sue to enforce Title VI unless a case has been referred to it by the granting agency, a view with which we disagree. Equally serious, as a practical matter, the Department seeks to excuse its failure to sue on the ground that few if any cases are even formally referred, while the granting agencies excuse their conduct on the ground that the Department has informally asked that possible cases not be referred. Some agency must be held responsible if suit is not brought, and that agency should be the Department of Justice. All doubts about the Department's power and thus about its responsibility for inaction, should be removed.

(2) Authority To Assume Control of an Administrative Proceeding.

At present the Deputy Attorney General can only review the procedural rules established by an agency for processing a Title VI complaint. If, however, the agency violates its own rules, or if within those rules the agency acts in a dilatory or otherwise insufficient manner, the Deputy Attorney General is powerless to act. Directing referral for litigation might be appropriate in some cases, but it entails abandonment of the administrative process which Congress contemplated would be the more expeditious and less formal forum. The Deputy Attorney General should have the power, in an appropriate case, to assume direct responsibility for the administrative proceeding, standing in the shoes of the granting agency and exercising all the authority available to that agency.

(3) Review of Rules and Decisions of General Applicability.

The present Executive Order authorizes the Attorney General to review all agency Title VI "regulations", a provision which the Attorney General properly construes as encompassing both procedural and substantive regulations. Presidential review of all Title VI regulations, here delegated to the Attorney General, is expressly mandated by Title VI itself.

The purpose of both the Executive Order and statute can be and are largely defeated, however, by the simple expedient of not placing most substantive policies in a formal regulation: Instead, an agency can merely promulgate a rephrasing of Title VI as its substantive regulation, and embody all its important substantive policies in less formal opinions, decisions, rules and manuals. The content of agency policies regarding discriminatory effect are of particularly great importance. To prevent such evasion, and to assure review originally contemplated by both Congress and the Executive Order, the Order should be amended to direct submission to and approval by the Attorney General of any substantive or procedural Title VI rule, decision or practice of general applicability.

(4) Concurrence of the Civil Rights Division for Specific Federal Actions.

The Attorney General should have the authority to direct that certain types of actions in specific cases cannot occur without the express written concurrence of the Assistant Attorney General in charge of the Civil Rights Division. When this authority should be exercised must to some extent depend on future experience with a reinvigorated administrative process. At a minimum, however, such authority should be exercised to require (a) that in the case of a Title VI suit against a federal agency the head of the Civil Rights Division must certify prior to the undertaking of a defense by the agency or the Civil Division, either that he or she believes the agency has not violated the law, or that whether a violation has occurred depends on factual matters too complex for prompt internal resolution, and (b) that the head of the Division must approve settlements of administrative proceedings after a designated stage in those proceedings.

(5) Control of Selection of Agency Title VI Personnel.

The Executive Order should authorize the Attorney General, in appropriate categories of cases, to exercise the authority to appoint the key officials responsible for Title VI enforcement within granting agencies. This will help to assure that a record of effective enforcement of Title VI will be an asset, rather than a liability, in advancing the career of a government employee, and may serve to encourage lateral mobility by Title VI specialists.

(6) Utilization of Non-Permanent Employees.

The personnel problems which have heretofore obstructed agency Title VI enforcement may not be solvable within the usual framework of full time agency employees. In some cases it may be more effective to direct that specified functions in particular cases or areas be filled by individuals who are employed by other agencies, such as EEOC, or who are outside the government entirely. The Attorney General should be given the authority to direct that this be done, and/or to select the individual involved, in either a particular case or area or a category thereof.

(7) Invocation of Attorney General Intervention By Private Parties.

Exercise of these new forms of authority can and should serve in appropriate cases as a remedy for a private party unable to obtain adequate and timely relief in the agency's administrative process. While a private party would always be free to request the intervention of the Department of Justice, procedures should be established to assume that such a request is acted upon by the Department in a considered and timely fashion.

Only time and experience can demonstrate the comparative value of each new form of authority. But it is essential that the subcommittee press now for Presidential action confering the needed powers. The institutional pressures which have largely nullified agency enforcement are likely to be arrayed against any effort to augment the enforcement role of the Department of Justice. The pending request for additional authorized positions presents the subcommittee with a unique opportunity to bring about needed reforms, and we urge you to use it.

Prepared Statement of Joaquin G. Avila

I am Joaquin Avila, Associate Counsel and Director of Political Access Litigation for the Mexican American Legal Defense and Educational Fund (MALDEF). I am accompanied today by David Lessard of our Washington, D.C. Office.

We appreciate this opportunity to testify on the Department of Justice authorization for fiscal year 1981. The major part of our testimony will discuss the administration of the Voting Rights Act and will focus on the following matters:

1. Preparation for handling redistricting submissions after the 1980 Census.
2. Enforcement of Section 5 provisions of the Voting Rights Act.
3. Litigation activities of the Voting Rights Section in Texas.

We also will discuss three other subjects: police abuse, affirmative action, and the establishment of civil rights units in U. S. Attorneys' offices.

Voting Rights

Perhaps the most important Congressional action providing minorities in the Southwest with greater access to the local political processes has been the 1975 Amendments to the Voting Rights Act. 42 U.S.C. §1973, et seq. With the 1975 Amendments, the special preclearance provisions of the Voting Rights Act were extended to the States of Texas, Arizona, and selected counties in Colorado and

California. The Section 5 special preclearance provisions, 42 U.S.C. §1973c, require political subdivisions in covered jurisdictions to submit all changes in the law affecting voting to the United States Attorney General for a determination that the proposed election change does not have a discriminatory purpose and does not discriminate on the basis of race, color, or membership in a language minority group. If the election change is not precleared, then the Attorney General issues a letter of objection preventing the political subdivision from implementing the election change in future elections. Alternatively, the political subdivision can seek preclearance through the more time consuming and more expensive litigation route by securing a declaratory judgment from the United States District Court for the District of Columbia that the election change does not have a discriminatory purpose or does not discriminate on the basis of color, race, or membership in an applicable language minority group. Our organization has utilized the Section 5 preclearance procedure very effectively in preventing the implementation of election changes which clearly had a discriminatory impact on minority political participation.

When the Voting Rights Act was extended to the Southwest, we established a system to review all voting changes submitted to the United States Attorney General and the United States District Court for preclearance from jurisdictions in the Southwest. Our staff in Washington, D.C. reviews all submissions from Texas, Arizona, Colorado, and California and alerts our San Antonio Office of potentially discriminatory voting changes. We then work with members of the minority community and try to prevent the implementation of the election change by litigation or by seeking to convince the United States Attorney General not to preclear a given election change and issue a letter of objection.

Of all the voting changes subject to preclearance under Section 5, redistricting is the most important to the minority community. It is the one change that can promote or destroy the participation of the community in the decision-making processes of government. [1]

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[1] The United States Supreme Court in United Jewish Organizations v. Carey, 430 U. S. 144 (1977) recognized that such election changes clearly have the potential for diluting the voting strength of minorities. This observation was also noted by the United States Congress in renewing the Voting Rights Act in 1970 and 1975. As noted in U.J.O., supra:

> When it renewed the Voting Rights Act in 1970 and again in 1975, Congress was well aware of the application of §5 to redistricting. In its 1970 extension, Congress relied on findings by the United States Commission on Civil Rights that the newly gained voting strength of minorities was in danger of being diluted by redistricting plans that divided minority communities among predominantly white districts. In 1975, Congress was unmistakably cognizant of this new phase in the effort to eliminate voting discrimination. Former Attorney General Katzenbach testified that §5 "has had its broadest impact. ...in the areas of redistricting and reapportionment," and the Senate and House reports recommending the extension of the Act referred specifically to the Attorney General's role in screening redistricting plans to protect the opportunities for nonwhites to be elected to public office.

430 U. S. at 158-159 (footnotes omitted).

Consequently, redistricting submissions are changes which must be carefully examined by the Voting Rights Section of the Department which is charged with the primary responsibility of assuring compliance with the Voting Rights Act.

Since we established our voting rights monitoring system, we have sent more comments, letters, and telegrams to the Voting Rights Section urging letters of objections on redistricting submissions than on any other type of submission. To underscore the importance of redistrictings on minority political participation, our oganization has devoted a significant amount of resources to the redistricting of political subdivision districts. Part of our current efforts in the redistricting area involve preparing for the upcoming reapportionments based upon the 1980 Census.

This focus on the anticipated redistrictings is important since there is a severe underrepresentation of Hispanics at the congressional, state legislative, county, municipal, and scholastic levels of government. For example in 1978, there were 1,016 county commissioners in Texas. Each county in Texas is governed by a County Commissioners' Court consisting of an elected county judge and four commissioners elected from districts. Due to the discriminatory impact of these redistricting plans in certain egregious instances, the Hispanic representation on the Commissioners Court was limited to 66 commissioners or 6.5% in 1978 in a state where Hispanics comprised 18.4% of the total state population according to the 1970 Census.

Armed with the Section 5 preclearance provisons and the new 1980 census data, our organization will be in a better position to require poltical subdivisions in the Southwest to adopt redistricting plans which will not have a discriminatory impact on Hispanics. Our organization in conjunction with the Southwest Voter Registration and Education Project and the Texas Rural Legal Aid are preparing for the upcoming redistrictings by purchasing the necessary census data, determining the feasibility of applying computer technology to the redistricting process, and training attorneys and supportive staff in evaluating redistricting plans. However, an important element in securing compliance with the Voting Rights Act is the ability of the Voting Rights Section to analyze and respond to all of the redistricting submissions expected in 1981. Given present levels of staffings and our extensive experience in dealing with the Voting Rights Section, we are concerned that the Department of Justice will not devote significant resources to analyze the significant number of redistricting submissions which will be forwarded shortly after the 1980 Census is published.

This anticipated number of redistricting submissions is realistic since out of the 290 redistrictings submitted to the United States Attorney General during the period of 1976-1979, 148 or 51.0% were from Texas; the next closest state was Mississippi which submitted 36. [2]

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[2] Data obtained from weekly submission lists of the Voting Rights Section.

Nine states (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia) are fully covered under the Voting Rights Act. Aside from congressional and state legislative redistricting in all of these states, numerous county and local jurisdictions will submit plans for approval. In Texas and Arizona alone, there will be 268 redistrictings of county governments. This is nearly equal to the total number submitted during the previous four year period. If all these submissions are sent to the Department of Justice in a short period of time, the Voting Rights Section, given its present staff level, will not be able to respond to the increased number of submissions.

At the present time, the Voting Rights Section has ten persons who regularly handle all Section 5 submissions. Our informal discussions with the staff at the Voting Rights Section reveal that a normal redistricting submission requires at least two full days of analysis. However, when the minority population is large and extensive use of census data is required, the analysis of the submission requires at least one week. Our discussions have also revealed that only about half of the staff can handle the difficult submissions in the normal time. The others either would require additional time or are not fully trained to analyze this type of submission.

Review of a redistricting submission requires a thorough examination of population data, location of the minority community within the jurisdiction, population deviations from the norm for each district, past election results to verify the existence of racially polarized voting, registered voter data, and the extent to which the minority community was involved in drawing the redistricting plan.

The use of census data is extremely important in analyzing a redistricting submission, yet the Voting Rights Section has not used this data to the fullest extent in its review process. For example, the Voting Section personnel does not as a matter of course utilize the 5th Count summary data for census enumeration districts to ascertain the number of Hispanics in non-metropolitan areas. Such data is essential in assessing the discriminatory impact of a given redistricting plan. Also for the upcoming 1980 Census, the Department did not seek to expand the block program in order to provide racial and ethnic data for city blocks in political subdivisions containing less than 10,000 persons. Again, such small area data is essential for evaluating the dilutive impact of a redistricting plan.

We understand that the Department of Justice does not expect to receive many redistricting submissions until mid-1981 and that they have not requested additional funds for fiscal year 1981 for staff increases in the Voting Rights Section to handle the increased number of submissions. They estimate that the greater number of redistricting plans will be submitted in fiscal year 1982 and plan to seek additional resources for the Voting Rights Section for that fiscal year.

We believe that additional resources and staff should be obtained in fiscal year 1981. The 1980 census data will be made available in 1981. In Texas, the congressional and state legislative redistrictings will be submitted during 1981 to the United States Attorney General. In addition, many county governments will reapportion since most political jurisdictions will be under pressure to change their districts in time for the 1982 election process which commences during the month of January. Consequently there will be a substantial number of redistricting plans submitted to the Voting Rights Section for Section 5 preclearance in 1981.

Also, the Voting Rights Section will need additional time to hire and train new personnel to work on redistricting submissions or, in the alternative, to fully train the existing staff to analyze these submissions. We have noted our plans to use census data and computer facilities to analyze and draw redistricting plans at all levels of government. If the Voting Rights Section plans to use computers in their analysis, then they should request the necessary funds for fiscal year 1981. We are prepared to work with your subcommittee, the appropriations committee, and the Department of Justice to see that the Voting Rights Section has the necessary staff and resources to fully analyze and respond to all redistricting submissions.

Our concern with the activities of thr Voting Rights Section extends to its enforcement of the Voting Rights Act and its litigation efforts in Texas. An examination of all voting rights litigation filed by the Department since 1965 is attached as Appendix A. Of the lawsuits on constitutional issues, only five were filed in Texas, while thirty-four were filed in the South. They participated as _amicus curiae_ in six lawsuits in the South and only twice in Texas.

The Voting Rights Act was designed to eliminate the slow process of case by case litigation to protect minority voting rights. It was believed that the administrative and judicial provisions would bring faster relief to those areas and citizens plagued by discrimination.

Texas became covered under the Act after the 1975 Amendments. One would have expected litigation by the Department to have increased in Texas, but as Appendix B demonstrates, only ten suits have been filed in Texas to enforce the provisions of Section 5 while fifteen were filed in the South. Moreover, there has been little affirmative litigation filed in Texas on behalf of Chicanos. Appendix C shows that of the suits filed to enforce Section 5, six were filed on behalf of blacks and two were filed on behalf of Chicanos. The same table also indicates that their Section 5 litigation in Texas for Chicanos has consisted largely of amicus participation in private lawsuits.

Some examples of this lack of aggressive enforcement will illustrate our concern. In 1973, the City of Lockhart, Texas, adopted a new City Charter which incorporated an at-large by place election device. After informing the Voting Rights Section of the failure of the City of Lockhart to seek preclearance of the Charter as required under the Voting Rights Act, we had to institute a lawsuit to require the City to submit the election change because the Department of Justice failed to initiate action. Cano v. Chessar, ___ F. Supp. ___ (Civ. Act. No. A-79-CA-0032) (W. D. Tex. 1979). Similarly in

Terrell County, Texas, we informed the Voting Rights Section in 1976 of the failure of the county to submit their 1973 redistricting plan as required by the Voting Rights Act. After repeated requests over a two year period, we had no alternative but to institute an action to require the County to preclear the redistricting plan. Escamilla v. Stavely, ____ F. Supp. ____ (Civ. Act. No. DR-78-CA-23) (W. D. Texas 1978).

A more serious example of its failure to litigate under Section 5 occurs when the submitting authority implements a change after an objection has been issued as in Jim Wells County, Atascosa County, and Medina County, Texas. Since the Department of Justice was not anticipating filing any lawsuits before the commencement of the election process in 1980, we instituted litigation to enforce the Department's administrative determination. Arriola v. Harville, ____ F. Supp. ____ (Civ. Act. No. C-78-87) (S. D. Texas 1978); Garza v. Gates, ____ F. Supp. ____ (Civ. Act. No. SA-79-CA-413) (W. D. Texas 1979); Garcia v. Decker, ____ F. Supp. ____ (Civ. Act. No. 79-CA-414) (W. D. Texas 1979).

Our litigation docket is replete with suits seeking to enforce objections, to enforce the preclearance provisions of Section 5, and to nullify election schemes that dilute minority voting strength. The Department must improve its litigation efforts in Texas. Their involvement should not be limited to participating in litigation when issues are "novel or complex" nor should they rely on the efforts of organizations to initiate actions to enforce Section 5 or to redress dilution of minority voting strength.[3] The lack of aggressive enforcement of the Voting Rights Act will only weaken its provisions and will not protect the voting rights of minority citizens.[4]

Police Abuse

Since the founding of MALDEF we have worked to prevent the abuse of police authority against Chicanos. Two years ago we began documenting cases of official violence and submitted to the Department of Justice fifty-six cases of suspected police brutality against Chicanos. We urged them to vigorously investigate these cases, but only three were prosecuted while forty-four were closed. We testified at the confirmation hearings for Attorney General Civiletti and Deputy General-designate Renfrew and again urged that measures be taken at the national level to prevent the abuse of police authority against our community.

While we are disappointed by the lack of strong federal leadership in dealing with this problem, we are encouraged by changes reflected in the Department's policies, programs, and budget. First, we are pleased to be part of the Attorney General's Hispanic Advisory Committee. We are confident that this forum will bring the issue of police abuse to the attention of the Attorney General and will seek creative and comprehensive remedies to this problem. Second, we understand that some of the eighteen additional positions appropriated for the Civil Rights Division for fiscal year 1980 will be allocated for the Civil Rights Prosecution program. We are also encouraged by the creation of task forces in the Civil Rights Division to study criminal civil rights violations against Hispanics and by increased budget requests in fiscal year 1981 for criminal civil rights matters.[5]

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[3] Letter from John H. Shenefield, Acting Associate Attorney General, to Senator Kennedy, January 28, 1980. We have discussed this issue with Mr. Shenefield and he has informed us that he is fully committed to enforcing the law.

[4] We have reviewed a paper presented at the annual meeting of the American Political Science Association. The authors concluded that the original congressional intent of voting equality for all citizens has receded and that intergovernmental bargaining has eroded the effects of the Voting Rights Act.

Although we are pleaded to see the Department take these initial steps, further action and litigation is needed to solve this problem. We continue to believe that there is an appropriate federal role in preventing widespread abuse of police authority against our community.

U. S. Attorneys-Civil Rights Units

As a result of the confirmation hearings of Judge Charles B. Renfrew to be Deputy Attorney General, civil rights units will be established in twenty-eight U. S. Attorneys' offices by this Spring. We strongly approve of the formation of these units and anticipate that they will be important segments of a comprehensive departmental policy to address all civil rights matters. We urge the Congress to authorize and appropriate any additional funds necessary for the establishment of these units.

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[5] U. S. Department of Justice, Civil Rights Division, Authorization Request. Fiscal Year 1981, (January 1980), p. 6.

Affirmative Action

We have continuously expressed our concern to the Department of Justice, the Congress, and the White House about the inadequate number of Hispanic employees in the Department of Justice. As of December 31, 1979, 5.9% of the Department's work force (See Appendix D) was Hispanic, but this figure is misleading since one agency, INS, has over one-half of the Department's employees.

Also, Hispanics are severely underrepresented in decision-making and management level positions. The Attorney General has issued numerous memoranda indicating that special attention be given to hiring Hispanics in key positions, but this group is still concentrated in the lower grade positions.

Attached as Appendix E is the best available data on the percentage distribution of minority groups by general schedule in the Department. Hispanics are poorly represented at all grade schedules, especially at the higher levels. An additional analysis of the top managers in the Department showed that just a few had Spanish-surnames.

The deficiencies of the Department's upward mobility and recruitment programs for Hispanics in key occupations are noted by examining certain offices under the jurisdiction of the Deputy Attorney General by total employees and Hispanic employees:

	Total	Hispanics	% Hispanic
Deputy AG's Staff	29	0	0
U. S. Attorneys Office	3,921	124	3.1
Lawyers	1,900	43	2.4
F.B.I.	18,483	456	2.4
Agents	7,815	215	2.8
FPS	9,698	456	4.7
DEA	4,190	342	8.1
U. S. Marshalls	2,484	95	3.3
Office of Pardon Attorney	10	0	0
Office of Public Information	16	0	0
Criminal Division	745	5	0.7

Efforts to recruit and hire Hispanics throughout the Department of Justice have not been successful. Except for additional promises and commitments, there has been little progress in the affirmative action efforts of the Department to employ Hispanics, and we do not see any immediate improvement. We urge this subcommittee to continue its investigation of the Department of Justice's equal employment opportunity program.

Thank you for the opportunity to present our views. We look forward to working with the subcommittee on these issues.

Appendix A [1]

DEPARTMENT OF JUSTICE

VOTING RIGHTS LITIGATION SINCE 1965

	South	Texas	Others	Total
Constitutional Suits	34	5	11	50
Constitutional Suits-Amicus	6	2	1	9
Suits to enforce Section5	37	10 [2]	1	48
Section 5- Amicus	15	5	0	20

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[1] Data for appendicies A, B, and C obtained from Department of Justice documents covering the period from 1965 through January, 1980.

[2] One suit filed as intervenor-plaintiff.

Appendix B

DEPARTMENT OF JUSTICE

VOTING RIGHTS LITIGATION SINCE 1975

	South	Texas	Others	Total
Constitutional Suits	7	4	1	12
Constitutional Suits-Amicus	5	1	0	6
Suits to enforce Section 5	15	10	1	26
Section 5-Amicus	5	5	0	10

Appendix C

DEPARTMENT OF JUSTICE

VOTING RIGHTS LITIGATION IN TEXAS SINCE 1975

BY ETHNICITY

	Blacks	Chicanos	Both	Total
Constitutional Suits	1	1	2	4
Constitutional Suits-Amicus	0	1	0	1
Suits to enforce Section 5	5	2	3	10
Section 5-Amicus	1	4	0	5

Statistical Survey of Women, Minorities and Handicapped Individuals in the Department of Justice as of December 31, 1979

ORGANIZATION	ALL EMPLOYEES			MINORITY			BLACK			HISPANIC			AMERICAN INDIAN			ASIAN/PACIFIC ISLANDER			HANDICAPPED		
	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female
Offices, Boards & Divisions	9,394	4,290	5,104 (54.3)	2,049 (21.8)	650	1,399	1,773 (18.7)	544	1,229	182 (1.9)	73	109	14 (0.1)	8	6	80 (0.9)	25	55	156 (1.7)	79	77
Federal Bureau of Investigation	18,443	10,917	7,526 (40.8)	3,814 (20.7)	1,087	2,727	3,142 (17.1)	696	2,446	479 (2.9)	274	205	39 (0.2)	25	14	154 (0.8)	92	62	556 (3.0)	312	244
Drug Enforcement Administration	4,282	2,784	1,498 (35.0)	1,082 (25.3)	552	560	656 (15.3)	254	402	351 (8.2)	214	137	12 (0.3)	12	--	63 (1.5)	42	21	77 (1.8)	59	18
Bureau of Prisons (Including Federal Prisons Industries)	9,906	8,140	1,766 (17.8)	2,089 (21.0)	1,607	482	1,512 (15.2)	1,120	392	491 (4.9)	413	78	45 (0.5)	40	5	41 (0.4)	34	7	81 (0.8)	66	15
Immigration and Naturalization Service	11,353	7,251	4,102 (36.1)	3,627 (32.0)	1,766	1,861	1,567 (13.8)	461	1,106	1,741 (15.3)	1,159	582	18 (0.2)	8	10	301 (2.6)	138	163	287 (2.5)	213	74
Law Enforcement Assistance Administration	809	383	426 (52.7)	298 (36.9)	61	237	282 (34.8)	53	229	8 (1.0)	4	4	1 (0.1)	1	--	7 (0.9)	3	4	11 (1.4)	9	2
U.S. Marshals Service	2,499	1,945	554 (22.2)	478 (19.1)	365	113	364 (14.6)	272	92	95 (3.8)	82	13	9 (0.3)	6	3	10 (0.4)	5	5	43 (1.7)	33	10
Department of Justice - TOTALS	56,686	35,710	20,976 (37.0)	13,437 (23.7)	6,058	7,379	9,296 (16.4)	3,400	5,896	3,347 (5.9)	2,219	1,128	138 (0.2)	100	38	656 (1.2)	339	317	1,211 (2.1)	771	440

PERCENTAGE DISTRIBUTION OF MINORITY/SEX GROUPS
FULL-TIME GENERAL SCHEDULE EMPLOYMENT
AS OF JUNE 30, 1977

GENERAL SCHEDULE GRADE	NUMBER EMPLOYEES	% TOTAL		% BLACKS		% HISPANICS		% AMER. IND.		% ORIENTALS		% OTHER	
		TOTAL	WOMEN	TOTAL	WOMEN	TOTAL	WOMEN	TOTAL	WOMEN	TOTAL	WOMEN	TOTAL	WOMEN
GS-1	7	100.0	71.4	14.2	0.0	0.0	0.0	0.0	0.0	0.0	0.0	85.8	71.4
GS-2	307	100.0	61.2	46.9	36.5	3.6	2.3	0.0	0.0	0.0	0.0	49.5	22.4
GS-3	2417	100.0	67.1	35.3	27.4	7.2	4.8	0.2	0.2	0.8	0.3	56.5	34.4
GS-4	4317	100.0	74.1	24.7	19.9	6.3	4.2	0.1	0.1	1.1	0.8	67.8	49.0
GS-5	6620	100.0	67.7	18.3	14.7	5.9	3.5	0.2	0.1	2.1	1.2	73.5	48.2
GS-6	4421	100.0	60.0	20.5	14.4	5.7	2.3	0.2	0.1	1.3	0.7	72.3	90.5
GS-7	5105	100.0	45.8	17.4	9.8	6.0	1.4	0.4	0.2	1.0	0.6	75.2	33.6
GS-8	2164	100.0	31.1	10.6	4.7	9.2	0.7	0.3	0.0	0.7	0.5	80.2	25.2
GS-9	5090	100.0	15.9	9.2	2.5	6.8	0.6	0.3	0.1	0.9	0.6	82.8	12.2
GS-10	1153	100.0	12.7	4.7	1.0	4.0	0.3	0.3	0.1	1.0	0.1	90.0	11.3
GS-11	4169	100.0	12.7	7.4	2.2	4.0	0.2	0.3	0.0	0.7	0.1	87.6	10.2
GS-12	9031	100.0	5.6	4.4	0.8	3.4	0.2	0.2	.01	0.7	.01	91.3	4.6
GS-13	5246	100.0	3.0	2.6	0.4	1.6	0.05	0.2	0.0	0.3	0.04	95.5	2.5
GS-14	2346	100.0	4.5	2.8	0.3	1.6	0.04	0.2	0.0	0.3	0.0	95.1	4.1
GS-15	1189	100.0	2.8	3.2	0.3	1.1	0.0	0.3	0.0	0.3	0.0	95.1	2.5

GENERAL SCHEDULE GRADE	NUMBER EMPLOYEES	% TOTAL		% BLACKS		% HISPANICS		% AMER. IND.		% ORIENTALS		% OTHER	
		TOTAL	WOMEN	TOTAL	WOMEN	TOTAL	WOMEN	TOTAL	WOMEN	TOTAL	WOMEN	TOTAL	WOMEN
GS-16	223	100.0	0.4	4.5	0.0	0.0	0.0	0.4	0.0	0.4	0.0	95.5	0.4
GS-17	99	100.0	1.0	0.0	0.0	1.0	0.0	0.0	0.0	0.0	0.0	99.0	0.0
GS-18	35	100.0	5.7	2.9	0.0	0.0	0.0	0.0	0.0	0.0	0.0	97.1	5.7

NOTE: Computation of percentages based upon figures for total employees for each grade level.
Example: Women account for 71.4% of all persons employed in grade GS-1.

Source: U. S. Department of Justice, Affirmative Action Plan- Fiscal Year 1978, pp 35-36.

Prepared Statement of Mark S. Schacht

Migrant Legal Action Program, Inc.
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Washington, D.C. 20005
Telephones: (202) 347-5100
(800) 424-9425

March 24, 1980

Senator Birch Bayh, Chairman
Subcommittee on Constitution
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Re: D.O.J. FY '81 Authorization Legislation

Dear Chairman Bayh:

We are writing you regarding the fiscal year 1981 re-authorization of appropriations for the Department of Justice. Our clients and other legal services attorneys with whom we work have identified an issue of major importance with respect to the Department's investigation and prosecution of violations of the Farm Labor Contractor Registration Act (FLCRA), 7 U.S.C. 2041 et seq. For the past year, various legal services programs have been informing us of an increase in violent assaults against farmworkers by the unscrupulous crewleaders who control them. They have also alerted us to the fact that legal services attorneys and other legal workers have been subjected to violence in the course of engaging in the representation of their clients. We have attempted to secure action by the Department in these matters and have discovered that no central unit or office has the authority, training or expertise to deal in a timely fashion with these cases as they arise.

We have discussed with your staff on the Subcommittee on Constitution the possibility of including report language with the authorization bill to direct the Department of Justice to begin to attack these problems in an effective and coordinated fashion. We are not necessarily interested in additional authorizations of funds; in our view, the Department probably has sufficient resources to deal with the problem. What we do request, however, is that the Subcommittee staff explore the problems we have raised and seek commitments of action that will correct them as soon as possible. It is intolerable that migrant and seasonal farmworkers should be daily victimized by violent crewleaders, many of whom hold the workers under peonage conditions in agricultural labor camps. We are equally concerned about the chilling impact that unchecked violence has upon those who are engaged in representing farmworkers. If crewleaders can seem to prevail over attorneys and legal workers through such tactics, what hope of change exists for the farmworkers who remain after the attorneys are driven off?

We have selected several of the most egregious cases for presentation to your staff and have already furnished them with a memorandum outlining the facts in each case. In all of these instances, efforts to remedy these assaults have been delayed or even denied because of the Department's inadequate handling of the cases. These incidents show that the Federal Bureau of Investigation has failed to properly investigate allegations of crewleader violence; that the Criminal Division (where prosecutorial discretion over FLCRA criminal charges rests) has responded either with long delays or outright failure to prosecute; and that the offices of the U.S. Attorneys have little or no direction or training from Washington about the legal avenues they may use to attack this pressing national problem. In sum, the Department is presently unable to respond to these concerns within its existing organizational framework.

We understand that the Department of Justice has notified your staff that it intends to establish a "Task Force on Peonage and Slavery" within the Criminal Division. We can not comment on whether its creation will address our concerns without knowing how the task force will be set up, what jurisdiction it will have, or what resources are at its disposal. Your staff has indicated that the Committee will submit questions to the Department regarding the task force. We would like to take this opportunity to suggest areas of questioning that, if answered appropriately, would be responsive to the needs of our clients.

First, in terms of jurisdiction, the task force should be the central coordinator for referral of all cases involving criminal violations of federal laws protecting farmworkers. Thus, when a case is brought to the attention of a U.S. Attorney, it should also be simultaneously brought to the attention of the task force in Washington. A decision in the first instance as to whether to take the case should, of course, rest with the U.S. Attorney. However, the task force should review the decisions on a case by case basis to insure that all cases that warrant prosecution are, in fact, prosecuted.

With respect to the functions of the Washington task force, it should be made clear that its role is to coordinate the investigation, preparation and prosecution of these cases. This will necessarily involve the development of better lines of communication with the F.B.I., with other government agencies with concurrent federal jurisdiction, and with the different States' Attorneys General. At the present time, we believe there is no system in place to guarantee that basic standards in these different areas are adhered to on a national basis.

The task force should have an acknowledged training function vis a vis the U.S. Attorneys so that they can recognize violations of federal statutes which protect migrant and seasonal farmworkers. For example, factual discovery in these cases is often a key to a successful prosecution. In at least one of the cases we discussed with your staff, it became evident that the Department had no internal standard listing the elements that must be present to bring a successful peonage action. A question thus arises about other federal laws and the extent to which they are familiar to U.S. Attorneys. Successful prosecution of crewleaders practicing peonage requires the utilization of several other related federal laws governing conditions which, in our experience, are prevalent in their labor camps. Peonage is difficult to prove and crewleaders are increasingly sophisticated in their efforts to avoid conviction. Other federal laws like the Occupational Safety and Health Act and the Fair Labor Standards Act should be viewed as different tools to be used to attack this problem. If the Department is serious about its commitment to end peonage, it should realistically take stock of the remedies provided by all federal farmworker protective statutes and insure that U.S. Attorneys make use of them. Centralized training is absolutely essential to transmit this information and to assure that abuses of farmworkers are timely investigated and prosecuted.

Finally, but perhaps most importantly, the attorney staff of the task force should be assigned there on a permanent full-time basis. Currently, the Department has assigned a single attorney to function as its "migrant coordinator." Legal Services attorneys seeking assistance at the Department through the "migrant coordinator" have repeatedly been told that we are competing with this attorney's existing (non-migrant) case load. We believe the Department can do better. The problems we are discussing affect many of the estimated five million migrant and seasonal agricultural workers at one time or another in their lives. It is incumbent upon the Department to protect these persons and those who represent them from the casual violence which pervades the farmworker's every day existence. Anything less is as unacceptable to our clients as it is to us.

We hope that you will be able to take action on this important matter at your earliest opportunity. We look forward to working with you and your staff as the Committee completes its work on the Department's fiscal year 1981 authorization bill. Please do not hesitate to contact us if we can be of assistance in any way.

Sincerely,

Mark S. Schacht
Senior Legislative Advocate

Sherry Teachnor
Staff Attorney

MS/rr

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DEPARTMENT OF JUSTICE AUTHORIZATION
CIVIL DIVISION

THURSDAY, MARCH 20, 1980

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met at 9:40 a.m., in room 2228, Dirksen Senate Office Building, Hon. Max Baucus presiding.

Present: Senators Baucus and Thurmond.

OPENING STATEMENT OF SENATOR BAUCUS

Senator **Baucus**. The hearing will come to order.

This is the first day of hearings the committee will be holding on the activities and role of the Civil Division of the Department of Justice, which has not been examined in an oversight hearing for some time. The staff of the Division has been most cooperative and helpful, gathering materials, pointing out difficulties and discussing the role of the Division and the problems it encounters in carrying out its responsibilities. For that I am personally grateful.

We hope to explore at these hearings a delineation of the responsibilities of the division, how it handles them and the obstacles confronting it in doing the most effective job on behalf of the public.

We will examine how the Division handles fraud cases to determine if a greater concentration of effort is required and desired.

We will also explore the Division's relationship with U.S. attorneys, the lines of communication and who has control over whom.

There are also a number of questions concerning the handling of cases on appeal. Most such case are handled by or delegated to agencies or U.S. attorneys.

The administration of the Civil Division is a matter of substantial interest to this committee. We want to know how records are kept, how they are retrieved, how paralegals are used, and the use of computers and other automated aids.

Of special concern to this committee is the relationship between the Civil Division and its client agencies. Last year, we found that the relationship between the Lands Division and the Environmental Protection Agency was not what it should have been. This was a crucial element in the difficulties Lands encountered in attempting to perform its responsibilities.

We want to know if delegations of litigation authority are in order, and whether or not such delegations in the past have served the public well and are working effectively. The memorandum of understanding between client agencies and Civil Division are of critical importance in well and working effectively. The memorandum of understanding between client agencies and Civil Division are of critical importance in this regard, and we have every intention of exploring that area to see if they are being interpreted clearly or have led to misunderstandings that will not serve the public interest.

Most of all, we want to gain a feel for how the Division views its own role.

There are still other questions that the committee wishes to look into regarding the Division, but they will be proper subjects for future discussions and hearings, notably on March 21. For now, we shall attempt to concentrate on the areas already delineated.

The first witness is Mrs. Carla Hills, a person for whom I have great regard. When she was Secretary of HUD, I happened to be a Member of the House and, at that time, I obtained a great deal of appreciation for her help.

We are very greatful to have you here, Mrs. Hills. You are particularly helpful to us, not only because of your position as Secretary of HUD, a client agency, but also because you were former Assistant Attorney General for the Civil Division. Being a former Assistant Attorney General perhaps, you will have a greater inclination for candor. And, second, as head of a client agency, you will have seen both sides of the problems that we are addressing.

I am wondering, just for the record if you could tell us about the period when you were Secretary of HUD and, second, the time that you were Assistant Attorney General for the Civil Division.

STATEMENT OF CARLA HILLS, FORMER ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

Mrs. **Hills**. I was chairman, or Secretary of Housing and Urban Development in 1975 through 1977, and Assistant Attorney General in charge of the Civil Division, 1974 to 1975.

Senator **Baucus**. Before I begin, do you have any introductory remarks that you would like to make?

Mrs. **Hills**. I have submitted, Mr. Chairman, for the record a statement and I would either be happy to summarize some of the points or just lead off and respond to your questions at your desire. I am very pleased to be here this morning.

Senator **Baucus**. If you do not mind, your statement will be inserted at the end of your oral testimony.

Mrs. **Hills**. Fine.

Senator **Baucus**. But, in the meantime, if you have one or two points that you wish to make at this time. please proceed.

Mrs. **Hills**. Let me say, as a Government employee, both in the lawyer role and in the client role, I am convinced that the Government as a whole would benefit from a clearer and a more consistent definition of the Justice Department's role with respect to Federal litigation. Therefore, I compliment you and this committee for its decision to look carefully at the system that now exists for handling the Federal Government's litigation. As I understand your basic question, it is to decide how litigation authority should be allocated throughout the Government. My bottom line decision on that question is that the Department of Justice should have control over the Federal Government's litigation. By "control" I mean that the Department should have the authority to determine the Government's position with respect to practically all legal issues; I do not mean that the Department should have authority to decide the policy prerogatives of the various departments and agencies.

I believe it is possible to draw a reasonable distinction between law and policy. Naturally that is easier said than done in many circumstances because there can be differing views of law and law and policy can collide. But those difficulties, in my view, merely underscore the need to handle issues which are essentially legal separately from those which are essentially programmatic.

There are a number of constitutional and pragmatic reasons to support the opinion that litigation authority for the Government should be centralized in a special body.

Senator Baucus. That is a very interesting distinction. But before we explore that further, I wanted to raise a related matter.

It is my feeling that there is considerable tension today between the client agencies and the Justice Department. Could you outline, in your judgment, the reasons for that tension? What is the cause of it?

Is it a lack of communication? Is it arbitrary decisions on the part of Justice or the client agency? Can you generally describe what the tension is?

Mrs. Hills. Yes; there probably always will be tension where you have centralized authority for any major decision in one body and distinct interests in a number of other bodies.

For the client agencies, I think they can ask for perhaps more responsive, sympathetic, and in-depth analysis of their problems. From the Justice Department's point of view, I think they can ask for less parochial demands and less programmatic analysis of the legal issues which pervade Government. I do not think the structure should be destroyed in order to try to get at tensions which are almost natural from the differing interests represented.

Senator Baucus. Let me ask the question a little differently.

Which tensions are always going to be present and which tensions can be more easily controlled?

Could you categorize those two areas?

Mrs. Hills. Probably the largest tension exists from different legal positions that would be urged by the various departments and agencies. These are profound with independent regulatory agencies which have independent litigating authority, You will frequently find, or at least not infrequently find two independent regulatory agencies on opposite sides of the same case. That forces the judicial branch to make a decision as to what is the Government's position, and I think that is unfortunate. That is particularly unfortunate where both agencies are within the executive branch. Thus, because there has been a chipping away of the litigating authority of the Department of Justice, you might, for example, find the Department of Labor on one side of the case and the Department of Justice, on the other side of the case representing some other executive branch agency.

Again that situation results in inappropriately delegating or pushing off onto the judicial branch the decision as to what is the legal position of the Government.

Senator Baucus. Would you make a distinction between executive agencies and independent regulatory agencies? You feel that Justice should resolve differences on "legal" issues in all cases?

Mrs. HILLS. Insofar as possible, I think that is the desirable way of handling Government-wide litigation.

With respect to executive departments and agencies, I would make practically no exception. I would have the Department of Justice handle all of that litigation. If the Justice Department, under a given stress of personnel, were to delegate informally the handling of some types of routine cases, I would let that decision be made by the Government's chief legal officer, namely the Attorney General, on an informal basis subject to his control and direction.

With respect to independent regulatory agencies, there is a strong conceptual argument that they are a creature of both Congress and the Executive, and that, therefore, they should not report through or to the executive branch, which includes the Department of Justice, but should have the authority to develop their own legal positions and, that is more particularly so, where that legal position outlines or involves their charter.

But I do think there are a host of cases which do not involve their charter and which do not endanger their independence. There are a host of Government-wide issues: the Freedom of Information Act, affirmative action, equal opportunity, discovery issues, evidentiary issues, a variety of other questions which I think could be better handled in a centralized fashion.

Senator BAUCUS. When the SEC is a party to a case involving the Freedom of Information Act that that case should be handled by the Justice Department? On the other hand if the SEC is arguing a 10(b)(5) case or an inside information case, that that should be handled by the SEC, is that correct?

Mrs. HILLS. That correct. I think if this committee were to examine closely the positions that have been taken on Government-wide issues, they would find that too frequently the Government's position has been affected adversely by various agencies, whether they be independent or part of the executive branch, handling their own litigation apart from the central supervision of the Department of Justice.

Senator BAUCUS. What can Justice do in particular to reduce the kinds of tension we are talking about?

Mrs. HILLS. As in private practices, I think the attorneys of the Justice Department should be conscious of client relations and try to respond as rapidly as possible in a quality fashion to the questions that are posed by client agencies. Some tensions can develop on an anecdotal basis where prompt answers are not given to the client agency, which feels under great stress because of programatic issues that are being litigated in the courts.

When I was at Justice, we initiated, and I think the system still continues whereby a General Counsel could bring to my attention a case which he felt deserved special attention by the attorneys in the Civil Division, That designation permitted us, as a cooperative team, to allocate properly the resources that exist at Justice.

To be honest with you, if you total all of the litigating resources and all the judicial resources that we have available, they are inadequate to handle every single case that can be brought by Government or against Government. That necessitates that the attorneys working, whether they be in a client agency or in the Justice Department, try to coordinate an efficient handling of the Federal docket.

Senator **Baucus**. I assume that it would be helpful if Justice reported back to its client agencies the outcome of certain litigation that the Justice is handling for that agency?

Mrs. **Hills**. Yes, sir. Communications should be strong and, as a general proposition, I think they are. I think that the grievances, for the most part, are anecdotal. But you develop reputations in this world, and reputations hold over, meaning that sometimes there is a perception of your conduct which does not quite gibe with the current facts. Today, the attorneys who want to develop a rapport with their client agencies have to go a long way to try to do more than they normally would do. And frankly, we do that in private practice. We would not keep our clientele unless we exhibited real concern about their issues and gave the impression that it did not matter whether it took 24 hours a day to try to handle their problems, their problem was our highest priority.

Senator **Baucus**. But you believe that the failure of Justice to display adequate respect for its clients is primarily anecdotal?

Mrs. **Hills**. It is more anecdotal than pervasive. I frankly think that the quality of service rendered by the Civil Division is extremely high.

Senator **Baucus**. What can client agencies do to relieve this tension?

Mrs. **Hills**. Again there has to be cooperation on both sides. The client agencies should understand the absolute need to allocate the resources that we have available: court time and lawyer time. It is a useful cooperative venture in both designating those cases which are the most important to be resolved by litigation and to try to develop alternative solutions for those which do not.

Situation that I faced at HUD was in the foreclosure area. We took back about 96,000 units of housing and, obviously, to dump all of those foreclosures on the courts at one time would be horrendous. More importantly, the time lapse involved in foreclosure created programmatic problems not only for the people at HUD but for the American people who needed shelter. We wanted to get those housing units back into useful occupancy.

As a result of those stresses, the lawyers at the Justice Department and the lawyers at HUD worked together to develop Federal nonjudicial foreclosure legislation. Unfortunately, Congress did not pass it, but it was an excellent exercise.

Senator **Baucus**. When you were head of the Civil Division, it is my understanding that the Department entered into a memorandum of understanding with the Department of Labor. It was dated February 11, 1975.

Could you tell us about any of the details of that memorandum? What led to it and what problems, if any, arose in those negotiations?

Mrs. **Hills**. To my recollection, that memorandum was entered into as a result of proposed legislation which would have pulled out of the Justice Department and given to the Department of Labor litigation authority over certain categories of cases. My recollection is that the memorandum covered ERISA cases, and I believe OSHA cases. The proposed loss of litigation authority over these cases caused the Justice Department concern. The Justice Department entered into negotiations with the Department of Labor and, with the threat on the horizon, agreed to the memorandum of understanding which let the Department of Labor have jurisdiction over some of those cases, but retained for Justice certain of them, such as those which raised constitutional issues.

Senator **Baucus**. Were there any problems in those negotiations from your viewpoint, say, as the Assistant Attorney General for the Civil Division?

Mrs. **Hills**. The basic problem is that it takes out of centralized litigation authority control over categories of cases which, in my opinion, should be under the Attorney General. I do not think that the Department of Labor, which is a part of the executive branch, and does not have independent regulatory authority, should have litigating authority. There are routine cases and the Department of Justice can delegate to certain executive branch attorneys, working with the U.S. attorney. But that is a different question.

Senator **Baucus**. But the reason that you entered into it was because of pending legislation?

Mrs. **Hills**. Yes, there was proposed legislation which threatened to take away from the jurisdiction of the Justice Department categories of cases which, to my recollection, were the ERISA cases and the OSHA cases.

Senator **Baucus**. Is the process of the Justice Department entering into memoranda of understanding with client agencies a good process in your view?

Mrs. **Hills**. I am only aware of about four such memoranda, Mr. Chairman, and in each instance, to my recollection, they were brought about by duress. I do not regard the memoranda as a problem solver but as a reaction to a chipping away of the Justice Department's litigation authority.

Senator **Baucus**. A chipping away of Justice Department litigation authority by Congress?

Mrs. **Hills**. Yes.

Senator **Baucus**. In each case Congress has been chipping away?

Mrs. **Hills**. That is right. There is proposed legislation as in the, Labor Department instance, which threatens to take away the litigation authority for a category of case. The Attorney General and the Solicitor General, who are concerned about the constitutional potential in every case and who are concerned about the Government-wide impact of interpretations and of analogies which can be drawn throughout given areas of the law, are very nervous, and rightfully so, when the 90-odd departments and agencies seek to get their own litigation authority. This is particularly grievous, it seems to me, as a constitutional matter when the executive branch fragments its own litigation authority.

Senator **Baucus**. It is your view then that most memoranda of understanding are a result of duress?

Mrs. **Hills**. That is correct.

Senator **Baucus**. In the case you have described it was duress?

Mrs. **Hills**. That is my recollection. Let me clarify that.

I am advised that there are approximately four memoranda, and I have recollection of one. I believe that the majority were developed under conditions, which I would call "duress" from the point of the Department of Justice.

Senator **Baucus**. In your view, would it be appropriate and good public policy for this committee, for example, to review any memoranda that the Justice Department enters into with various client agencies? Might this committee bring a broader perspective to the litigation authority problem?

Mrs. Hills. I think that this committee should hold regular oversight hearings with respect to the civil litigation that is being performed at the Justice Department. To my knowledge, this is the first such hearing that has been held, and the substantive committees of the various departments and agencies are the committees that are looking at Government litigation from another point of view. Perhaps from a parochial point of view.

I think it behooves this committee to know and to hear what other problems and what other concerns and what other suggestions that this committee could make for a better handling of our civil litigation.

Senator Baucus. When you were Secretary of HUD, did you feel that you had adequate input into Justice's decisions, involving HUD litigation.?

Mrs. Hills. Yes. Yes; I did.

Senator Baucus. You had adequate access to the Department?

Were you ever overruled or make a recommendation that Justice did not follow?

Mrs. Hills. No. I had confidence in my trial counsel. I also knew the agency and could talk candidly with those persons who were in a position to make a legal decision.

Senator Baucus. To what degree was your rapport a result of having served as Assistant Attorney General? What about Secretaries of agencies that have not had your prior experience?

Mrs. Hills. Probably a Secretary would not get involved in the great majority of cases that concern his or her agency. Probably the General Counsel would be the natural liaison to the Assistant Attorney General in charge of the Civil Division. That is why I recommend, and I am sure it is continuing, a process whereby there is continuing communications and contact between the General Counsel of the given agency and the Assistant Attorney General in charge of Civil. I think that the General Counsel can then state when a case has real programmatic impact: where it is of dire concern to the agency. The Assistant Attorney General can respond accordingly.

There is a desire to handle the work in an efficient fashion. There are sometimes stresses with respect to adequate resources.

Senator Baucus. When you were at HUD, did you or your staff detect a pattern of the type of cases that the Department of Justice would prosecute?

Mrs. Hills. HUD had no independent litigation authority, and I did not strive to get any for HUD. I was content to work with the Department of Justice, and I was pleased with the response which they gave to HUD with respect to litigation. We also cooperated regarding specific problems which did not have a solution with respect to legislation. For example, foreclosures. We needed new legislation to handle them in a more efficient fashion.

Cooperatively, we tried to obtain legislation so we could implement nonjudicial foreclosure. Approximately half of the States have such a procedure; half do not. The half that do not delay the resolution and the return to useful occupancy of housing which has been foreclosed; in fact, there is about a 3-year delay. You may recall that my substantive committee was very concerned about the 3-year delay;

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boarded-up dwellings were causing a downward spiral in many, many neighborhoods. I felt we got full cooperation from the Civil Division to work out an alternative solution which would expedite the process. But, we did not get the attention of Congress.

Senator BAUCUS. But as HUD Secretary, did you ever feel the Department of Justice did not display sufficient interest in a case that was important to your Department?

Mrs. HILLS. No; I did not.

Senator BAUCUS. So what you are saying is that there was no instance in which you felt that Justice was not responding to legitimate HUD requests?

Mrs. HILLS. None were called to my attention by my General Counsel, and my perception was there was a good working relationship between him and the Civil Division.

Senator BAUCUS. Could you give us some examples you are familiar with where the Federal Government did not adequately coordinate its litigation policies?

Mrs. HILLS. There have been few examples, to my recollection, where there has been inadequate coordination. Most of those have occurred where an independent regulatory agency or an executive branch agency which had independent litigating authority took a position which was contrary to the position which the Department of Justice was recommending. That could be on a legal issue or it could be on an overall case.

The cause in most instances in my opinion, was primarily that the agency was looking at the question from a programmatic point of view, whereas the Department of Justice was looking at the question or the case from a governmentwide point of view. Opening up the lines of communication, which we tried very hard to do, seemed to soften those issues. We were able to persuade, in most instances, the client agencies to understand why their argument would not be in the Government's best interest. And, of course, if it is not in the Government's best interest, very often it is not in the agency's long-range best interest either. You can win a single case and lose a whole cause, where you are talking about discovery or contempt or jurisdiction or standing, or a host of other issues, which are procedural. And there are also many that are substantive, such as the Freedom of Information Act. A coordinated, centralized approach, which develops "the Government position," is highly desirable. For the most part, I think we were able to persuade.

Senator BAUCUS. When you were HUD Secretary, how did the delegation of cases to U.S. attorneys work out? Did you see problems there other than the problems that we have discussed between client agencies and Justice? Once a case was delegated to a U.S. attorney's office, what other kinds of problems, if any, arose?

Mrs. HILLS. The relationship with U.S. attorneys requires coordination and communication just as it does between the lawyers at the client agencies and the Civil Division. I am sure there were anecdotal problems of not responding to a given case in time or of not communicating what had occurred in court as clearly as might be desired. But again, the structure of having a litigation specialist in each of our 95 judicial districts, persons who know the judges, who know the procedure, who understand court techniques, provides an efficient way and a cost-effective way of handling our cases.

As Secretary of HUD, I could not, within the resources that I had, handle our litigation. When I was at Civil, we were the third largest client of the Civil Division. It would take enormous expansion of HUD resources to get a litigating capability. In the event that the Congress were to give HUD an increase in legal staff, those people probably would not be in the right place at the right time.

Senator **Baucus**. Do the U.S. attorneys have too much prosecutorial discretion in civil cases? Are there instances, where the U.S. attorney just does not care about HUD cases?

Mrs. **Hills**. That is a "people" problem not a structure problem. It requires a better appointment system and a better recruiting system.

My perception is it is more anecdotal than pervasive. As I have said, I think the way to prevent that kind of problem is by enhancing communications. In any given case, if the General Counsel had alerted the people at the Civil Division that this case meant a lot to the Department—it was not just one foreclosure of one unit of housing; it was not just one review of one social security case. It had the overall impact to the programmatic responsibilities of his agency. I believe that concern would be expressed to the U.S. attorney and, furthermore, if it were a case of some significance, the client Department would probably allocate a substantive specialist to the case who would go out to the judicial district and sit as inhouse counsel with litigation counsel.

Senator **Baucus**. But you are saying too often General Counsels do not bring particularly important cases to the Justice Department's attention?

Mrs. **Hills**. I am not saying that. I am saying that that is a therapeutic system. I believe that it still exists. If every General Counsel who is grieving today, whether he or she has independent litigation authority, takes advantage of the lines of communications that do exist, I believe they would not have such concern over who had litigation authority. There would be comfort in the fact that the Justice Department had centralized authority.

Senator **Baucus**. But you seem to be implying that there either are not adequate lines of communication or they are not being taken advantage of.

Mrs. **Hills**. That may be the case where there are complaints.

Senator **Baucus**. In your experience, are there too many complaints, too many problems?

Mrs. **Hills**. When I arrived at the Civil Division, I felt that there were a substantial number of complaints. When I instituted the system calling for an alert as to the most significant cases, we were not deluged with requests. Many of the General Counsels did call and come in and talk about the issues, and sometimes where there were collisions between two agencies or among more than two on a given issue. I thought that the manner in which we were able to reach a resolution was a happy one, and it worked.

I think that the lines of communication are there; they can be exercised. That does not mean that the Civil Division is immune from any criticism of being adequately responsive in every case. It is a balance, and it takes the effort on both sides. But I do think that the system, the structure that is in place, is the one whereby you get the best results for the Government as a whole.

Senator **Baucus**. How many times did you testify before the Congress as Secretary of HUD?

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Mrs. Hills. At one point, I figured that I was giving about a third of my time to respond to some question that was posed by one or the other body of Congress. We had, as you recall, quarterly oversight hearings, budget hearings, governmental operations hearings, and a number of individual letters which came from a Congressman or a Senator requesting information or my personal attention and my presence. I would say that one-third would be a conservative estimate of the time I gave to congressional matters as Secretary.

Senator Baucus. As Secretary of HUD how many different congressional inquiries did you have to respond to?

Mrs. Hills. Literally thousands. We had a staff that would try to do the ground work on the inquiries that were posed.

Senator Baucus. How many times did you personally come to the Hill?

Mrs. Hills. In that 2-year period or approximately a 2-year period, I can say hundreds.

Senator Baucus. When you were Assistant Attorney General for the Civil Division, how many inquiries did you have to respond to and how many times did you come to the Hill?

Mrs. Hills. I never came to the Hill as the representative of the Civil Division. Although I am sure that I got an inquiry by mail from time to time, it was so infrequent that I have no particular recollection.

Senator Baucus. What is the reason for the difference?

Mrs. Hills. The substantive committees of Congress are very interested in the departments and agencies that fall within their substantive jurisdiction. In contrast, lawyers are regarded as staff. And I say that, being a lawyer myself, the staff functions often receive less scrutiny than the substantive functions. Historically, the Judiciary Committee has not spent a great deal of time focusing on the concerns, the resources, the problems of how the Government's legal staff handles the litigation of the total Government.

Senator Baucus. I suppose one of the reasons for the differences is the one you have already outlined; that is the difference between substantive committees and the Judiciary Committees. We talked about how the erosion of litigation authority has resulted from that difference.

What other policies or problems result from that difference?

Mrs. Hills. The substantive committees will be focusing on questions from a programmatic point of view. For example, the Banking Committee, as you will recall, was interested in financial institutions and housing, the economy, and probably did not spend a great deal of time reflecting upon how the litigation of the Department of Housing and Urban Development was handled. Notwithstanding that, HUD's litigation was probably third in terms of quantity on the Justice Department's civil docket.

Thus you have a more parochial focus by the substantive department and by the congressional committee. That leaves the staff function sort of out of there in limbo.

Senator Baucus. But how——

Mrs. Hills. And the concerns, the resources, the whole manner in which we handle litigation has not received very much congressional attention.

Senator **Baucus**. I understand that, but I am wondering how that affects John Q. Citizen who lives in Peoria, Ill.? Does it affect him in any way?

Mrs. **Hills**. Of course it does, because the Constitution requires an even application of the law.

If the Department of Labor happens to get jurisdiction over a particular case, and John Q. in Peoria is either told by Labor that the law is one way or finds himself litigating a question which the Government, through Labor, litigates one way, but another department, which has a similar type question in New York, has it litigated by the Department of Justice in another fashion, it can be quite uneven. I think John Q. Public is entitled to some uniformity in the law so he has the capacity to predict what the Government's position will be. He also has a legitimate stake in the efficiency of Government process. Where a litigation position is developed in a parochial fashion, it may not be fully analyzed or fairly analyzed, yet, it may be taken as "the Government position." Then, I think John Q. Public is shortchanged.

Senator **Baucus**. I think you are absolutely right.

The Government is becoming more and more confusing for some of the reasons that we have discussed this morning. But that takes us back to the issue we discussed earlier.

How do we make the distinction between legal and policy decisions? You stated that one way to achieve greater uniformity is for the Justice Department to decide all legal matters. The regulatory agencies will then make their own decisions with respect to policy.

Could you flush out that distinction a little more clearly? Do you have in your mind some guidelines, some parameters that might indicate how we decide what is a legal issue and what is a policy consideration?

Mrs. **Hills**. The distinctions, I think, on the far sides of the spectrum are not difficult. A programmatic question is easy to define: whether or not to have a rental subsidy program; whether or not to have a mortgage subsidy program. Whether, once it is in place, you should enforce it. Those decisions should rest with the client department or agency.

As to certain legal questions, some are also at the far side; they are easy to define in terms of procedure, discovery, standing and various statutory matters.

Senator **Baucus**. What about the middle of the spectrum?

Mrs. **Hills**. There is a gray area which will require some sorting out and some difficulty. There is no question but that reasonable minds will differ on the law. That is how we get 5 to 4 decisions in the Supreme Court of the United States. The tougher issues of law will create some differences, and law and policy will collide on occasion.

In the executive branch where there is a collision of law and policy, it can be elevated to the Attorney General, and if necessary to the President.

Senator **Baucus**. The Attorney General should decide what is law and what is policy?

Mrs. **Hills**. The Attorney General should decide legal questions. In most instances there probably would be some kind of consensus reached between the Secretary of the department and the Attorney

General as to what is "policy". I think, in general, the Attorney General and those who work with the Attorney General want very much to respond to what the departments have set as their goals. There is no question about it.

The Attorney General does not set himself up as a substitute for the various departments or agencies. That is not his goal, and I do not think there have been many collisions in that regard. I do not think that the client department should send over a question to Justice and ask, "Can we do this?" I think the department should send over a memorandum that states "This is our program, we would like to proceed as follows. Will Justice defend us if we are sued?"

Senator BAUCUS. Has the Attorney General tried to set up a system that results in uniform "legal" positions on the part of the Government? Has this been done before? Has anybody attempted to do it?

Mrs. HILLS. I think that Attorneys General have for the most part open lines of communications. Solutions of problems that are civil in nature, should first rest with the Attorney General in charge of the Civil Division. In most instances, that is a perfect extension of the General Counsel of the department or agency. Where there are questions at that level, they ought first to be decided there.

Senator BAUCUS. When you were HUD Secretary, did your Department try to determine the Government-wide position on a matter of discovery or standing or the Freedom of Information Act? Or did you ever want to take a position that differed from the Justice Department position?

Mrs. HILLS. I am sure the respective staffs on occasion had differences but I am not aware of any difference that was elevated to my office. I did not intercede, in short, for my Department with the Department of Justice. It was not necessary.

Senator BAUCUS. I have no further questions.

I want to thank you very much. You have been very helpful this morning. I appreciate your coming here.

[The prepared statement of Mrs. Hills follows:]

PREPARED STATEMENT OF CARLA A. HILLS

Mr. Chairman, members of the Committee: I am pleased to have this opportunity to testify before your Committee regarding the distribution of litigation authority throughout the Federal Government. Having served in the Justice Department as an Assistant United States Attorney and later as Assistant Attorney General in charge of the Civil Division (1974–1975) and as Secretary of Housing and Urban Development (1975–1977), I have, as a government employee, been both the lawyer and the client. Those experiences convince me that government as a whole would benefit from a clearer and more consistent definition of the Justice Department's role with respect to federal litigation. I applaud, therefore, this Committee's decision to look carefully at the system that now exists for handling the federal government's litigation.

You pose six questions and ask for my views. Let me address them in the order asked.

1. To what extent should the Department of Justice control litigation conducted by the federal government?

I believe that the Department of Justice should have control over the federal government's litigation. By that I mean that the Department should have the authority to determine the government's position on practically all legal questions. At the same time, I do not mean that the Department should have the authority to decide the policy prerogatives of the various departments and agencies.

It is possible, I believe, to draw a reasonable distinction between law and policy. Naturally, there are times when the actual drawing of such a distinction is easier said than done. There can be differing views of the law, and law and policy can collide. But the difficulties that arise under some circumstances do not detract from, indeed they underscore, the need to handle issues which are essentially legal separately from those which are essentially programmatic.

Our Constitution requires that our laws be applied evenly. In addition, citizens may rightfully expect our government to take uniform positions on issues so that they may predict what the government will do in a given situation. Also, citizens are entitled to expect that the goverment's legal positions will be impartially analyzed and fully and fairly developed. No single agency should be permitted to develop "the government's legal position" solely within the context of its programmatic interests.

Yet, Congress has been tempted, more and more frequently, to create exceptions to the historic statutory proposition (28 U.S.C. §§ 516, 519; 5 U.S.C. § 3106) that litigating authority for the United States resides in the Department of Justice. There are about thirty government entities today which have authority to conduct some or all of their litigation. The majority of the exceptions were created in the last decade.

At the same time, there are more and more legal questions which are not limited in their impact to one department or agency. For example, issues involving affirmative action, equal opportunity, the Freedom of Information Act, privilege, contempt, procedure and evidence, clearly cross departmental lines and affect government as a whole.

Efficiency calls for centralizing government litigation. It often happens that the laws of more than one department are involved in the same litigation. Obviously, it is cumbersome if each agency must have separate counsel representing it against the same private party litigants.

Also, centralized authority enables the government to be represented by experienced trial counsel in every federal court in a cost-effective fashion.

Most agencies have a general counsel and staff to give legal advice primarily with respect to the programs administered by that agency, to draft regulations, to participate in the administrative process, and to assist with litigation. Most agency counsel are not litigation specialists and do not have the time to become such if they are to perform their other assignments. The Department of Justice, working with the U.S. Attorney's offices, located in each of the 95 judicial districts, can provide litigation expertise for government as a whole in a far more cost-effective way than could the individual departments and agencies, under a decentralized system. Whether the issues relate to something as relatively unimportant as a monetary claim or as severe as a constitutional deprivation, the public will be better served if the government's litigation is centralized. No matter how good the litigation arms of individual agencies can be, and many are superb, in the long-run the government will be better represented by more highly trained trial counsel from a central litigation office.

For all these reasons, the continued encouragement and maintenance of a centralized system of litigation in the Department of Justice is, in my view, in the best interest of the Federal Government.

2. Have there been areas where the Federal Government has not adequately coordinated its litigation policies? If so, what are the reasons?

There have been a few instances in my experience of inadequate coordination of Federal litigation policy. Most often these have occurred where an independent regulatory agency insisted on proceeding in court either on a theory or in a case contrary to the Justice Department's recommendation. The most common cause for this sort of clash was the client agency's concern with the particular case in contrast to the Justice Department's concern with all of its cases.

There are, of course, many direct conflicts in the legal views of independent agencies, a subject which I will discuss in response to your question number 4.

The fact is that there are insufficient lawyer and judicial resources to handle every civil action brought by or against the federal government. Thus, lawyers at client agencies and at Justice must cooperate to develop creative solutions to coordinate the growing number of cases on the federal docket. While I was at Justice, the Civil Division initiated a system whereby general counsel of client agencies could designate cases which they wanted to receive special attention at Justice. This system helped to coordinate the total litigation burden of the government, ensuring that the cases that were the most significant to the client agency would be alloted the necessary resources.

The system also broadened lines of communication between Justice and client agencies regarding special problems, such as ballooning volumes of particular types of cases. For example, in the 1974–75 recession HUD took back thousands of units of housing. About half the states required judicial foreclosure before that housing could be returned to useful occupancy. In an effort to deal with this problem, HUD and Justice jointly developed and recommended federal legislation which would permit non-judicial foreclosure, a procedure successfully used in several states. Joint effort by agency and Justice attorneys could result in a more efficient use of scarce judicial and lawyer resources.

3. In your view, to what extent have memoranda of understanding between the Justice Department and other agencies been useful in solving problems of litigation authority? Have there been problems with any memoranda of understanding?

Most memoranda of understanding between Justice and client agencies have not been vehicles for solving problems of litigation authority. Generally, such memoranda are the product of proposed legislation which threatens to give an agency litigating authority for certain types of cases. The memorandum seeks to keep in Justice some of those cases, such as those which may have constitutional potential or those which cut across department lines. The problem is in the legislation which chips at Justice's centralized litigation authority, not in the memorandum which seeks to rationalize a new statutory exception.

4. To what extent should agencies have their own litigating authority?

In my view, there is very little justification for Congress giving executive branch agencies independent litigating authority.

The Department of Justice has informally delegated to certain agencies some areas of the law which raise no unique questions and where there is little likelihood that the issues would impact another agency.

For example, for many years the Department of Health, Education, and Welfare has handled the review of a majority of social security decisions in the United States District Courts. That delegation has worked well, I believe, because the Department of Justice retains authority to retrieve cases of government-wide significance or of constitutional importance.

No doubt, the greatest problem facing a coordinated government litigation capacity is the recent proliferation of independent agencies such as the Commodity Futures Trading Commission, the Consumer Products Safety Commission, and the International Trade Commission, among others. There is, of course, an argument that such agencies must be kept strictly independent of the executive branch, that they are in principle a creature of both Congress and the Executive, and that the executive branch, through the Justice Department, should not, therefore, exercise control over their legal positions, particularly when an interpretation of their charter is involved. However, giving such agencies independent authority to litigate their own cases has caused some sharp conflicts within government.

For example, from about 1975 through 1979, a continuing debate existed between the Department of Labor and the Securities and Exchange Commission as to whether certain kinds of interests in pension plans were securities subject to the jurisdiction of the SEC. That dispute was resolved only by the final decision of the Supreme Court of the United States.

Today, there is a growing dispute between the Commodity Futures Trading Commission and the Securities and Exchange Commission as to jurisdiction over certain kinds of financial futures instruments. The Treasury Department and the Federal Reserve Board also have expressed themselves on this issue.

In my view the fact that independent agencies may need to retain authority to interpret the laws that they administer, does not mean that they need to have similar authority over laws which apply on a government-wide basis. For example, the Justice Department could have the ability to assume responsibility for the enforcement of laws such as the Freedom of Information Act. The ad hoc litigation on an agency-by-agency basis has made uniform administration of the FOIA difficult. Indeed, I suspect that this Committee might find on close investigation that some independent agencies may have damaged the government's position by their handling of FOIA matters and by their interpretation of other laws of government-wide application.

The fact that there has been this type of contention between independent agencies should perhaps cause Congress to pause before creating additional agencies with independent litigation authority and could perhaps be grounds for merging some agencies that already exist.

5. What is my view of S. 2401?

I agree with the principle stated in S. 2401. These are the sort of inquiries which are the legitimate subjects of oversight hearings. Indeed, the reports enumerated could be informally requested of the Attorney General by this Committee prior to any oversight hearings. I believe that the Committee could exercise a greater degree of oversight than it has in the past and in so doing contribute to increased efficiency in the handling of federal litigation.

6. What is my view of Executive Order 12146?

I am in favor of better managing federal legal resources, which is the stated purpose of Executive Order 12146 signed on July 10, 1979. I am unaware how that order has been implemented. The promotion of enhanced coordination and communication among federal legal offices and the informational gathering aspects clearly are desirable goals that should be pursued.

Senator BAUCUS. The next witness is Ms. Alice Daniel who is presently the Assistant Attorney General for the Civil Division.

I am happy to have you here, Ms. Daniel. Although you have not been head of the Division for a long time, you are very active in the area so your views will be very helpful.

I understand you do not have an opening statement, is that correct? Or if you do, go ahead.

STATEMENT OF HON. ALICE DANIEL, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, ACCOMPANIED BY ROBERT KOPP, ACTING DIRECTOR, APPELLATE STAFF, AND STUART SCHIFFER, DEPUTY ASSISTANT ATTORNEY GENERAL, COMMERCIAL LITIGATION BRANCH

Ms. DANIEL. I am very pleased to be here this morning. I want to thank Carla Hills for taking time from her own busy schedule to be here.

It was particularly interesting for me to hear her comments and observations because, as you know, I have only recently joined the Division. Listening to her, I am struck by how many problems and how many positive qualities continue from her time to this time.

I, too, have noticed that there is a tendency toward chipping away at the litigation authority of the Civil Division, and I think that a prime cause of that is that until now there has not been any committee that took responsibility for full oversight over the Justice Department, over the Civil Division particularly.

Since I have come, I have been struck by a number of things. One is the superb quality of the lawyers who work in the Civil Division. Another is the extraordinarily broad range of cases that come within our jurisdiction. We do all of the Government torts work, contract work, and we represent over 100 agencies.

Until these oversight activities were begun by your committee, there was nobody on Capitol Hill who had an interest as broad as the jurisdiction of the Civil Division. That resulted in a number of adverse effects.

One, as has been noted, is the litigating authority problem. Another is, because of the lack of interest in the Government's broad litigating posture, I think the Civil Division has not had sufficient growth in its resources and staff to meet the burgeoning caseload. So there are many reasons why we welcome your interest and we are very grateful to your staff who have been extraordinarily constructive in their work with us. They are very diplomatic and tactful in not interfering with our ongoing work with our attorneys.

Senator BAUCUS. Are you familiar with the October 25, 1979, GAO report on the coordination of criminal and civil fraud cases?

Ms. DANIEL. Yes; I am.

Senator BAUCUS. As you know, one of the conclusions of that report is the Department of Justice has not capitalized on its opportunities to use civil sanctions in prosecuting fraud as opposed to criminal sactions.

Do you agree with that conclusion?

Ms. DANIEL. There are some legal impediments to coordination that were pointed out by the Justice Department in its comments that are set forth in appendix 2 to that report, but where is no doubt that the report highlights some——

Senator BAUCUS. Could you pull the microphone silghtly closer to you? I am having a hard time hearing. Thank you.

Ms. DANIEL. The report clearly highlights some areas in which improvement is needed. I think some steps toward improvement have been taken since Attorney General Civiletti—since Mr. Civiletti became Attorney General, and through my reading of the report and the awareness that he has given me of the high priority he gives to fraud, we have, within the last few months, instituted a number of steps toward improving coordination.

Senator BAUCUS. But you generally agree that there has been insufficient attention to civil fraud compared to criminal fraud, and you are taking steps to correct that?

Ms. DANIEL. We are taking steps to correct that.

Senator BAUCUS. How long does it take before a fraud matter is brought to the attention of the Civil Division? That is, say, a criminal action is prosecuted, how long does it take before your Division is made aware of the Criminal Division's action on at least that there is a potential civil fraud case?

Ms. DANIEL. Typically, a fraud case would not be referred to the Civil Division until after the prosecution is complete.

I think that is a mistake and that is one of the problems that we are addressing. I have suggested that the FBI be instructed on the ways in which their investigation should be broadened to cover the matters that are relevant to civil as well as to criminal work. For example, the amount of the dollar loss to the Government and the assets of the defendant that would lead us to know whether civil judgement could be collectible.

Senator BAUCUS. But how are you progressing in those efforts? Are you meeting any resistance? Does the FBI agree with you? Does the Criminal Division agree that you should be notified earlier?

Ms. DANIEL. I think everyone agrees on the need for improvement. Implementing is sometimes far more difficult. Deputy Attorney General Renfew has just joined the Department, as you know, and Mr. Civiletti has already given him the mandate to bring together an interdecisional effort to enhance the coordination of civil and criminal fraud effort.

Senator BAUCUS. When will that effort be completed?

Ms. DANIEL. I imagine it will be an ongoing effort. There is no specific timetable in mind. A number of things have already happened. For example, I have met with the head of the Criminal Division's new Economic Crime Unit. These are special positions in target cities that will be looking into white collar crime. I have suggested that in each of these target cities there be a team of lawyers looking into criminal—the possibilities of criminal prosecution, and a lawyer who is trained to recognize the possibilities for civil work. I am optimistic about the possibilities of learning a good deal from these experimental effosts.

Senator BAUCUS. Do you agree with the prior witness, Mrs. Hills, in stating that as agency principle, all legal questions should be decided by the Department of Justice whereas programmatic issues should be decided by the client agencies?

Do you think that is a sound principle?

Ms. DANIEL. I do think so.

I also recognize that there are places where they blur.

Senator BAUCUS. There are places where what?

Ms. DANIEL. They blur, blend together.

Senator BAUCUS. How would you make the distinction as to what is legal and what is a programmatic issue?

Ms. DANIEL. As you noted in response to Mrs. Hills' statement, at the far end of the spectrum it is far easier to tell. In the middle, I do not think we can have a rule of thumb. We have team efforts on our cases. For every case we ask an agency to assign a specific lawyer to work with our Department of Justice lawyers to assist in discovery, in helping to identify programmatic interests in the lawsuit. Inevitably, there are conflicts from time to time because strategic decisions sometimes have to be made in terms of the overall litigation or because of the need for consistency with other cases representing other agencies. And that is sometimes difficult for an agency to understand.

Senator BAUCUS. What do we do with the cases which are in the blurry area and the Justice Department says this is legal, SEC says, no; it is programmatic? How do we resolve that?

Ms. DANIEL. By sitting down and talking together.

Senator BAUCUS. So you say they are both equal, that is in that sense?

What happens when we cannot resolve it? What happens when Justice says, no, it is legal, it should have a uniform Government position on this whereas the client agency says it is not legal at all but programmatic?

Ms. DANIEL. I have never yet encountered a case yet in which there was a claim this is not a legal matter, you know, it is one within our jurisdiction. The Attorney General is given the authority, both by statute and by the President's recent Executive order to resolve disputes between agencies or between the Department of Justice and an agency, and from the few opportunities I have had so far to observe that, it is clear to me that the Attorney General feels a great obligation to be evenhanded.

Senator BAUCUS. Excuse me, the Attorney General is what?

Ms. DANIEL. He has the authority to resolve disputes between agencies or between the Department and an agency client. There have been very few conflicts since I have been there that have had to go to the Attorney General.

But when that occurs, I think he does make every effort to be evenhanded and judicious.

Senator BAUCUS. Even though Justice often professes a uniformity within divisions on legal questions and also professes that it has certain uniformity among U.S. attorneys on legal questions, some claim, in fact, that is not the case. Some people claim there is no uniformity because Justice does not have inspection procedures and does not have mechanisms for determining whether U.S. attorneys are, in fact, uniform or not.

Do you find that to be a valid criticism of the Justice Department?

Ms. DANIEL. There is no question that we could have better coordination.

I look forward to the day when we may have automatic data processing equipment that will allow us to communicate immediately with each of the 95 U.S. attorneys' offices and to have Thermofax machines that will allow instantaneous exchange of pleadings. There is no doubt there are communication difficulties.

On the whole, though, I think that we have been more successful than one would expect in achieving certain degree of consistency, and we achieve that through a variety of means. There is both Civil Division practice manual and the U.S. attorneys manual that provides pointers and how-to-do-it guidelines for the U.S. attorneys. They also include policy statements and directives.

When a case is assigned to a U.S. attorney and is placed in what we call the supervised or shared caseload, there are a variety of techniques used to insure that the case is carried out in a manner that is consistent with the Department of Justice's view. There is frequent telephonic communication. The letters of referral will frequently outline the relevant law, the issues that are likely to arise, particularly problems that may be encountered, with instructions on how to deal with them if they do arise, and a frequent instruction will be—let us know, get in touch with us.

Senator BAUCUS. Returning to the GAO report, one of the statements GAO made was that apparently the Civil Division does not have sufficient access to grand jury material or does not use civil settlements during criminal fraud proceedings.

Is that statement accurate? And should the Civil Division be more involved in the use of civil settlements, say, in criminal fraud proceedings? And should Civil have greater access to grand jury material?

Ms. DANIEL. I mentioned earlier that there were some legal problems that I thought GAO perhaps underestimated the importance of, and it is here that they come in. There are serious due process questions that may arise if civil proceedings are instituted at the same time that criminal proceedings are going on. Some of those can be resolved and we are examining them. But some of them are inherent in the constitutional protections given to criminal defendants.

There is now less doubt than there formerly was about the right of the Civil Division to have access to grand jury minutes. The Office of Legal Counsel has issued two opinions explaining the circumstances in which the Civil Division can have access to grand jury transcripts and it is very useful for us to have them.

Senator BAUCUS. What about the use of civil settlements?

Ms. DANIEL. I am not sure exactly what you mean by civil settlements.

Senator BAUCUS. I suppose it would be a form of plea bargaining.

Ms. DANIEL. Regardless of whether a criminal case is instituted, many of our cases are settled, certainly, and civil settlements are essential. As you know the dockets of Federal Courts are very crowded and the Speedy Trial Act has resulted in even more pressure on the civil side. If we did not settle many of our cases, we would really be totally hamstrung.

Senator BAUCUS. Who would handle that civil settlement? I suppose it would be the Criminal Division, is that right? And, if so, are you notified?

Ms. DANIEL. Do you mean the way the waiver of the right to bring a civil case as part of plea bargaining?

Senator **Baucus**. That would be part of it.

Ms. **Daniel**. The Criminal Division does not have authority to waive the Government's right to civil recovery without consulting with the Civil Division.

Senator **Baucus**. That is what I wanted.

Let us turn a minute to the U.S. attorneys and the role of U.S. attorneys.

As a general principle, do you find U.S. attorneys both capable in handling all your Civil Division actions, and if they are capable, do you find them willing to handle all of your actions in the civil fraud area?

Ms. **Daniel**. Right. Of course, I have not been here long enough to have very deep observation, a very broad observation of a great many attorneys. I think on the whole that their work is very good, but with the U.S. attorneys, as with any group of lawyers, quality varies. The amount of attention that is given to civil fraud does vary from office to office, and that is something that we are looking at closely right now. Some U.S. attorneys' offices have separate civil divisions, and in those offices it is more likely that the civil fraud cases will be given the attention that they deserve.

Senator **Baucus**. For example, the District of Columbia has a separate section?

Ms. **Daniel**. Yes. And so does the Southern District of New York.

Senator **Baucus**. You are implying that some offices do not pay attention to civil fraud cases; is that correct?

Ms. **Daniel**. That is right. There are some offices that may be too small to have a separate civil division, for example, and frankly I think a lot of U.S. attorneys enjoy trying criminal cases, so we are engaged in somewhat of a crusade to convince them that civil fraud cases are equally interesting and important.

Senator **Baucus**. So, to that degree, is the inattention to civil fraud cases by U.S. attorneys attributable to insufficient staff on the hand and just lack of interest on the other?

Ms. **Daniel**. Insufficient staff is a problem that runs through every operation of the Department of Justice. Through all of our operations and all of the U.S. attorneys.

To give you an example of that, in 1978, the number of attorneys in U.S. attorneys' offices who were devoting their time exclusively to civil cases was only double the number of lawyers that we have in the Civil Division itself, and those almost 600 lawyers were spread out in 95 offices. When you realize the enormous range of cases, the number of cases that they have to give their attention to, you can understand how, if you looked at any single area, you would feel that that single area was not getting as much attention as it deserves, and that is true. There just are not enough lawyers.

Senator **Baucus**. What is your backlog of civil fraud cases?

Ms. **Daniel**. At this time, our backlog—and I should say, at this point, to use the term "cases" would not be correct from our point of view since what we are really talking about is requests for investigation received from agencies. Our backlog is somewhat over 5,000; a year ago, the backlog was somewhat over 8,000.

One of the things that I did after reading the GAO report and receiving instructions from the Attorney General to make fraud work a priority, was to insure that—to require that the backlog of fraud inquiries be assigned to every lawyer in our Commercial Branch.

There are 110 of them. Most of them spend most of their time on contract work and other kinds of work, but they are all doing some fraud work now. As a result of that, we have closed the 2,200 cases since December, and we have assigned another, something between 75 and 100 for workup and filing by staff attorneys. So, at this rate—when we are closing about 700 a month, and we receive about 400 new ones every month—we expect therefore to be current by late summer.

Senator **Baucus**. By current, you mean what?

Ms. **Daniel**. Current; having no backlog, being able to deal with cases, dispose of matters in the months in which they are received.

Senator **Baucus**. OK.

You say right now there are about 5,000 matters. How many of those matters are cases, that is where——

Ms. **Daniel**. Have the case potential?

Senator **Baucus**. Yes.

Ms. **Daniel**. On the whole, of the matters that we receive, only somewhere between 2 and 5 percent are likely to result in litigation. There is a prescreening and the big case, the one involving corruption or a large amount of money, does not have to stand on line and wait its turn. It would be assigned immediately.

Senator **Baucus**. How much do you think the Government will be able to recover with your backlog of fraud cases? What does that amount to, roughly?

Ms. **Daniel**. Of the cases that are now pending, we have about $75 million in claims. Of the backlog, of course it is very hard to estimate because these are cases that have not been thoroughly investigated yet. And one of the things that we attempt to do in that investigation is to figure out what the case is worth. But we would estimate it is another $150 million of claims.

Senator **Baucus**. How long is it going to take to recover that $75 million? What cost?

Ms. **Daniel**. Well, last year, we recovered $50 million.

Senator **Baucus**. Last year; $50 million in 1 year?

Ms. **Daniel**. Yes. I am sorry. Last year we initiated cases seeking $50 million. This year so far, we have initiated cases seeking $75 million in fraud cases. I am not sure that we have the information that will allow us to tell you how long it takes the average case from the time it is filed until the judgment is collected, but I will attempt to get that information.

Senator **Baucus**. What I would like, if you can get it, is: On an annual basis for the last several years, the number of fraud claims brought to the attention of the Civil Division, the number of those claims that Civil thinks are meritorious and valid, third, the dollar amount collected in total during each of these years on fraud cases, and, fourth, the cost to the Government in recovering that dollar amount in terms of the staff and overhead.

Ms. **Daniel**. I will be glad to submit that for the record.

[Material referred to above is on file with the committee.]

Senator **Baucus**. Thank you.

After commencing fraud action, and say you are successful in obtaining a judgment, can you tell me what collection problems you have?

Ms. **Daniel.** Like so many of our problems, not enough people, not enough computer support. This is an area in which paralegals are very useful.

But, as you know, Government agencies are limited not only in the amount of money that they can spend on personnel but the number of people that they can have, so we frequently run into a situation where two paralegals would not cost more than one lawyer in salary, but we do not have two slots. We could use a lot more paralegals in these efforts.

We also need to have improved management information because about 11,500, somewhere around that, 12,000, uncollected judgments are in the U.S. attorneys' offices. We need to have better communications with those offices in order to have tickler systems to follow up and to know what is being done in the cases.

As it now stands, when we assign a case to a U.S. attorney's office for collection, 90 days later a report is requested to determine what has been done by the U.S. attorney to obtain collection. If appropriate steps have been taken, the case is then marked for tickler 90 days later. If the appropriate steps have not been taken, the U.S. attorney's office will be instructed to take those steps.

Most collection work has to be done in the U.S. attorneys districts because that is where the debtors live, that is where their assets are located, that is where their other creditors are located. Again, the manpower problem.

Senator **Baucus.** Actually your answer raises a couple of questions.

First, let us turn to the collection problem. I would guess that very few U.S. attorneys are excited about collections. Is that true?

Ms. **Daniel.** I am sure that is right.

Senator **Baucus.** And I therefore would wonder if they pay adequate attention to collections. They probably do not.

They probably, on the other hand, have only 24 hours a day just like all of us, certain problems of resources and time, in addition to the lack of glory and drama in collection cases compared with criminal cases.

Some suggest that perhaps the Justice Department and the U.S. attorneys, that is the Government would do much better if they took away all these collection cases from the Government and, instead, assigned them to private attorneys and let private attorneys try to go out and collect on a commission basis.

Does that make any sense to you?

Ms. **Daniel.** It is an interesting idea that I have thought about. There are some problems that would be involved in that.

One is that the Government would not want to have people acting on its behalf whose methods it could not control. That is some collection agents are notorious in methods that they use. We would not want the Government to be blamed for those.

Another is that there are certain Privacy Act problems that would have to be overcome before these kinds of claims could be put in the hands of private collectors.

Senator **Baucus.** Can these problems be overcome or do you think that those problems are too great to warrant looking into this particular approach?

Ms. **Daniel.** I think it needs study to determine that. We have made a supplemental budget request for a number of items. One of the things that we have asked for is funds for a study of how the Government could improve its collection efforts.

Senator **Baucus**. Do you need congressional approval for that kind of a study. Can Justice not do it on its own?

Ms. **Daniel**. We need funds.

Senator **Baucus**. Can you not transfer?

Ms. **Daniel**. It is getting pretty tight.

Senator **Baucus**. It is going to get tighter.

The second general area is the problem of paralegals. I understand your point that the Government could probably do better if it had more slots, different descriptions so that you could hire paralegals to do the work that presently is done by attorneys.

Have you requested, either to Justice or OMB, or somewhere the authority to have more paralegals?

Ms. **Daniel**. Well, we have pending now a supplemental budget request that includes a number of items, dollars, attorneys, secretaries, and paralegals. That request is still in the Justice Department. It has not yet been submitted to OMB.

But we recognize generally that we could make better use of paralegals if we had more of them, and that that could ultimately save money for the Government.

Senator **Baucus**. But you are making the request?

Ms. **Daniel**. Yes.

Senator **Baucus**. How many attorneys handle fraud cases?

Ms. **Daniel**. On a regular basis, I think we have 25 attorneys.

Senator **Baucus**. On a regular basis?

Ms. **Daniel**. Full-time basis.

Senator **Baucus**. How many handle fraud cases other than on a full-time basis?

Ms. **Daniel**. Well, at the moment, all of the 110 lawyers in the Commercial Branch are helping in working on the backlog, and I think that these are important and interesting cases, and I would like to see each of those attorneys continue to have one or two of them in litigation.

Senator **Baucus**. I am sorry. How many handle fraud cases on a full-time basis?

Ms. **Daniel**. Twenty-five.

Senator **Baucus**. And how many fraud cases on the average does each of those 25 handle?

Ms. **Daniel**. I would like to submit for the record.

Senator **Baucus**. Any rough estimate at this point?

Ms. **Daniel**. It varies because of the—it is hard to say because of the different status of the cases.

Senator **Baucus**. Would it be 10, 50, 100? Just a rough estimate.

Ms. **Daniel**. Twenty-five. Stuart Schiffer, who is our Deputy for the Commercial Branch, which includes the Fraud Unit, tells me that each lawyer in the Frauds Unit has on the average 65 files in litigation.

Senator **Baucus**. Average is about 65?

Ms. **Daniel**. Yes.

Senator **Baucus**. If you had more attorneys, would you be able to litigate more cases successfully and would you recover more money?

Ms. **Daniel**. Absolutely.

Senator **Baucus**. How many more attorneys—I am not surprised at your answer, it is not the first time that we have heard that. How many more reasonably do you suggest?

Ms. **Daniel**. Well, we would also need more space to put them in.

Senator **Baucus**. So do we.

Ms. **Daniel**. You mean in the fraud area how many more could we use?

Senator **Baucus**. Yes.

Ms. **Daniel**. Twenty.

Senator **Baucus**. About 20 more attorneys?

Ms. **Daniel**. Yes.

Senator **Baucus**. How much do you think the Government would be able to collect with that additional number of attorneys?

Ms. **Daniel**. Well, there is clearly some relationship between the number of attorneys and the number of cases filed and the amount of money collected.

I would like to submit for the record some workup on what the current ratio is and project from that what we might gain by having more attorneys.

[Material referred to above is on file with the committee.]

Senator **Baucus**. When I asked you earlier to provide the committee information with respect to the number of fraud matters brought to your attention and so forth, I asked also for you to state the dollar amount recovered.

Could you differentiate between judgments received and the amount collected in each of those years, too?

Ms. **Daniel**. As you noted earlier, collecting judgments is difficult, and there is a substantial discrepancy between them.

Senator **Baucus**. I am sure there will be, but if you could provide that, state the dollar amount of the discrepancy in each year. It would be very helpful.

Ms. **Daniel**. OK. Yes; I will submit that for the record.

[The material referred to above is on file with the committee.]

Senator **Baucus**. I do not have any more fraud questions, but I have a letter here which I have just received from Senator Magnuson, who has several questions concerning fraud cases brought by the Government and I will ask that be submitted for the record.

[The questions of Senator Magnuson and the responses of the Justice Department appear in the questions and answers section.]

Senator **Baucus**. Senator Thurmond, do you have questions or a statement?

Senator **Thurmond**. Ms. Daniel, we are glad to have you here this morning.

I have a question from the Chief of Staff of the National Guard in South Carolina about bringing the National Guard under the Torts Claim Act. Some States, I believe, have provisions to make the State responsible if guardsmen have wrecks with their trucks and jeeps in convoys and so forth, but some do not.

Since the National Guard really is in reserve to serve the Nation in time of emergency, they feel that this ought to be done.

I just wonder if you have any suggestion along that line? I believe you have tort claims under your jurisdiction.

Ms. **Daniel**. That is correct.

Senator **Thurmond**. There probably would not be too many cases a year arising from this, and if the individual had to pay it, unless the States carried insurance, it would probably discourage some from joining the National Guard. It just strikes me offhand if maybe it might be a good move to take.

What do you think about it?

Ms. **Daniel**. Well, one obstacle——

Senator **Thurmond**. Speak a little louder.

Ms. **Daniel**. One obstacle to placing liability on the U.S. Government is that the Government has no control over the activities of the National Guardsmen who are all working under State supervision and, therefore, it would not have the ability to limit liability by requiring safety precautions and taking similar measures. But I will be very glad to look into that, Senator Thurmond.

Senator **Thurmond**. I wish you would look into it.

I can see your point that they are not under the Federal Government until they are mobilized in case of emergency. At other times they are under the control of the government of the State.

On the other hand, they are training mostly when going back and forth for their training periods for the purpose of keeping the country prepared if they should be needed.

Ms. **Daniel**. Yes.

Senator **Thurmond**. So I guess it has two sides to it.

But you look into it and I appreciate it.

Ms. **Daniel**. Yes; I will.

Senator **Thurmond**. Do you have very many admiralty claims?

Ms. **Daniel**. We do have a substantial number and I would be glad to submit for the record what the precise number is.

[Material referred to above is on file with the committee.]

Senator **Thurmond**. Do you have many aviation claims?

Ms. **Daniel**. Fortunately, we have fewer aviation claims than admiralty ones. The aviation claims usually involve serious injury to life or loss of life.

Senator **Thurmond**. Do you have a backlog of cases in any particular section of your Division? In other words, are we overloaded with any particular type of cases?

Ms. **Daniel**. The only substantial backlog is in the fraud area.

Senator **Thurmond**. Is in what?

Ms. **Daniel**. The fraud area that I have been discussing with Senator Baucus.

Senator **Thurmond**. Are these actions that the Federal Goverment brings against individuals or corporations for civil fraud?

Ms. **Daniel**. Correct. And also against its own employees.

Senator **Thurmond**. As distinguished from criminal fraud?

Ms. **Daniel**. That is correct.

Senator **Thurmond**. Of course, you do not handle the criminal fraud?

Ms. **Daniel**. No, sir

Senator **Thurmond**. You just have the civil fraud?

Ms. **Daniel**. Yes.

Senator **Thurmond**. And you have a backlog in that?

Ms. **Daniel**. That is right.

Senator **Thurmond**. How far back are you?

Ms. **Daniel**. I do not think we have a backlog that—of cases received more than a year ago, but the numbers are still too high to satisfy us, and we are engaged in an effort now to bring ourselves current.

Since last December, we have closed 2,200 cases, we reduced the backlog by that amount, and we expect, by this summer, we will have eliminated the backlog entirely.

Senator **Thurmond**. This summer you hope to eliminate the backlog entirely?

Ms. **Daniel**. Yes, sir.

Senator **Thurmond**. How many cases do you try a year, civil fraud?

Ms. **Daniel**. I will have to submit that for the record.

Do you mean cases that go to trial as distinguished from cases that are settled?

Senator **Thurmond**. How many cases—I might say are instituted a year and how many do you fully try? I guess you settle a good many.

Ms. **Daniel**. That is right.

Senator **Thurmond**. If you could, give us the figures for both those.

Ms. **Daniel**. Yes, sir.

[Information pertaining to the above are on file with the committee.]

Senator **Thurmond**. Where do most of these civil fraud cases grow out of?

Ms. **Daniel**. There is a reason why these cases arrive. A substantial number are those brought under the False Claim Act, and they may involve illegality by Government contractors. There are also a substantial number of cases involving corruption of public officials.

Senator **Thurmond**. Now, how do you in the Justice Department distinguish between criminal fraud and civil fraud?

In other words, does a case fall in both categories or in one or the other?

Ms. **Daniel**. Many cases——

Senator **Thurmond**. Who makes a decision in case of fraud whether it is a civil or criminal?

Ms. **Daniel**. If a case is thought to be of criminal potential, it goes to the Criminal Division first.

One of the things that I have suggested, and I hope will come about, is that we will have a screening team composed of lawyers from both the Civil and the Criminal Division who will be alerted of a fraud matter as early as possible, and that the team can work with the FBI to make sure that the investigation covers both the things that are relevant to criminal prosecution and to the civil case. And at that time I believe a decision should be made whether to proceed civilly or criminally or both, and in terms of timing. The Justice Department's priority in the past has been in giving priority to criminal cases because it is believed that they have a greater detriment value. But I think that there is a growing recognition of the importance of civil fraud and of the deterrent possibility of civil fraud cases as well.

Senator **Thurmond**. Is there a screening committee now to determine which way it goes, criminal or civil, or who makes that determination now?

Ms. **Daniel**. Now, the Criminal Division does.

Senator **Thurmond**. The Criminal Division decides whether—in other words, I guess if they decide to proceed criminally and the outcome will result in sufficient punishment then they do not pass it on to you?

Ms. **Daniel.** The Criminal Division does not have the authority to prevent a civil action following the criminal action.

Senator **Thurmond.** Does not have what?

Ms. **Daniel.** The authority to prevent a civil action. That is, the Criminal Division could not decide, "Well, we have prosecuted this person and that is enough. There should not be any civil action to follow." That kind of a decision would require participation by the Civil Division, but the earlier point, when the question was how should we proceed if the Criminal Division believes there is a case, then the criminal case goes first.

Senator **Baucus.** Would the Senator yield on that point?

Senator **Thurmond.** Yes.

Senator **Baucus.** Do you have a problem with that procedure?

Ms. **Daniel.** As I indicated by mentioning that there should be a committee that screens cases earlier, I think that it would—such a procedure would help to eliminate some of the problems the GAO noted in the lack of coordination.

Senator **Baucus.** I am sorry. Maybe you mentioned this and I did not hear it.

Is there a screening committee set up or is the Justice Department working on setting one up?

Ms. **Daniel.** That is one of the things that will be studied by Judge Renfrew's coordination effort. I think that this—that that is one thing that will emerge from it, yes.

Senator **Thurmond.** There is a bill now pending known as S. 1981 introduced by Senator DeConcini, called the False Claims Bill.

Are you familiar with that bill?

Ms. **Daniel.** I am aware of it and somewhat familiar with it, yes. It is a bill that was proposed by the Civil Division.

Senator **Thurmond.** I understaned the Armed Services Committe wants it referred there, since it may concern a good many Defense contractors or something of that nature.

Are you familiar with that?

Ms. **Daniel.** Well, the bill will affect every Government contractor. I understand that there are concerns about whether some contractors would be discouraged from doing business with the Government because of the increased effectiveness of the Government remedies against false claims. I do not personally believe that that worry is justified.

Senator **Thurmond.** I believe this bill provides—I believe it contains preponderance of the evidence test, is that correct?

Ms. **Daniel.** It did contain a preponderance of the evidence test but, as a result of an amendment that was offered on the floor, or anyway an amendment has been added making the test a clear preponderance of evidence. That is a new test.

I think that the addition of the word "clear" will serve to alert a jury or whoever the fact finder is.

Senator **Thurmond.** Who authored that amendment, do you know?

Ms. **Daniel.** Just a minute. Senator Thurmond, I would like to introduce——

Senator **Thurmond.** Did Senator DeConcini offer that amendment?

Mr. **Schiffer.** I think the amendment has not been introduced yet.

Senator THURMOND. I am just wondering. I am not too sure what the Defense contractors are proposing, but I understood that they probably proposed something similar to a criminal test—beyond a reasonable doubt.

Is that what they are asking for, do you know?

Mr. SCHIFFER. Those who are opposed to the bill have proposed that the standards should be something approaching a criminal standard; yes.

Senator THURMOND. Have you handled this bill for the Justice Department?

Mr. SCHIFFER. I have familiarity. I have worked on it extensively; yes.

Senator THURMOND. Do you think preponderance of the evidence is sufficient, clear preponderance is sufficient? Or do you think the suggestion made by some of the Defense contractors is reasonable?

Ms. DANIEL. It is our view that these are civil cases essentially, albeit fraud cases. They are civil cases where we seek civil remedies and the preponderance is the accepted civil standards.

Senator THURMOND. I am not too sure. I understand the Defense Department might be concerned about this.

I wonder if you conferred with the Defense Department about this?

Mr. SCHIFFER. The bill was an administration bill. It was cleared by all agencies, and there are discussions ongoing now with the Defense Department.

Senator THURMOND. If you have not specifically conferred with the Defense Department, it might be worth it if you would do that to prevent any hitch or complication later.

Mr. SCHIFFER. Very much—we are doing that now, sir.

Ms. DANIEL. And we will continue to do it, sir.

Senator THURMOND. You are not asking for any new positions, are you?

Ms. DANIEL. Our 1981 budget request does not ask for any new positions; no.

Senator THURMOND. How many people work for you, how many lawyers and how many others?

Ms. DANIEL. The Civil Division is now authorized to have 660 persons.

Senator THURMOND. 660 people?

Ms. DANIEL. Yes; and that is divided about equally between lawyers on the one hand and all others on the other hand, including paralegals, secretaries, clerks, messengers, Xerox operators.

Senator THURMOND. Do you have investigators, or does the FBI do your investigating?

Ms. DANIEL. The FBI does our investigating.

Senator THURMOND. All the investigations?

Ms. DANIEL. Frequently, we use personnel of the agencies that are our clients, and for many——

Senator THURMOND. Speak a little bit louder, please.

Ms. DANIEL. We work cooperatively with the agencies that are our clients and so there are a variety of investigative assistants available to us.

For example, we are working with the Inspectors General, the new Inspectors General.

Senator THURMOND. The Inspectors General in the various agencies?

Ms. DANIEL. Yes, sir.

Senator THURMOND. And they should be able—because they more or less call these cases to your attention, I guess, do they not? They refer them to you generally?

Ms. DANIEL. Yes; they do refer them to us.

Senator THURMOND. Most of your cases in the future probably would be referred by an Inspector General, would they not?

Ms. DANIEL. We expect that there will be an increase in our caseload as a result of the work of the Inspectors General and we are engaged in a number of training and orientation courses to make the Inspectors General aware of the importance of civil fraud as a means of safeguarding the integrity of their own agencies.

Senator THURMOND. I think the Inspectors General can be very valuable. I was just thinking out loud there that they ought to be completely independent; they ought not to be subservient to the agency that they are acting as watchdog over.

For instance, if the head of that agency recommends someone for Inspector General, then he will look to the head of the agency to keep his job. There really ought to be completely independent people if you are going to get a true watchdog; do not you think?

Ms. DANIEL. I agree.

I think the Congress was very wise in recognizing that problem and in passing the statute making clear that the appointment was made by the President and confirmed by the Senate, not made by the head of each agency.

Senator THURMOND. That is true. It is made by the President, but I am hoping the President would not follow the head of the agency when he makes an appointment because if he does, then the head of the agency more or less is still in control, so to speak. Do you catch what I mean?

I think it would be wise if the President would, on his own initiative, or through his White House staff, would select people that would really be a true watchdog. There has been entirely too much wrongdoing in the Government, too much corruption and fraud. If there is any facet of public life that ought to set the example, it ought to be the Federal Government; because the people look and feel that what we do here is more or less the standard for the Nation. If you have honest, clean government at the Federal level, that is going to encourage the State government to do likewise and it can have city governments do likewise. It is just like people looking upon the White House as more or less setting the standards, possibly not the standards like Dolly Madison set in her day; she was more or less the Queen of the Nation in social matters.

But I am speaking about honesty and integrity and in conducting the public affairs in a proper and exemplary manner.

Thank you very much. We are glad to have you with us.

Ms. DANIEL. Thank you, Senator.

Senator BAUCUS. Ms. Daniel, pursuing the question of civil versus criminal fraud and who would determine which division brings its action at which time, to what degree should Congress become involved in trying to resolve that question? That is, to what degree is this partly a legislative area

You have mentioned that there are some constitutional questions, due process questions, surrounding whether or not the Civil Division should proceed when the Criminal Division is or is not proceeding in a certain area.

Do you think it would be helpful if you and the Assistant Attorney General for the Criminal Division and some appropriate committee were to sit down and work this out? Would that help the process or defeat it?

Ms. DANIEL. If we found that there were problems that were created by current law, we might welcome and ask for statutory change. Obviously, with respect to constitutional problems, neither the Congress nor the Executive can act. But then the coordination of problems I think is more particularly in the Executive domain.

What we need is effective implementation and enforcement and I think that there now is the interest within the Department of Justice that will bring about the kinds of coordination that we all want to see.

Senator BAUCUS. When will Judge Renfrew's report be completed?

Ms. DANIEL. It is a working team that he is going to assemble. There is no form or requirement for a report. He just joined the Justice Department about 2 weeks ago.

Senator BAUCUS. As a practical matter, do you know when he might be able to, in his team, address this issue?

Ms. DANIEL. I do not; but I will be glad to ask him and let you know.

Senator BAUCUS. Is my understanding correct that your division and others in Justice are going—within say a number of weeks or a couple of months—to have a report outlining how Justice can better bolster its fraud collection records; is that correct?

Ms. DANIEL. No, sir. What I said was that in my request for supplemental budget, I have asked for funds that would allow us to carry out the study and evaluation analysis, come out with a report and plan. Whether we will get those funds, I do not know. But whether we get them or not, we are, within the Division, focusing a great deal of attention on our collection efforts, attempting to improve them and attempting to figure out ways of insuring that they are improved in the U.S. attorneys' offices as well.

For example, we have, on an experimental basis, instituted a series of field inspection trips by our own members of our own judgment collection unit, going to the U.S. attorneys' offices that we have targeted as being delinquent in their judgment collection efforts and having our people go out and actually spend a week with them in the office, looking at the methods they have for processing claims.

Senator BAUCUS. How do you determine which cases to refer to the U.S. attorneys for direct handling, compared to those cases which are shared with the U.S. attorneys' offices?

Ms. DANIEL. There are a variety of criteria that we use to determine whether to retain cases within the Division for personal handling.

Senator BAUCUS. I take it there are three categories: personally handled, shared, and those that are completely delegated?

Ms. DANIEL. That is right.

Senator BAUCUS. I do not want to take too much time here, but could you generally outline how that determination is made; that is, which of the three categories to which a case might be assigned?

Ms. DANIEL. Sure.

We retain cases for personal handling if they present important constitutional issues; if they have transcendent public importance because of the nature of the program that is involved in them; or because of the administration's position or congressional——

Senator BAUCUS. You keep the bigger cases?

Ms. DANIEL. Some of the more—bigger; that is true. Because we have greater resources.

Senator BAUCUS. Which are shared?

Ms. DANIEL. Our share of the cases?

Senator BAUCUS. No; not the number. Which kinds of cases are shared, as opposed to those that are completely delegated?

Ms. DANIEL. The completely delegated is easier to do first. Cases where less than $60,000 is at stake would generally be completely delegated. Cases which are largely fact bound; cases in which the law is settled and where there are repetitive issues that arise; cases in a shared category frequently are of great importance.

Senator BAUCUS. Just less great?

Ms. DANIEL. Well, for one reason or another, they may be more appropriate for handling in the U.S. attorney's office, but in that situation, we may keep it in a supervised category for a number of reasons. One is simply so that we can have more regular notice of what is going on in a case.

Senator BAUCUS. Are there any supervisory problems? Or has that worked out pretty well?

Ms. DANIEL. In a system of this size, there have to be some problems, and, of course, there are.

One of the things that concerns me, that I noticed as soon as I came, is that there are too many cases in the supervised category and, as a result, I question how effective we can be in the supervision that we give.

Senator BAUCUS. That is, should more be delegated?

Ms. DANIEL. We are studying whether more should be delegated. Since we have begun studying this, we have moved about 2,500 cases from the shared category into the delegated category as results of review that we have done.

Senator BAUCUS. Some people point out that because U.S. attorneys have significant prior experience, often significant prior litigating experience, and also because they know the local communities quite well; and on the other hand, attorneys in the Civil Division, as well as in other divisions of Justice, often are recent law school graduates, do not have the same trial experience, and often do not have the same legal experience, those Civil Division attorneys tend to get in the way of U.S. attorneys. That is, they are kids out of law school, to some degree, supervising hardened, encrusted U.S. attorneys who have lots of experience and know the ways of the world a little bit.

Is that a valid criticism?

Ms. DANIEL. To some extent, it falls into the category that Mrs. Hills described as anecdotal rather than record evidence. I do not know what the age profile is of the Department of Justice attorneys as compared to those in the U.S. attorney's offices. I am sure it has sometimes happened that the attorney who has responsibility for "supervising" a case, is younger and less experienced than the attorney in the field office. However, the method that we use in supervising or in monitoring these cases is quite different from what it was at a time when the kind of complaints that you have described were more prevalent.

There was a time when almost all papers had to be cleared by the Department of Justice before they were filed by a U.S. attorney. That is no longer true, and in many of the shared cases what we really do is function as a resource or as a consultant for the U.S. attorney.

Senator Baucus. You said that presently the Civil Division tends to supervise too many cases; that is, it should supervise fewer.

Is the failure to delegate more cases just an institutional problem that has arisen or is there some other reason why the Civil Divison historically has not delegated more cases? Or are there too many cases?

Ms. Daniel. Historically, say 10 years ago, as I have been told, most of the Civil Division's caseload was supervised and—well, most of it is still in the supervised category, but there were far fewer cases personally being handled.

Today, our caseloads are much greater than they were before. There is, I think naturally, a lag time between the time that—say when a statute is passed, while the caseload is emerging, it is important for us to keep the cases in the personally handled, but as the law becomes settled, they can become supervised or delegated. Inevitably, there is a delay sometimes in doing that.

Senator Baucus. Do U.S. attorneys make too many mistakes? Do you find errors in any of the cases? I suppose the ones that are relevant are the supervised cases and those that are completely delegated. Do you monitor those that are delegated completely and, if so, do you find mistakes, too many mistakes?

Ms. Daniel. We do not monitor the delegative cases at all.

Senator Baucus. What about the shared cases? Do you find too many mistakes?

Ms. Daniel. Well, I have been accused of being a perfectionist; so I think that even one mistake is too many. Of course, we occasionally find mistakes. We occasionally find mistakes in the work of our own attorneys.

Senator Baucus. By all reasonable standards, do you find too many?

Ms. Daniel. No, sir.

Senator Baucus. Is there a need for more written directives or clearer directives in the U.S. attorney's manual to minimize mistakes?

Ms. Daniel. If we had the resources we could do a great deal to upgrade—to update the U.S. attorney's manual. We could provide more of the monographs that we have provided in the past that the U.S. attorneys report are very useful and they have asked us to do more of them. We are now employing law students part time to help us in that effort. There is no doubt that we could do more. We should do more.

Senator Baucus. You mentioned that you are looking into ways to delegate more cases or at least to lower the number of cases that are presently being handled on a shared basis. When do you reach that decision as to how to reduce that number?

Ms. Daniel. Again, it is an ongoing effort. As a result of the efforts that I initiated in October–September, we have delegated over 2,000 cases that previously were shared.

Senator Baucus. So it is not a report or task study that is going on? You are continually working down the number?

Ms. Daniel. That is right.

Senator Baucus. What percentage of Civil Division cases are delegated?

Ms. DANIEL. Well, again, I do not have the figures on delegated cases, because those are referred directly from the agency to the U.S. attorney. I do have the figures on the comparison between the supervised and personally handled.

Senator BAUCUS. You do not have that?

Ms. DANIEL. I do have that. Just a minute. I can furnish it for the record.

Senator BAUCUS. That would be fine.

[Material referred to above is on file with the committee.]

Senator BAUCUS. Once a case has been delegated to the U.S. attorney, you said earlier that you do not monitor that case.

Do you have any tracking system? Do you have any idea what happens after you delegate a case or is that the end of it?

Ms. DANIEL. The delegated case——

Senator BAUCUS. Does it just fall in a pit someplace?

Ms. DANIEL. The delegated cases do not come through the Civil Division; they are referred from the Agency in the office. So that category—we——

Senator BAUCUS. Who delegates it in the first place?

Ms. DANIEL. Well, there is a provision of the Code of Federal Regulations that specifies those cases that can be referred by an agency to a U.S. attorney's office without going through the Civil Division. That includes things like, for example, social security disability benefit cases certain black lung cases, small claims.

Senator BAUCUS. What about those cases, though, where the division itself; that is, your division, delegates? Do you have any way of keeping track of what happens to those cases?

Ms. DANIEL. Again, with the cases, one of the reasons that we keep cases in a supervised category is just so that we can track them. Sometimes we want to participate in litigating of that case and to be consulted on key decisions. Other times, we want to know when key events occur.

Senator BAUCUS. I am more concerned with those cases that you delegate.

Do you have any way of knowing what happens in those cases——

Ms. DANIEL. It is my understanding that our management——

Senator BAUCUS. [continuing]. That you delegate?

Ms. DANIEL. I appreciate that.

Our management information system is still in the process of being developed, and I think we have not yet developed the capability to track the delegated cases.

Senator BAUCUS. And you are implying that you do not think that you should do it either?

Ms. DANIEL. Yes; we should.

Senator BAUCUS. Can you insist that a U.S. attorney work on a case?

Ms. DANIEL. No. However, I should say——

Senator BAUCUS. Should you have that capability?

Ms. DANIEL. The U.S. attorneys are themselves Presidential appointees and, as you can appreciate, there are delicate relationships from time to time.

In the Civil Division we may have fewer of the kinds of problems that you are suggesting than other divisions, because a large part of our caseload is defensive and in those cases, the compulsions of litigating cases keep you going. Cases do not languish within our files or within the U.S. attorney's files.

Senator **Baucus.** I appreciate that U.S. attorneys do have other kinds of considerations. But from your perspective as head of the Civil Division, do you find U.S. attorneys give adequate attention to delegation cases?

Ms. **Daniel.** I do not think there is a problem except the one that we talked about earlier about judgment collection.

Senator **Baucus.** To the degree that you know, what happens to those cases because, as you said earlier, you do not know what happens to them?

Ms. **Daniel.** Correct. I should say that even if a case is delegated, that the agencies frequently call us if there is a problem in the U.S. attorney's office.

Senator **Baucus.** To what degree is there a problem due to different abilities among the attorneys or different specialties among U.S. attorneys? Do those differences in ability and specialties have any bearing upon what cases you refer or delegate or not delegate?

My real question is: Should there be some systematic basis, some system set up so that all of us have better ideas as to what is happening due to those differences in specialties, or should the present system, which is based on who knows whom over a period of time and experience, should that system be retained?

Ms. **Daniel.** I do not think that individual differences play a very large part. Institutional ones may.

As I answered earlier, some U.S. attorneys' offices do not have separate civil divisions. Increasingly, more of them do. We would obviously be more reluctant to delegate a case to an office where there was no separate civil division.

Senator **Baucus.** But do you know whether for Management and Budget purposes, cases that you originally have in your jurisdiction, about which you then delegate to U.S. attorneys' offices, are double counted?

Ms. **Daniel.** For what purpose?

Senator **Baucus.** For budget considerations, for example, whether OMB tells you how many cases the Government is working on, how many of those cases are double counted? Those figures that are worked on by your division, as opposed to those worked on by the U.S. attorneys' totals, but are often the same case?

Ms. **Daniel.** OK.

There could be no double count of delegated case because we do not count them. There could be no double count of a personally handled case because the U.S. attorneys do not count them. The cases that are in the supervised category we show as being in the supervised category and therefore we would designate them in that way, say for OMB.

I should say that it is only within about the last year and a half, last year, that we have developed our automated case tracking system; we are still developing management information. I have heard anecdotal information that in the past there was double or triple counting. I think we have made substantial progress toward eliminating that possibility.

Senator **Baucus.** It is my understanding that the Civil Division appellate staff handles about 20 percent of the 3,000 civil appellate cases that currently make up your caseload.

If it is important to speak with one voice, why are not more cases handled by your appellate case staff?

Ms. **Daniel.** Not enough lawyers.

Senator **Baucus.** How many do you need?

Ms. **Daniel.** We could double the number that we now have.

Senator **Baucus.** How many do you now have?

Ms. **Daniel.** Thirty-six.

Senator **Baucus.** Could you give me a rough estimate as to the number of cases that you have referred to others, appellate cases that you have referred which you should have kept yourself?

Ms. **Daniel.** Yes.

In the court of appeals, the appellate staff is now handling about 20 percent of the cases. That is 693 out of 3,186. The remainder of the cases have been delegated to either agencies or to the U.S. attorneys.

Senator **Baucus.** How many of those cases that are delegated do you think should have been kept?

Ms. **Daniel.** There is certainly a substantial number of cases that have been delegated where the results would have been far better if we had kept them within the division.

Senator **Baucus.** Do you mean a couple of hundred? You do not mean all 3,000?

Ms. **Daniel.** I would like to introduce Robert Kopp, who is the acting director of the appellate staff, and I know he would be pleased to give you that information.

Mr. **Kopp.** Yes, Senator.

We have stated for budget purposes—and I will admit that it is simply a subjective judgment—that approximately at least 200 additional cases that we have delegated out should be assigned to the appellate staff.

Senator **Baucus.** Could you characterize those cases? What do they generally involve; that is, the category of 200?

Mr. **Kopp.** The category of 200 cases that we assign out basically are cases where the Government prevailed in the district court; and we tend, even though on a rational basis, there are often many cases of great importance at the appellate level where the Government prevailed in the district court, we tend in terms of our assignments to assign out to the trial attorney or to the agency, cases where the Government prevailed in the district court. Part of the theory for that is that since the Government won in the district court, that should be handled similarly in the court of appeals. There, in fact, are quite a few important cases in that category that result in being assigned out even though because of their importance they should be kept for centralized control.

Senator **Baucus.** Could you indicate, though, more precisely, maybe according to the subject, the nature of the case, which cases you presently refer but due to their importance, feel that you should keep if you had the manpower?

I am trying to get a feel for what kinds of cases they are. In addition to cases where the district court and Government prevailed.

Mr. **Kopp.** In terms of what we assign out, and in terms of what we keep in appellate state staff, we basically look in terms of general criteria, which Ms. Daniel has mentioned, such as: Is it a question of Government-wide importance or confined to a single agency; are the issues factual or do they have ramifications beyond that case? Is it a case worthy of Supreme Court review? I think the only way to answer the question is really to give examples of some types of cases.

Senator **Baucus**. If you could give one or two.

Mr. **Kopp**. For instance, a case we assigned to the U.S. attorney was a case called Goolsby against Blumenthal, and one of the issues in that case was whether the Government had to comply or—State and local government had to comply with the Relocation Act, with the funds being used under the Revenue Sharing Act, and since the Government prevailed in the district court, that case was assigned out to the U.S. attorney. The fifth circuit decided the case in the court of appeals, and the panel held that funds under the Revenue Sharing Act were subject to the Relocation Act; and that was quite a major precedent and it could have been anticipated at the time really that the assignment was made, that that was a risk that was involved in that case; that the court would rule in that direction.

Nonetheless, the case had been assigned out originally to the U.S. attorney. Once, however, the panel decision came down and entered a decision that would have had tremendous consequences, we then pulled the case back to our office. We participated in the case and got the decision of the fifth circuit vacated and on rehearing en banc the original panel decision was vacated and the court adopted the position of the dissenting judge. That was one type of case that was assigned out to the U.S. attorney that we should have pulled in and it was basically assigned out because we prevailed in the district court. Even though we knew there was some risk that could develop if we lost, as a very important case, nonetheless, we did not really have the resources to handle that case.

Another example is the case which we had several years ago called *Simmons* v. *Schlesinger* which involved the question whether you could have class actions under title VII of the Civil Rights Act with respect to the Government.

In that case, that case was assigned in the court—to the Navy in the court of appeals, and the court of appeals, probably, because the court was somewhat confused as to some rather exotic regulations of the Civil Service Commission, got the idea that there was a class remedy available at the administrative level, and the court therefore held in the Government's favor on an exhaustion of remedies, even though we in the appellate knew, but the Navy had not, that there was not any such administrative remedy.

The other side filed a petition for hearing en banc on that case and at that point we got into the case and we in effect confessed error to the case, pointing out to the court of appeals that there was not any administrative remedy. That was a type of case that was assigned out that really should have been kept here but, again, because the Government prevailed at division court level and because of our resources, we assigned it out and had to pay the price.

Another example is the *Iannone* case, which was a case recently decided in the District of Columbia circuit, and it involved general issues under the Inspector General Act. The Department of Energy, however, was interested in handling that case; the case arose at a time when our resources were very pressed, and so we gave the case to the Department of Energy. I think it was handled adequately. We did lose—we then, through our office, tried to file a petition for rehearing. That was also unsuccessful. So we are basically in a situation where, because of resource problems, essentially in the situation where the Government is the appellee, we look very favorably on the one hand where people are willing—trial people are willing to handle their cases and on the other hand, we will assign out cases where we are the appellee, unless it is a case clearly under our criteria that should be handled centrally.

Senator **Baucus**. Is there any way for you to determine the number of times that the Government has lost a case on appeal because your division did not handle the case, but instead it was delegated? I am sure that this client agency and the trial attorneys that lose feel that they are better, but I wonder whether you have any objective basis or even subjective, for that matter, to make a determination?

Mr. **Kopp**. I think that is almost an impossible question to answer. We really only have—get a very subjective feeling in terms of this area. I think on the whole, surprisingly, the Government comes out quite well in terms of the ultimate result in its cases. You always have a feeling that there are mistakes that slip through that should have been caught; and if you had a greater ability, you would catch those mistakes but we do not have statistics in this area, and we have not even worked up.

Senator **Baucus**. So it is difficult to tell how many times the Government has been reversed; is that correct?

Ms. **Daniel**. We prevail in 80 percent of the cases that are handled by the appellate staff. The percentage of cases in which the Government prevails should be even higher among those delegated because we try to delegate the easier cases. The extent to which it is not proportionately higher, we would say it is our absence.

Senator **Baucus**. Do you know whether it is higher or lower?

Mr. **Kopp**. It is about equal.

Senator **Baucus**. Eighty percent—among delegated, it is 80 percent success rate?

Mr. **Kopp**. Yes.

Senator **Baucus**. And you feel it should be higher because of the cases?

Ms. **Daniel**. Correct.

Senator **Baucus**. I must say, my staff is sympathetic with your workload. When they were over there visiting you, they came back and told me about the conversations that they had with—I do not know whether it was with you, but found you were working very, very hard, as hard as I work my staff, which is quite a bit, I must say.

Earlier, Ms. Daniel, you suggested that your division should have more adequate data processing equipment, better word processing equipment, and more paralegals.

How does your division and its resources in this general area compare with other divisions in Justice?

Do you have proportionately the same amount of data processing equipment, or do you have proportionately less?

Ms. **Daniel**. Disproportionately less. We have substantially less despite the fact that we have the largest caseload.

Senator **Baucus**. Have you requested more capability in this area?

Ms. **Daniel**. We have, beginning with the budget request for 1980. Previously, the Civil Division has not had perhaps a grand enough vision of what it should be like as a modern law firm.

Senator **Baucus**. I take it you are pushing aggressively?

Ms. **Daniel**. Yes.

Senator BAUCUS. And you have also hired a new Deputy Secretary for Policy and Planning branch?

Ms. DANIEL. That is correct.

Senator BAUCUS. What is the turnover rate among attorneys in your division?

Ms. DANIEL. I will be glad to submit that for the record. I do not know offhand.

Senator BAUCUS. Is it about average when compared with other divisions, or is it higher or lower?

Ms. DANIEL. I think it is about average, but I will submit that for the record.

[The material referred to is on file with the committee.]

Senator BAUCUS. Do you feel that you have a sufficient number of senior executive office slots?

Ms. DANIEL. I think that the Civil Division and every division in the Justice Department could be greatly improved if we had more of those slots.

A problem we have that does result in turnover in the loss of experienced attorneys is that we do not have capability to create what a private law firm would call litigating partners. We have a handful of SES slots for counsel. We could use three times as many as we now have.

The whole Government, I think, certainly within the Justice Department, needs to have better career tracks for lawyers. Unlike administrative agencies employing nonlawyers, we face fierce competition from the outside for our lawyers.

Senator BAUCUS. What you are saying is to boost the salaries of your experienced, able attorneys, you have to push them up into nonlegal positions; that is, to administrative positions where you are not utilizing their legal talents?

Ms. DANIEL. Exactly.

Senator BAUCUS. Otherwise, if they want to stay lawyers, they have to leave if they want to increase their income?

Ms. DANIEL. That is right.

Senator BAUCUS. And you think that is a pervasive problem throughout the Government, not only the Civil Division?

Ms. DANIEL. I think the problem is more among litigating lawyers than the other lawyers but General Counsels in agencies have complained about similar problems.

Senator BAUCUS. How many SES slots have you been appropriated in the Civil Division?

Ms. DANIEL. I could guess, but I would like to sit down and really work that out and submit it for the record, because that would be very helpful to us.

Senator BAUCUS. And the same would apply to paralegals: can you tell me now how many you need, or would you like to submit that?

Ms. DANIEL. I would like to submit that for the record.

[Information referred to above can be found in the appendix.]

Senator BAUCUS. According to the annual report of the Director of the Office of Administration, U.S. Courts, the criminal caseload decreased in the last decade from 40,000 to just over 30,000 cases, while civil suits have increased from 25,000 to 55,000.

Given that shift in cases, has the Department of Justice reallocated attorney slots from the Criminal Division to the Civil Division?

Ms. DANIEL. No; not that I am aware of.

Senator BAUCUS. Why not?

Ms. DANIEL. Rather than say why not, I would like to say that I hope that the department would study the kinds of figures that you have just read to me and made appropriate reallocations.

Senator BAUCUS. But do you have any feeling as to why it has not been a shift?

Ms. DANIEL. No; I do not.

Senator BAUCUS. Do they know about this difference in caseload? Does Justice know about this?

Ms. DANIEL. I could not say.

Senator BAUCUS. Would that be the reason, plead simple ignorance? I am not being critical.

Ms. DANIEL. I understand. I have just recently joined the department so I could not say whether this is something that has received a lot of attention or not.

Senator BAUCUS. How do you weight cases in your division?

Ms. DANIEL. At the moment——

Senator BAUCUS. Is it just subjective?

Ms. DANIEL. At the moment, it is largely subjective. We are working on an improved case weighting system that has been required by the Congress and by the Department and that is an area in which I believe my new deputy will be very, very helpful to us.

Senator BAUCUS. Given the fact, that we do not want additional paperwork and redtape, at least needless redtape, you do feel that some system should be worked up because it is too subjective at the present; is that correct?

Ms. DANIEL. That is right.

We want to make sure that our attorneys have approximately equal caseloads; we want to be able to have better means of evaluating the cost of the Government of litigating particular cases.

Senator BAUCUS. When will you know whether or not you can develop adequate guidelines here?

Ms. DANIEL. I know we can.

Senator BAUCUS. When will you have them in place?

Ms. DANIEL. I hope we will have it in place by the end of the year.

Senator BAUCUS. End of this calendar year?

Ms. DANIEL. Correct.

I should say that is a hope and not an estimate.

Senator BAUCUS. To what degree are you personally in touch with heads of your client agencies or with their general counsels?

Ms. DANIEL. When I first arrived at the Justice Department, I had heard the same kinds of anecdotes you have about the lack of harmony and relations, so I made it my business to call up the General Counsel of almost every one of our major clients and sit down and have lunch and make it very clear that I wanted to be contacted at any time there was a problem or any time there was a case which the General Counsel thought deserved special attention; and I do receive phone calls from General Counsels regularly and try to see them as often as possible.

Senator Baucus. That is working out well?

Ms. DANIEL. I believe so. I hope they think so, too.

Senator BAUCUS. Do you think there should be a more formal mechanism? Does the system work fairly well?

Ms. DANIEL. There is a formal mechanism available through the Federal Legal Counsel that is just beginning to get off the ground. It seems to me these are the kinds of areas in which one-on-one contacts are more productive than large meetings; because clients want individualized attention.

Senator **Baucus**. What about the general question of allocating litigation authority between Justice and client agencies? You heard Carla Hills this morning and you agreed with her that the basic criteria should be whether a matter is legal or programmatic. If it is legal, then it should be litigated with one Government voice and Justice should determine that one voice.

Do you have any other suggestions as to how we resolve the tension; that is, the unnatural tension and the executive tension between Justice and client agencies?

Ms. **Daniel**. I think the interest this committee is taking on the issue will itself have a beneficial effect. I have been told by lawyers who have been with the Division for a long period of time that the tension and the requests for litigating authority, as you mentioned earlier, rise and fall; that they seem to rise at times when they think the Congress will be receptive to the request by the separate agencies. When they are in a period of demanding independent litigating authority, cooperating with the Division drops.

At times when they recognize that there is a status quo that will be followed, there is more cooperation with the Division; and I think that your interest will encourage the agencies to be more cooperative.

Senator **Baucus**. Is there any office within the executive branch which monitors these kinds of problems; does OMB or the White House monitor them? Is any office or person other than the client agency and Justice itself involved?

Ms. **Daniel**. No, sir.

Senator **Baucus**. Should there be?

Ms. **Daniel**. I must say that I am somewhat handicapped because I have not experienced in the last 6 months the degree of tension and conflict that I have heard people describe. I assume that is a matter of luck and 6 months——

Senator **Baucus**. Maybe you are giving them too much authority?

Ms. **Daniel**. It may be that 6 months from now, I will be back here banging your door; but right now, I do not feel the need for any outside agency.

Senator **Baucus**. Do you feel that there is a sufficient mechanism or sufficient occurrence whereby litigating attorneys, whether in the U.S. attorneys office or whether in a client agency, make suggestions to the Civil Division that would help your role?

I understand that once you delegate a case whether it is an appellate case or trial case, that those attorneys who receive the casework on them and I assume in some cases the Civil Division will make certain recommendations. It certainly helps in those areas where the Division supervises those cases, but what about the upstream flow of information and suggestions?

Is there enough upstream flow? Should you on the other hand try to develop a system? What suggestions can you make to further facilitate proper upstream flow?

Ms. **Daniel**. My observation is that neither our clients nor the U.S. attorneys hesitate to give us advice on every occasion.

Senator **Baucus**. So that is not a problem.

Ms. **Daniel**. No; it is not.

Senator **Baucus**. Does the Government-wide cutback on travel funds affect your division's ability to investigate or litigate cases? Does the cutback significantly affect your work?

Ms. **Daniel**. I think it may. We are concerned about the cutback because we have almost no control over our travel expenses. The only times when our attorneys travel is to attend depositions or trials or to meet the judicially imposed requirements; and we are very concerned about how we will be affected by that cut.

Senator **Baucus**. I did not expect you to answer that any differently.

Could you, though, flush out the reasons why it is impeding your work, a little more precisely?

Ms. **Daniel**. Well, frankly, it has not impeded it yet because we have not yet fully disciplined ourselves, and I do not know how we would begin to do it unless the judges excuse us from trial appearances.

Senator **Baucus**. How much have you cut back in travel?

Ms. **Daniel**. $172,000.

Senator **Baucus**. $172,000 cut.

Ms. **Daniel**. The Government's cutback right now.

Senator **Baucus**. How much is spent in travel?

Ms. **Daniel**. I will have to submit that for the record.

[The material referred to is on file with the committee.]

Senator **Baucus**. I have no further questions.

I want to thank you very much. You have been very helpful.

We will resume this hearing on the 31st and some other areas. But with respect to the general questions that we asked at this time, I want to thank you very much, and I wish you luck and I hope you are successful in persuading the Attorney General and the others that Justice has a right as well as client agencies in litigating cases and determining legal cases and in some cases policy as well.

Thank you very much.

[Whereupon, at 12:03 p.m., the Committee on the Judiciary adjourned.]

U.S. SENATE,
COMMITTEE ON APPROPRIATIONS,
Washington, D.C., March 20, 1980.

Hon. MAX BAUCUS,
Subcommittee on Limitations of Contracted and Delegated Authority,
Senate Judiciary Committee

DEAR MR. CHAIRMAN: I was pleased to learn of your oversight hearing on the Civil Division of the Justice Department, particularly in light of the responsibilities of the Department in recovering funds lost through government fraud.

As you know, fraud and waste in federal programs are subjects which the Appropriations Committee is very concerned about. On February 27 the Committee held a hearing specifically on those problems and the steps underway to resolve them. During the course of that hearing, questions were raised about the effectiveness of efforts among federal agencies, Inspectors General, and the Justice Department in pursuing fraud and taking action to reduce it.

As a result of that hearing, I submitted a lengthy list of questions, which I have enclosed, to the Department when it appeared before the Appropriations Subcommittee on State, Justice, Commerce, and the Judiciary on March 10. I hope to receive responses in the near future and will be happy to share them with you. I would also appreciate receiving a copy of the transcript of your hearing as soon as it is available.

Should you or your Subcommittee require any assistance, please let me know.

Sincerely,

WARREN G. MAGNUSON.

QUESTIONS OF SENATOR MAGNUSON AND RESPONSES OF DEPARTMENT OF JUSTICE

GAO Reports on Fraud in Government

A September 1978 GAO Report ("Federal Agencies Can, And Should, Do More to Combat Fraud in Government Programs," September 19, 1978) quoted a Justice Department estimate that the amount of fraud in government ranged from 1 to 10 percent of expenditures — or between $2.5 billion and $25 billion annually. Is that estimate accurate or has the Department since changed its mind? What would be a more accurate estimate?

The Department of Justice does not know the amount of fraud in government. Our estimate of 1 to 10 percent was based on our experience in the prosecution of program fraud in a particular area. It is not a basis from which to extrapolate to an overall figure of 10 percent or 1 percent or 5 percent of any total number, no matter how appealing that might be to demonstrate the true seriousness of the fraud problem. Our percentage estimates on the extent of fraud and abuse referred only to federal programs intensely investigated after detection and referral to Justice. These experiences generated both support for the Inspector General Act of 1978 and the high priority the Attorney General and the administration have given to enforcement in this area.

We do know that whenever there has been a concentrated audit or investigation, significant fraud, abuse, waste and mismanagement have been uncovered.

Clearly, perceptions in the Congress, the Executive Branch, and in the public of the extent of fraud and abuse in federal expenditures have escalated greatly in the past few years. Yet, our investigations of HUD, DOD and, lately GSA programs have confirmed that the problem has been with us for a very long time. The recent and continuing trends toward increased complexity in federal spending programs, attempts to reduce administrative red tape, and dispersed administration of federal funds all may contribute to an increased potential for fraud and abuse.

In a report last October ("Department of Justice Should Coordinate Criminal and Civil Remedies to Effectively Pursue Fraud in Federal Programs," October 25, 1979), GAO concluded that the Justice Department's tendency of giving little, if any, consideration to civil recovery action until the completion of criminal prosecution was making the total prosecutive effort less efficient and was reducing the potential for recovering the money lost through fraud. What specific actions have been taken to address the criticisms raised by GAO?

The Department did not agree with many of the conclusions expressed in the GAO report. Appendix II of that report provides our response identifying areas of special emphasis. Recently, we have undertaken a case tracking effort in the Criminal Division which requires the prosecutor to identify at the start of the investigation the civil potential of the matter. In addition, the Civil Division is developing a training block of instructions for agency auditors and investigators to better enable them to recognize the civil potential of matters uncovered. These most recent reforms, as well as those reflected in our GAO response, indicate in part the special emphasis we are placing on the increased utilization of the civil remedy. Our civil money penalty legislative proposal is also part of our effort to focus enforcement considerations into dollar recovery areas.

Referral of fraud cases

In testimony before the full Appropriations Committee in February, GAO reported that about 90 calls from its toll-free hotline have been referred to the Justice Department during the past year. GAO indicated that only ten of those have been closed and in nine of those ten, the Department of Justice concluded that the cases did not have substance. Why have so few of these referrals been acted upon? What were the specific reasons for rejecting the nine cases and could you give us the details of the nine rejected?

We have not had the opportunity to review the GAO hotline referral status. However, our understanding of the import of the testimony was not that of the ninety referrals only ten were acted upon, but that in only ten referrals had a final decision been made. All the referrals are the subject of close review and analysis and are normally investigated before any decision is made. Without reviewing the specific ten cases closed, we expect the reason for no further prosecutive action was insufficient evidence of a federal criminal violation warranting prosecution. Recent experience leads us to become increasingly skeptical of the long range law enforcement benefits of a hotline system, but we suspect final conclusions on that question are premature.

Declination of cases

GAO stated that it is about half finished with an overview analysis of trends in government fraud. Of the 2,400 cases it has analyzed so far, about 450 cases were referred by agencies to Justice for prosecution. Of those 450 cases, Justice declined about 62 percent, citing "insufficient evidence" as one of the main reasons for declining cases. Does that mean the cases were not adequately investigated by agencies before they were referred or that the Department concluded that the allegations were unfounded? What should agencies be doing to provide "sufficient" evidence?

"Insufficient evidence" as a reason for declination is not unusual. It normally does not mean that the investigation was necessarily inadequate, but rather a full investigation was unsuccessful in discovering sufficient evidence to prove a prosecutable federal crime occurred. On the question of agency efforts to "provide sufficient evidence", the principal solution here is in the form of greater emphasis on training.

The Department provides training to agency investigators and auditors in an ongoing effort to improve the detection and speedy investigation of criminal cases. Some of this training is conducted at the Federal Law Enforcement Training Center in Georgia, and some is given in independent training sessions for investigators by Criminal Division attorneys. The Executive Group, chaired by the Attorney General, has recently worked with the Office of Policy and Management (OPM) on the development of a comprehensive training plan. It should also be noted that Assistant U.S. Attorneys have been receiving periodic seminars on white collar crime investigation and prosecution over the last four years.

In its February testimony before the Committee, GAO stated that Justice should provide guidance to agencies about the kind of cases that should be referred for prosecution. Has the Department done that?

The Department of Justice has not instituted guidelines to agencies on the kinds of cases that would be accepted for prosecution. The Department is opposed to the general institution of such guidelines. We believe it is desirable to consider community standards in this decision-making process. Where it appears feasible, however, the Department will establish general rules concerning the prosecution of cases as has been done with the Social Security Administration and the Food and Nutrition Division of the Department of Agriculture. Such rules describe fact situations in which prosecution is not deemed available due to the dollar amount or the characteristics of the defendant. It is stressed that there are always exceptions to every rule, and agencies are encouraged to refer cases they feel warrant prosecution whether or not the case falls within the guidelines.

In GAO's overview study to date, the Department gave "insignificant dollar loss" as being the reason for declining 18 percent of the cases in the sample and listed "lack of jury appeal" as the reason for declining four percent. How does Justice go about determining whether a case involves sufficient dollars and sufficient interest for prosecution? Specifically, what is the criteria?

The generic areas of declination "insignificant dollar loss" and "lack of jury appeal" are determinations made in particular factual circumstances and are difficult to address in general terms. The Declination Study addresses the various dollar loss questions which will vary among the federal districts to a limited extent and more importantly, will vary from case to case depending on other factors as well. These would include clarity of the evidence, difficulty of proof, alternative remedies, seriousness of the conduct, prior conduct of the subject and the like. The lack of jury appeal reason for declination also involves the collection of conditions described above as well as a basic evaluation concerning whether the matter is of sufficient severity to warrant the most drastic societal sanction - criminal prosecution.

Both reasons for declination, however, are a function of the exercise of prosecutorial discretion which is an important part of the criminal justice system.

Has the Department put out any directive to U.S. Attorneys explaining the criteria for either of the categories mentioned in the previous question or is it left entirely to the discretion of the individual U.S. Attorney?

No. Reference should be made to the Declination Study. However, there are checks on the exercise of the discretion. The system calls for all possible criminal violations to be referred and as the GAO report incorrectly would suggest, does not place "the responsibility to determine from experience which cases will be prosecuted". Agencies can and often do seek early guidance from the U.S. Attorney on the anticipated prosecutive action. After declination, agencies can and often do seek Criminal Division review of the declination, which if found lacking, will result in a reopening and reconsideration of the matter.

GAO said that its statistics on its overview study at this point indicate that the majority of fraud cases in the sample involved dollar amounts of less than $1,000. If individuals know that cases involving low-dollar amounts won't be prosecuted, doesn't that encourage fraud? Isn't that similar to a police department that decides it won't try to catch thieves who steal less than, say $100 or $1,000?

Recognizing that prosecuting small dollar cases may cost more than the amount of money that could be recovered, does the Department ever prosecute such cases to show that anyone involved with fraud runs the risk of being prosecuted?

This question addresses the precise reason for our hesitation to provide what GAO often seeks - detailed guidelines on dollar loss (e.g., Question 5).

Deterrence is a principal objective of criminal prosecution. On occasion, the Department of Justice will seek prosecution of smaller dollar cases to further that objective. However, these cases usually possess other factors which warrant their prosecution. In response to agencies' concern with our inability to prosecute the small dollar cases, the Criminal Division has, for the past several years, suggested that the agencies develop a series of such cases to achieve the deterrent purposes suggested by your question. Defense, Agriculture, Labor and HEW have responded on occasion.

Does failure to prosecute fraud cases involving low dollar losses make it more difficult or impossible to recover the lost funds?

Yes, however, the failure to prosecute matters involving low dollar losses should only make it more difficult or impossible to recover lost funds if the consequence of the decision is that the matter is not fully investigated. Without doubt, prior criminal prosecution makes subsequent civil or administrative action to recover funds easier, but that convenience alone does not justify pursuing a criminal prosecution. Assuming adequate investigation, a declination to prosecute does not prejudice civil or administrative action to recover funds.

As noted in the 1979 GAO report, the Justice Department often gives little, if any, consideration to civil recovery action until a criminal case has been successfully concluded. Yet GAO's fraud overview study to date shows that the Department has declined 62 percent of the referred cases which allege criminal fraud. Does this mean the final result will be that little of the money will be recovered?

We do not agree with the premise of the question. Prosecutors are encouraged to consider the civil potential of criminal matters at an early stage. The Civil Division routinely assigns attorneys to review fraud referrals to identify civil potential. However, for legal and economical reasons, it is frequenty in the best interest of the United States to proceed with the criminal case prior to initiating civil action. Reference should be made to the Department's lengthy response to the 1979 GAO report.

The reported declination rate of 62 percent does not reflect directly the civil consequence in terms of recovery of money. However, our experience suggests that in the majority of cases, if after investigation insufficient evidence exists to justify criminal prosecution, there also is insufficient evidence to support the initiation of civil action to recover funds.

If the Department doesn't prosecute certain cases, what steps are taken to insure that the individuals involved are punished or reprimanded in some way? Does Justice coordinate with the agencies to make sure that some corrective action is taken?

What steps does the Department take to inform agencies of the status of cases referred, especially when those cases have been declined? What happens to cases once they are declined?

Remedies over which the Department of Justice has direct control are limited to criminal and civil actions. Agencies have the power to debar or suspend contractors and program participants and, in some limited cases, assess penalties. With respect to federal employees, the employing agency has the ability to take appropriate administrative action. The Department has no control over these remedies but does make an attempt to coordinate while the criminal and civil actions are pending to avoid prejudice to the United States. However, once our criminal and civil interests are completed, the Department has not jurisdiction even to coordinate the actions of other agencies. We often will suggest, however, at the conclusion of an investigation that serious consideration be given to such administrative action.

After a case is declined, normally the Assistant United States Attorney or the FBI communicates directly to the agency that decision either by letter or transmittal of a report. The actions taken by the agency after declination are their responsibility exclusively. We suspect the new Inspectors General will closely monitor the post-declination use of the available administrative remedies.

Guidance on fraud cases

The 1978 GAO report stated that the Attorney General should establish a formal plan to assist Federal agencies in combating fraud, including such procedures as "...advising agencies of the types of cases which will receive priority for prosecution and working with agencies to devise alternative solutions for those which will not." What, if anything, has the Department done to comply with this recommendation?

During the past year the Department, through the Economic Crime Program and the individual U.S. Attorney, has begun to make strides in communicating enforcement priorities. To supplement this effort, the Criminal Division with the cooperation of all law enforcement has undertaken a massive review of the white collar crime priorities of the investigation community. We expect that this review will result in the Attorney General identifying and publishing national enforcement priorities for the first time.

Also in the 1978 report, GAO said Justice had not provided agencies with "overall management information on how fraud has occurred and can occur in their programs." What steps have been taken to provide such information?

One recent action is the change in the FBI reporting format to include a section analyzing the program weaknesses which contributed to the fraud. In addition, through close working relations with the Inspectors General and the growth of the Economic Crime program, increased efforts at prevention and correction are expected.

GAO says it is considering recommending to Congress that it pass legislation which would enable the agencies to settle cases -- particularly civil cases -- on their own, under guidelines set up by the Justice Department. What is your view of that idea?

We are skeptical that this proposed reform will improve the Government's performance in civil cases. The problems do not relate to authority to settle, but rather to adequate development of the facts to settle the cases. The solution we are presently considering along these lines is the creation of a new administrative remedy to be exercised by the affected agencies - civil money penalty. Over the past six months substantial work has been done to refine this idea and we expect in the next month to distribute a proposed bill for agency comment.

Executive Group to Combat Fraud and Waste

What tangible effect has the Executive Group to Combat Fraud and Waste had on doing just that, i.e., combating fraud and waste?

The Executive Group to Combat Fraud and Waste In Government was established by the President in May 1980. The principal members (other than the Attorney General, the FBI, and OMB) are the fourteen Inspectors General. Inasmuch as the Inspectors General were only confirmed this past summer and many of the offices just formed, a substantial portion of their attention, as well as that of the Executive Group, has been directed at building a sound structure to fulfill the sizeable legislative mission imposed by the Act. Four committees have been formed by the Executive Group -- Training, Enforcement, Audit and Legislation, each chaired by an Inspector General. Out of these committees has developed a series of orientation programs for the IGs and senior staff, a training plan for auditors and investigators, manuals on the use of the Inspector General subpoena power and compliance with the Right to Financial Privacy Act, formal recognition of the Inspector General as law enforcement officers, and substantive comment on proposed legislation seriously impacting on the Inspector General's ability to satisfy their legislative responsibilities. In the areas of joint audits and investigations, with the assistance of the Executive Group cooperative efforts such as the GSA led punitive efforts are possible.

False Claims Act

What is the Department's view of the proposed changes in the False Claims Act? What effect would they have in the prosecution or prevention of fraud?

The changes in the False Claims Act promise to increase the utilization of the civil false claims remedy. This increased utilization is desirable as part of the present government strategy to use more effectively all available remedies--criminal, civil, and administrative.

Punishment of fraud in government

There is a belief among many that fraud in government isn't punished and that if it is, people are only getting a slap on the wrist. For example, GAO pointed out a case where Department of Defense employees stole $6,000 worth of surplus property. They were caught and the stolen material was recovered. However, the Department of Justice declined prosecution and the final action taken against them was a verbal reprimand.

What is your reaction to the view that those guilty of fraud are only getting a slap on the wrist, if that much? What further steps are needed to assure that such individuals are properly reprimanded?

Without knowing the particular case, we cannot comment on the declination of the DOD matter cited. With respect to a mere reprimand after a declination, we have observed that the existing administrative remedies are underutilized. In a number of circumstances, agencies say that unless we prosecute, no administrative action will be taken. Our view is that criminal prosecution is the remedy of last resort, and that the administrative remedies exist separate and independent of the criminal remedy. As the criminal justice system through the Economic Crime Program identifies enforcement priorities and Inspectors General better maximize their own capabilities, a large area for improvement in performance will still lie in the actions to be taken by the affected agency. The Inspectors General are closely following their agencies' administrative responses to irregularities identified by them.

In light of your activities in prosecuting fraud, what more do you think should be done in the federal government's effort to reduce fraud and waste?

The present strategy of the Department of Justice includes the activities of the Inspectors General, the Economic Crime Program, the FBI, Criminal Division, Civil Division and the U.S. Attorneys. All these activities are the subject of high interest and are moving in a positive direction. The area over which we have practically no control is the use of administrative remedies. We expect greater emphasis in that area will result in sizeable improvements in the government's effort to reduce fraud and waste.

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DEPARTMENT OF JUSTICE AUTHORIZATION FEDERAL LEGAL COUNCIL AND GOVERNMENT LITIGATION

THURSDAY, MARCH 27, 1980

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:34 a.m. in room 2228, Dirksen Senate Office Building, Hon. Max Baucus presiding.

Present: Senator Baucus.

OPENING STATEMENT OF SENATOR BAUCUS

Senator BAUCUS. The hearing will come to order.

This morning we continue hearings on the Department of Justice authorization bill for fiscal year 1981. Today's hearing focuses on oversight of the Federal Legal Council and on the Federal Government's coordination of litigation resources and policy.

The hearings are significant because they concern an area of longstanding congressional neglect. Congress has failed to address the problem of Government litigation authority comprehensively, and this is largely responsible for the growing tension between the Department of Justice and other Federal agencies.

Congress has become increasingly insensitive to the essential role of the Department of Justice in the area of Government litigation. At the same time, the Department itself may not be doing all it can to enhance relations with its client agencies and to articulate and enforce a consistent Government litigation policy.

These conflicts among Government agencies are more than simple bureaucratic infighting.

In some instances, lawyers from the Department of Justice and other agencies are spending their time arguing over who should litigate certain cases rather than enforcing the laws of the United States. Shouldn't these lawyers be spending their time litigating?

In 1977, there were several hundred cases in which Government agencies were litigating against each other. Why should American taxpayers have to foot the bill for Government lawyers litigating against other Government lawyers?

In large Federal buildings, lawyers from various Federal agencies are not sharing their legal resources. Why shouldn't taxpayer dollars be saved by pooling Federal legal resources?

Last year, in response to some of these questions, President Carter issued an Executive order which, in part, established a Federal Legal Council.

At this morning's hearing, we intend to conduct oversight of the Federal Legal Council, to examine its origins, and to find out where it is heading. In addition, we intend to explore other issues related to the Government's and the Department's approach to Federal litigation policy

We are grateful to have with us Harrison Wellford, Executive Associate Director for Reorganization and Management of OMB; Judy Areen, General Counsel of the President's Reorganization Project of OMB; Associate Attorney General John Shenefield; and Ralph Ferrara, General Counsel of the Securities and Exchange Commission.

The first panel will be Harrison Wellford and Judy Areen. We are particularly interested in your testimony because of your involvement with the PRP study of Federal legal representation, as well as your involvement in the development of President Carter's Executive order creating the Federal Legal Council.

At this point, I would like for you to briefly summarize any statements you have. Otherwise, proceed in any manner you wish.

STATEMENTS OF HARRISON WELLFORD, EXECUTIVE ASSOCIATE DIRECTOR FOR REORGANIZATION AND MANAGEMENT, ACCOMPANIED BY JUDITH AREEN, GENERAL COUNSEL, PRESIDENT'S REORGANIZATION PROJECT, OFFICE OF MANAGEMENT AND BUDGET

Mr. **Wellford.** Thank you, Mr. Chairman.

We appreciate the opportunity to discuss the Federal Legal Council and the other management improvements made in the Federal legal system by the President when he issued Executive Order No. 12146. We are particularly appreciative of the interest this committee has shown in these efforts and have benefited from our discussions with you. We look forward to working with you in the future to carry out our mutual objectives.

In August 1977, the President directed the reorganization project staff to make the first comprehensive study of the Federal Government's legal system since the Hoover Commission completed its 1955 report. We wanted to do a number of things with this study. We wanted to prevent unnecessary litigation and administrative delay. We also wanted to improve the way litigation is conducted in order to insure better and more uniform application of the law.

We put together a staff that drew from legal offices and professionals in the executive branch agencies as well as from the independent regulatory commissions. We had excellent cooperation. We communicated directly or through a questionnaire with almost 90 percent or more of legal personnel in the Federal Government.

The study led to decisions by the President that were implemented in the Executive order issued on July 18, 1979. In the interest of time, I will not go into details about the results of the study. All of this will be in my statement, which I will submit for the record.

Senator BAUCUS. Your statement will be included in the record at the end of your oral testimony. If you could briefly summarize your formal statement, it would be helpful.

Mr. WELLFORD. There are several points that I want to emphasize. Then we can go into your questions.

The study pointed out a number of problems that the Executive order tries to deal with.

First: We have established a litigation notice system that will make it possible for the first time to monitor and coordinate the litigation conducted by different departments and agencies in the Government. We hope to reduce duplication and make the system more efficient.

Second: We addressed the problem of two Federal agencies litigating against each other in court, a problem you mention in your opening statement. This litigation is confusing to the judiciary who wonder who is really speaking for the Federal Government. It is also costly to taxpayers to have to pay for both sides of the litigation.

The Executive order, as you know, directs executive agencies to submit such disputes to the Attorney General rather than to the courts. Mr. Shenefield will be reporting on the results of this change in a minute.

Third: We have encouraged the development of an adequate access to computerized legal research.

Finally: To skip over to the last point, the Executive order established the Federal Legal Council, to be chaired by the Attorney General, with the goal of fostering coordination and communication among Federal legal offices and to work on problems of mutual concern that are beyond the capacity or authority of individual agencies to resolve.

Let me make one or two comments on S. 2041.

Obviously, to the extent that it implements many of the features of Executive Order 12146, we think it is a fine bill. We particularly agree that trying to prescribe in detail in statute the allocation of litigation responsibilities in the executive branch is not a wise course; we are pleased that your bill recognizes the need for administrative flexibility in the allocation of litigation responsibility within the executive branch. We have thought very carefully about the optimum allocation of litigation authority. I want to make a couple points about it and then conclude my statement.

The issue of delegating litigation within the executive branch, we feel, is so complex that it needs to be handled administratively rather than prescribed in detail by statute. We do not say that all executive litigation should be conducted by the Justice Department lawyers. On the contrary, a number of executive departments, on a case-by-case basis, conduct some of their own litigation now, either as cocounsel with the Justice Department or entirely on their own.

In addition, several departments, including Labor and Energy, now conduct some of their litigation pursuant to written administrative delegations made in the form of memoranda of understanding. Such administrative delegation in appropriate instances can take advantage of the specialized subject matter, knowledge of agency lawyers, particularly in cases that do not involve matters, of governmentwide significance. The issue of when such delegations should be undertaken, either in a single case or for a category of cases, is a complex one. It requires a careful balancing of such factors as size and quality of an agency's legal staff, their ability to litigate cases outside of Washington, the level of the court involved, the nature of the case or cases, at issue, and any costs involved in shifting litigation authority from one agency to another.

So we urge this committee to leave this difficult balance to the President and the Attorney General.

Let me conclude by observing that in our view the most important changes needed to improve the quality of legal work in the Federal Government are changes in management and support systems. While these changes are not as dramatic as shifts in statutory litigation authority, they are the only ones that, in the long run, will make a significant difference. That is why President Carter focused on managerial organization changes in Executive Order 12146, and why the Federal Legal Council was established.

Thank you, Mr. Chairman.

That concludes my statement.

We will be glad to take your questions.

Senator BAUCUS. Thank you, Dr. Wellford.

Ms. Areen, do you have a statement?

Ms. AREEN. No, I do not have a statement this morning.

Senator BAUCUS. What amount of Federal resources are wasted when one agency litigates against another agency? It is my understanding that there were 300 casse in 1979 in which one agency litigated against another. My question is: How much is this costing us? What are the resources involved?

Mr. WELLFORD. In our study, we found in fiscal 1977, 458 separate instances where there was litigation of one agency against another. We do not know how many of those 458 were double reported. We conclude that probably there were roughly 200 such cases. Obviously, that is costing the taxpayers money, although we could not determine exactly how much money was involved. The solution that we have proposed in the Executive order is to require executive agencies to bring such disputes to the Attorney General and to let him resolve them.

Obviously, to the extent the Attorney General is able to do that, we are going to save money. I cannot give you a specific dollar figure.

Senator BAUCUS. Do you have any general idea? Are these protracted cases? Are they simple disputes? Are they lengthy? How much time and effort is involved? Do you have any sense of how long they take? How many are appealed?

Mr. WELLFORD. Yes. They ran the gamut from fairly simple disputes to very prolonged ones and really covered the whole variety of Federal litigation.

Do you have anything further on that?

Ms. AREEN. I would concur in that. Some of these cases are resolved at the district court level, but there are instances that have gone up to the Supreme Court in which agencies are, if not by name on opposite sides of litigation, at least supporting opposite positions in the case. I would point out that we do not yet have an accurate count because our case-tracking system is not yet developed to that point. That is one of the reforms we have begun with the Executive order.

Our sense is, however, that many of these disputes involve independent agencies on the one side and executive agencies on the other.

That is something the Executive order is not going to be able to eliminate. We have invited the independent agencies to make use of this dispute resolution procedure that the Attorney General offers, but we are not in a position to mandate their use.

So we are concerned that the problem will remain in this area unless Congress chooses to become more involved.

Senator **Baucus**. In your personal view, do you think that all disputes between Federal agencies, including independent regulatory agencies, should be resolved in the executive branch to avoid litigation between two Government agencies?

Ms. **Areen**. I have no doubt that it will save resources to resolve that kind of dispute in the executive branch. I am trying to suggest, however, that there is a difficult political question as to the independence of independent agencies at stake here. I am not sure that cost is the only factor the Congress will weigh in deciding whether to grant authority to the Attorney General over independent agencies in these disputes.

Senator **Baucus**. When Carla Hills testified before this committee last week, she suggested that all general issues such as standing and evidence should be handled by the Justice Department, whereas SEC, for example, expert in securities laws, should itself be able to determine how to handle litigation in that area. Justice should not be able to override the SEC's decision whether to bring 10b(5) cases, for example.

Do you think that is a fair distinction?

Ms. **Areen**. I think it is an important distinction. We have tried in our discussions on litigation authority to suggest that it is different to talk about an issue that is of government-wide significance and something that really affects only the special statutory responsibility of a given agency. So, yes, I think it is a good distinction to make.

Senator **Baucus**. Is it fair to say that a large portion of waste is due to lack of coordination in litigation policy?

Mr. **Wellford**. I think it is fair to say that more coordination of the kind that we have mandated in the Executive order is clearly going to reduce the waste. There is a great deal to be done, as we all recognize. OMB and the Justice Department will work aggressively to carry out the Executive order to get the maximum reduction in waste possible from it. We still have a way to go, but I think the proposals that we have put into the Executive order and the work that is now getting underway will respond to that problem.

Ms. **Areen**. Perhaps I can give two specific examples of areas where we believe these changes will really reduce duplication.

Right now, we do not have an automated legal research system that is available governmentwide, with the comprehensive data base. Let me suggest two things that eventually, I think, will be put on that data base.

One is to put Federal regulations on the data base. As you know, there is a lot of talk these days, and concern, about the amount of Government regulation and duplicative regulation. When you think that all lawyers inside the Government and outside are researching by hand through those vast numbers of regulations, it is easy to see that once we have them on a computerized base so you can call them up by subject matter, as we do with cases, it is going to reduce a great deal of legal time, as well as spot points of duplication we may have missed in the past.

Similarly, we have suggested that more general counsel opinions in agencies can be put on that data base. If, for example, EPA has just looked at a particular question of ethics involving personnel in the Agency, it could save lawyers in HEW from repeating that research. Right now, there is no way for them to know that the very issue has just been worked on.

Senator BAUCUS. When will the Justice Department and the agencies have an adequate data base?

Ms. AREEN. As you know, under the Executive order, the President has vested that responsibility in the Attorney General. We have given every signal that we want it to move very quickly and the Justice Department should be in a position to tell you exactly where they are.

Senator BAUCUS. At this point, there are no appropriations allocated for that; is that correct?

Ms. AREEN. There has in fact been money appropriated specifically for the notice system. As to the computerized legal research system, yes, there is one that Justice operates at present. There is also one operating in the Deprtment of Defense. Funds are available now.

What we need to do is coordinate the two systems and expand the data base.

Senator BAUCUS. Why hasn't OMB insured that submissions to the Congress include a funding request for this?

Ms. AREEN. As I said, we are presently paying for the system now in operation. We are working with the Justice Department to work out the specifics of expanding the system, and when the details have been planned we will request whatever additional funding is appropiate.

Senator BAUCUS. As I understand it, the PRP study indicates that more than 70 percent of all Government agencies and departments have never participated in any working group to discuss legal matters of mutual concern.

What, in your view, has contributed to this lack of dialog and lack of exchange of information and ideas?

Mr. WELLFORD. That question tempts me to philosophize on the tunnel vision of many agencies in carrying out their missions, but I will forbear doing that and ask Judy to respond in terms of the response we got on the questionnaires.

Ms. AREEN. A great deal of the lack of communication in the legal system reflects the traditional distinction between the executive branch and independent agencies. When you look at statutory allocation of litigation authority, most of the statutory allocations are to independent agencies. They operate independently, not only in the sense of coordinating legal operations, but in other operations as well. Nonetheless, we are very encouraged, having attended the first meeting of the Council that is set up by Executive order, to learn there is not only great interest, but great cooperation being shown by these independent agencies at the opportunity to sit with executive agencies and talk about problems of mutual concern. These problems involve not just litigating, but other issues that may seem mundane, although in the long run they are not, such as how well is government making use of paralegals? What incentives can be developed to keep our very best attorneys in the Government? Too often, not just because of greater opportunities for compensation outside of Government, but because of conditions and other nonmonetary reasons, we lose our very best and most senior litigators.

This is a problem that cuts across that traditional gap between executive branch and independent agencies.

Senator BAUCUS. What was the date of the Executive order we are talking about here?

Ms. AREEN. July 18, 1979.

Senator BAUCUS. 1979?

Mr. WELLFORD. Yes.

Senator BAUCUS. What date did the Attorney General convene the first meeting of the Federal Legal Council?

Ms. AREEN. It was January 17, 1980.

Senator BAUCUS. Is it your view that the Department of Justice has moved expeditiously to implement that order? That seems like quite a gap in time to me.

Mr. WELLFORD. It takes some time to set up a Council like this. I think the cooperation that we have gotten from the Justice Department has been excellent this year. I also think everybody is moving in good faith to carry out the provisions of the Executive order and to try to realize the mission of the Council.

Ms. AREEN. We were particularly pleased that the Attorney General chaired the first meeting and indicated he would personally chair the Council. That kind of senior level attention is generally more important than how often the group meets.

Senator BAUCUS. Mr. Ned Slaughter is Special Assistant to the Attorney General.

What is your understanding of the relationship between Mr. Slaughter and the Federal Legal Council and its notice system?

Mr. WELLFORD. I think Mr. Shenefield is in a better position to answer that than we are.

Judy, do you want to comment on that specifically, or not?

Ms. AREEN. My understanding is that he does serve as Special Assistant to the Attorney General in this area, and the Attorney General in turn chairs the Council. I think that explains his role in terms of his relationship to the Council. Beyond that, I do think that Mr. Shenefield and the Attorney General can best explain his duties.

Senator BAUCUS. Do you see any conflicts in policy objectives there at all, since Mr. Slaughter works for Mr. Shenefield on the one hand and, on the other, it's working on an area that the Council has responsibility for? What is his role with the Council?

Ms. AREEN. He does not have an official role, that I am aware of, with the Council. We do in the Executive order direct the Attorney General to provide staff support to the Council, and I assume Mr. Slaughter's role is part of that obligation.

Senator BAUCUS. One thing that interests me in looking at that order is what the order did not address as well as what it did address.

It explicitly addressed legal disputes involving programmatic and regulatory jurisdiction of agencies. Why did it fail to address disputes involving litigation?

Mr. WELLFORD. Well, we have decided to take first steps first. The whole question of allocation of litigation authority is one that is so controversial, both in the Congress and between the executive branch and independent regulatory agencies, that we felt that it was not fruitful to try to reach for some kind of final decision in the Executive order.

What we are doing now is bringing people together so they can then discuss their problems, and taking a management approach which will respond to the overlap, duplication, and confusion that you have pointed out. This is the right approach for now. We will learn a lot from this process, and if we have to go back and look further at the issue of litigating authority we will be prepared to do that.

Senator BAUCUS. Do you not think that you should start addressing the question of disputes? It seems to me the problem is getting worse and worse, and not one that is resolving itself.

Ms. AREEN. The fact that it is not in the Executive order does not mean that we have not addressed considerable time and attention to it. We certainly have looked into the issue.

As Dr. Wellford indicated in his testimony, we were trying to suggest some of the guidelines we found useful in thinking about the issue. What we have concluded is, even as to the executive branch or administrative delegation, it is not the kind of problem that is solved by sweeping, across-the-board solutions. It is not right to say everything should be litigated outside of Justice, just as we feel it is not right to say everything will in all instances be litigated by Justice. We think the issue of litigation authority has to be looked at with respect to each department and agency, and that negotiation process is underway.

Senator BAUCUS. The Executive order also did not address the question of misallocation of lawyers in one agency as compared with another.

It is my understanding that some agencies are overstaffed with lawyers, and that there is a great need for lawyers in some other agencies.

Why did the order not address the allocation problem?

Ms. AREEN. We did not find that there was a misallocation. We did collect data as to where lawyers were located. We did not find evidence that there is a misallocation at this point.

Senator BAUCUS. In light of the fact that the Federal Legal Council has no authority over independent agencies such as the Securities and Exchange Commission, what role can it play in resolving disputes involving those agencies?

Ms. AREEN. There is only one possible role at this time because the President does not have the authority to order the resolution of those disputes. The Council can encourage consultation and communication. The very fact that independent agencies are sitting with executive agencies and the Attorney General on the Council, we think, is a useful step toward creating an atmosphere in which that kind of coordination can occur.

Senator BAUCUS. What role will OMB play with the Council?

Mr. WELLFORD. We will continue to play the role that led to our role in the study. OMB is the central management agency with a governmentwide responsibility. We will also continue to oversee activities of the Council, to be sure that it is living up to its mandate. Obviously, if more resources are requested as a result of the discussions and reform proposals that may come out of the Council, OMB will be involved in making decisions on that. We will continue to keep our eye on the process, and we will report to the President on how it is performing.

Senator **Baucus**. Are you aware of the Bureau of the Budget Circular No. A99, issued on June 30, 1970?

Mr. **Wellford**. Yes.

Senator **Baucus**. Can you describe the contents of that circular, please?

Mr. **Wellford**. Yes. That circular basically told executive agencies that when they were looking at new legislation, they should include in that legislation provisions giving the Justice Department direction and control of litigation.

Senator **Baucus**. Do you know the current status of that circular?

Mr. **Wellford**. It is still in effect.

Senator **Baucus**. Let me read part of it verbatim. It says:

> Departments and agencies should oppose legislative provisions in pending legislation which infringe on the Attorney General's litigative responsibilities.

My question is: Are you and/or the administration aware that several agencies have been in violation of this order?

Mr. **Wellford**. I am aware that there have been instances where, for overriding reasons, we have agreed that an agency would have litigation authority outside of the intent of the circular.

For example, when we did Civil Service reform in 1978, we established a Merit Systems Protection Board. In the course of negotiating the approval of that Board in the Congress, we did agree that it should have authority that is not contemplated by the circular. We are trying to keep those exceptions down to a minimum, and only do so where, for political reasons or for some other overriding reason necessary to get legislation passed, we had to agree to sanction the exception.

Senator **Baucus**. The content of the order is sound public policy——

Mr. **Wellford**. Yes, sir.

Senator **Baucus** [continuing]. For this administration?

Mr. **Wellford**. Yes, sir.

Senator **Baucus**. If that is the case, do you not think this circular should be brought more emphatically to the attention of these agencies?

Mr. **Wellford**. Well, I think that is in fact being done through the attention that has been brought to the whole Federal legal system through this study, through the Executive order, and now through the Federal Legal Council. I do not think the people are unaware of the circular now.

Senator **Baucus**. Actually, the problem goes further than that. It is my understanding that the administration has supported litigation authority for various Federal agencies for one reason or another, for political reasons, for example. In effect, the order is being violated not only by neglect, but by active efforts on the part of the administration. That seems to be very confusing, don't you think?

Ms. **Areen**. Well, I just wanted to point out that the circular is directed strictly to statutory authority. I think if you examine our records, what you will see is that we have continued the policies exemplified in the circular of opposing, with the limited exceptions that Dr. Wellford has pointed out, the statutory allocations of litigation authority.

On the other hand, we consider statutory authority very different from administrative delegation.

Senator **Baucus**. What about the proposed Energy Mobilization Board?

As I understand it, that bill would give litigation authority——

Ms. AREEN. The Senate bill does not give such litigation authority. The House bill does. It is in conference, and we are awaiting the outcome of that conference. The allocation of litigation authority to the EMB was not proposed by the administration.

Senator BAUCUS. My understanding is that even though the Department has taken a position against that provision the administration has not opposed that provision in the House bill.

Ms. AREEN. We are not in a position to dictate to the conference the outcome of the conference.

Senator BAUCUS. I am not suggesting that you are, but I am suggesting that the administration is not opposed to that provision in the House bill.

Ms. AREEN. There has been discussion that the EMB may present special circumstances for two reasons, (1) it may be a political necessity, and it is important to have legislation completed, (2) the other and more substantive reason is that the EMB will, in some situations, be taking other agencies to court, presumably independent agencies, although in theory, executive agencies too, in order to enforce its authority. In that sense, there is potentially a conflict between agencies Justice would represent and the EMB. There is a quasi-independent function——

Senator BAUCUS. Is that a good idea? It seems to me you are making EMB even more independent than present independent agencies and that sets a precedent for other agencies. The Department of Justice's authority is eroding more and more. I frankly have a hard time swallowing that.

Ms. AREEN. It will come down in the end to balancing the importance of the energy security against——

Senator BAUCUS. Why not shape up the Justice Department and give them the authority? The President does appoint the Attorney General, at least I thought he did. If energy policy is so important, the Attorney General would give it a high priority. There are many ways to skin a cat.

Ms. AREEN. Justice is not being cut out of this picture at all. If you look at what is in the House bill, it does not apply to all litigation conducted by EMB. It would not apply, for example, to litigation at the Supreme Court level. So it would be a limited grant, parallel in many ways to the memorandum of understanding that has been developed with the Department of Energy. There again we have said, as a substantive matter, it may make sense to have some dispersal of litigation authority where you can develop real expertise in a particular area in an agency.

Senator BAUCUS. Isn't it true that politics is a major factor involved in the decision to negotiate a memorandum of understanding between, the Justice Department and the Department of Energy, rather than enacting a statute giving litigation authority to DOE?

Ms. AREEN. Politics is clearly part of this, yes.

Mr. WELLFORD. I think if you look at any element of national energy policy that has been before various Congresses in the last few years, no one would suggest that substance alone determines things.

Ms. AREEN. We are still trying to keep up with conference decisions. One decision the conference has made tentatively is that two of the three members of the Board will in fact be independent appointments, so they have created an agency that is in part an independent agency. If that is the final congressional decision, then it is consistent with decisions made as to other independent agencies to give them some of their own litigation authority.

Senator BAUCUS. It seems to me, though, that the administration could and should back up the Justice Department.

I was a little concerned, Dr. Wellford, that in your opening statement you said that Congress should not enact legislation which would effect litigation authority. It is not the first time that I have heard somebody from the administration say that they do not want to be told what to do by Congress.

Still, the problem is getting worse. This last discussion we have had about EMB indicates the kinds of problems that arise.

We have a system of checks and balances. We in the Congress are accountable to the people. I think the public is getting more and more confused when it sees various Federal agencies litigating against one another. The public does not care whether an agency is an executive agency or independent regulatory agency. It does not make any difference to them. I tend to think they are right.

Do you not think it is sound public policy, in our democratic system of government, for Congress to prescribe some way to resolve this issue rather than leave it entirely up to the executive branch?

Mr. WELLFORD. Well, I understand your concern. It is one that we share, and we have spent a lot of time thinking about it.

I think that the premise, though, of your approach needs examination.

In the old days, I think the courts tended to look to litigation specialists, and in doing so, would have been more sympathetic to having the Justice Department, as the Government's special litigator, control and direct the whole process. I think that more recently we need to look at areas that are highly technical, highly specialized, and have a high science component, where it may be that it is in the interest of the courts to have the special expertise that, for example, energy lawyers, who work with these matters all the time, can bring to these problems before them.

What I am saying is not that the system is perfect, obviously, but that these public policy problems are becoming so complex, so technical, that we need to retain administrative flexibility in deciding what is the proper allocation of litigation authority. I think that while Congress may perhaps be able to come up with a system of guidelines that is helpful, you need to be careful that you do not straitjacket administrative flexibility to such a degree that the Attorney General cannot make his allocation decisions in a way that keeps this technical expertise problem is some kind of proportion.

Senator BAUCUS. That is right. It is finding a balance between anarchy and some dictatorial, tyrannical imposition under the administration. You are right. It demands a continual reexamination and refocusing; but Congress does play a role. Perhaps we should pass very loosely defined guidelines at this point and keep reexamining the administration's effort at resolving this issue. If they aren't adequate, then perhaps we should provide stricter guidelines.

Both of us have to work at it.

I want to thank you very much for your testimony this morning.

Mr. **Wellford**. Thank you, Mr. Chairman.

[The prepared statement of Mr. Wellford follows:]

Statement of Dr. Harrison Wellford

Mr. Chairman and members of the committee: I am pleased to be here today to discuss the Federal Legal Council, and other important management improvements that have been made in the legal system of the Federal Government by President Carter in Executive Order No. 12146, which was issued on July 18, 1979. With me is Judith Areen, the General Counsel of the President's Reorganization Project, who directed the reorganization study that culminated in Executive Order 12146. We are very pleased with the interest this Committee has shown in our efforts to improve the Federal legal system, and have benefitted from the thorough and imaginative work you have devoted to the subject. We look forward to continuing to work with you in the future in this important area.

President Carter, in August of 1977, directed the Reorganization Project to make a comprehensive study of the Federal Government's legal system. This was the first comprehensive review of the system conducted in more than 20 years, when the Hoover Commission completed its 1955 report on legal services and procedures. In his memorandum for heads of departments and agencies announcing the study, the President stated:

"This study is designed to improve the way governmental units use the legal resources at their disposal, which include their own legal offices and the services of the Department of Justice, including United States Attorneys. Better use of these resources should help prevent unnecessary litigation and administrative delay by enabling the Federal Government to do a better job of complying with its own rules and regulations. A second objective is to improve the way litigation is conducted in order to ensure better and more uniform application of the law."

To carry out the study, staff was drawn from the legal offices of seven Executive departments and agencies and three of the independent regulatory commissions as well as the private sector. Questionnaires were developed and sent to lawyers in the litigating divisions of the Department of Justice, all U.S. Attorneys, 133 agency general counsels and 334 agency legal offices around the country. More than 95 percent of the questionnaires were returned. The resulting data covered some 86 percent of the 14,387 lawyers performing civilian legal work for the Federal Government at the time of the study.

In addition to the questionnaires, the reorganization staff conducted scores of personal interviews with lawyers and officials in 11 departments, 18 Executive agencies and 15 independent regulatory commissions both in Washington, D.C. and in New York, Texas, Illinois, South Carolina, Washington State and California. Federal judges and private lawyers were interviewed as well.

The information collected by the study staff was used to prepare an initial options paper on improving the government's legal system. That options paper, issued on March 24, 1978, was widely circulated both inside and outside the government for review and comment.

Final recommendations were then made to the President. His decisions on improving the system were implemented in Executive Order 12146, which was issued on July 18, 1979.

Before discussing the Executive Order, I would like to highlight for you some of the more interesting data collected by the Reorganization Study staff.

In 1954, there were 6,735 non-military lawyers working as lawyers in the Executive branch. By April of 1977, there were 14,387. Of these, 3,608 or 25.2 percent were employed in the Department of Justice. The other agencies with significant numbers of attorneys include the Department of Defense with 1,610 (11.2 percent), the Department of the Treasury with 1,224 (8.5 percent) and the National Labor Relations Board with 963 (6.7 percent).

Departments and agencies report that most of their legal personnel (42 percent) spend their time on administrative law activities or on counseling and other traditional legal activities other than litigation. Nevertheless, almost one-third of their personnel is involved with litigation either directly (18 percent) or in coordinating cases with lawyers in the Department of Justice (12 percent).

While it is true that the absolute number of cases filed in court has increased more than the number of lawyers employed in the Department of Justice since 1955, the percentage change in the number of lawyers in the Department has been significantly higher (130 percent by 1978) than the percentage change in the number of cases (45 percent by 1978). Total civilian employment in the Executive branch rose only 19 percent during this same period.

In our judgment, the most sensible course for the future is to look to increases in the quality and productivity of our lawyers and their support systems rather than increases in the total numbers of lawyers to keep pace with the obviously increasing workload.

Our study results produced cause for concern on several points. For example, unlike the private sector, where firms in 1976 were employing roughly 13 paralegals for every 100 lawyers, the government, on the average, employed only 6 paralegals for every 100 lawyers.

Similarly, there is no government-wide system of computerized legal research available to support the work of our lawyers. Finally, there are now 29 departments and agencies with statutory authority to conduct some or all of their own litigation without even notifiying other agencies that will be affected by the outcome of such litigation.

These points of concern were addressed by President Carter in the Executive Order issued this past July. While much of that order is self explanatory, I would like to highlight some of the important management reforms it contains.

First, Executive Order 12146 establishes a litigation notice system that will for the first time make it possible to monitor and, at least for Executive agencies, coordinate the litigation conducted by different departments and agencies. Equally important, the notice system will for the first time make it possible for one agency to know that another is litigating on an issue of mutual concern, thereby reducing duplicative legal work. The Executive Order directs that the notice system will be established and maintained by the Attorney General. All agencies are to be provided with reasonable access to the information collected in the system. While a manual system may be the most efficient initially, we envision placing the system on a computer basis in the near future because the more timely the system, the more useful it will be.

Second, the Executive Order addresses the problem of two Federal agencies litigating against each other in court. Such litigation is not only confusing to the judiciary, (as to who speaks for the government) but costly for taxpayers (who pay for attorneys on both sides of the litigation). The Executive Order directs Executive agencies to submit such disputes to the Attorney General rather than to the judiciary. Other agencies are encouraged to also use this dispute resolution procedure.

Third, the Executive Order takes up the problem of providing adequate access to a computerized legal research system for all Federal offices by directing the Attorney General, in coordination with the Secretary of Defense and other agency heads, to provide such a system, and to make sure its data base includes such useful information as regulations and case briefs as well as court decisions.

Let me emphasize that at a time of concern about government regulation and particularly about conflicting regulations, automated access to such a data base has the potential of drastically reducing both conflicts in regulation and duplicative legal work.

This part of the Executive Order in the long run may prove to be one of the most important reforms it contains if it really does move thousands of lawyers out of the horse-and-buggy process of laborious searching by hand for regulations on a particular point to the twentieth century of instant data retrieval on a computer terminal.

Fourth, the Memorandum to Executive Departments and Agencies that announced the Executive Order moved the Legal Education Institute from the Office of Personnel Management to the Department of Justice. This reorganization was designed both to highlight the importance of adequate advanced training for government lawyers and to enhance the usefulness of the training provided by placing it in the main legal arm of the government.

Fifth, the Executive Order established the Federal Legal Council, an organization of representative general counsels, chaired by the Attorney General, which is intended to foster coordination and communication among Federal legal offices, and to work on problems of mutual concern that are beyond the capacity or authority of individual agencies to resolve. In addition, the Council can assist the Attorney General in carrying out the duties assigned to him by the Executive Order.

You have aked for our views on S. 2401. To the extent it implements Executive Order 12146, we understandably agree with its objectives. S. 2401 also raises the issue of the allocation of litigation authority, so I would like to turn my attention to that issue.

The debate about which agencies should be authorized to conduct their own litigation, and which directed to use the Department of Justice is hardly a new one. For one thing, the Department of Justice was not even created until 1870, long after solicitors had been established in the Departments of the Treasury, Navy, War, State and the Post Office. Since 1887, when the Interstate Commerce Commission was established, it has handled much of its litigation in lower courts. The pattern of decentralized litigation authority was briefly reversed in 1918, when President Wilson issued an Executive Order placing all solicitors and other law officers under the authority of the Attorney General. By 1928, the Attorney General reported that only 115 of the 900 legal positions in Executive departments and agencies were even nominally under his control.

President Franklin Roosevelt issued an Executive Order in 1933 that was intended to centralize all litigation authority in the Department of Justice. But in 1934, the SEC was established and authorized by Congress to conduct its own litigation. Similar authority was granted to the NLRB in 1935.

We believe several points should be kept in mind in making judgments about the optimum allocation of litigation authority. First, it is helpful to address separately the issue the authority granted to Executive departments and agencies and the authority granted to independent regulatory commissions, and government corporations because litigation authority is directly tied to the question of the dependence or independence of the commissions and corporations.

We also believe the issue of delegating litigation authority within the Executive Branch is so complex that it needs to be handled administratively rather than prescribed in detail by statute. We are pleased, therefore, to see that S. 2401 does not propose statutory changes. Coordination of the government's litigation will clearly be enhanced by leaving existing statutory authority in the Attorney General.

This is not to say that all Executive litigation should in our view be conducted by Justice Department lawyers. On the contrary, a number of Executive departments, on a case-by-case basis, conduct some of their own litigation now either as cocounsel with Justice Department lawyers, or entirely on their own. In addition, several departments (including Labor and Energy) now conduct some of their litigation pursuant to written administrative delegations made in the form of Memoranda of Understanding. Such administrative delegation, in appropriate instances, can take advantage of the specialized subject matter knowledge of agency lawyers, particularly in cases that do not involved matters of government-wise significance.

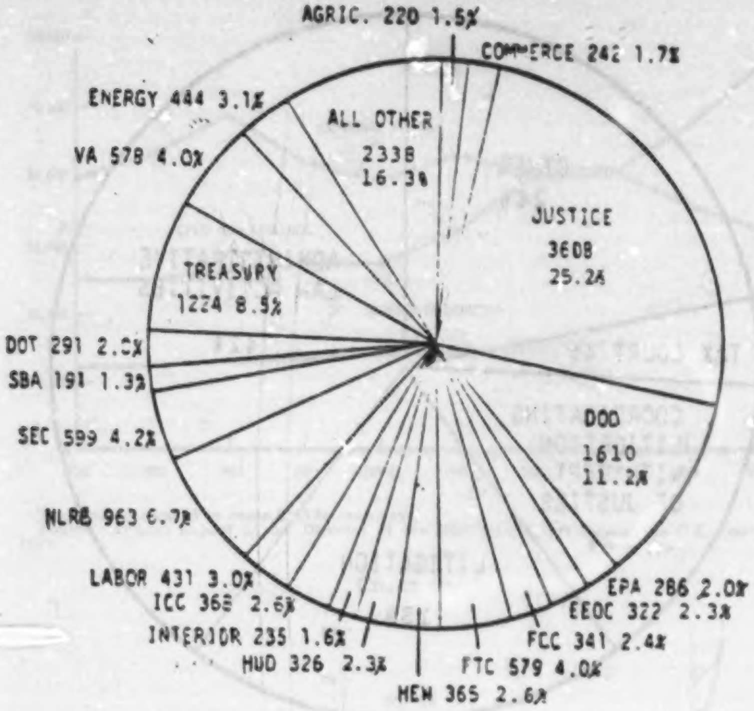
The issue of when such delegations should be undertaken either in a single case or for a category of cases, is a complex one. It requires a careful balancing of such factors as the size and quality of an agency's legal staff, their ability to litigate cases outside of Washington, the level of the court involved, the nature of the case or cases at issue, and any cost involved in shifting litigation authority from one agency to another (including loss of expertise, start-up costs, etc.). We urge this Committee to leave this difficult balancing to the President and the Attorney General.

Let me conclude by observing that in our view, the most important changes needed to improve the quality of legal work in the Federal Government are changes in the management and support systems. While these changes are not as dramatic as shifts in statutory litigation authority, they are the only ones that in the long run will make a significant difference. This is why President Carter focused on managerial and organizational changes in Executive Order 12146, and why the Federal Legal Council was established.

Thank you for the opportunity to appear today. I would be happy to answer any questions you may have.

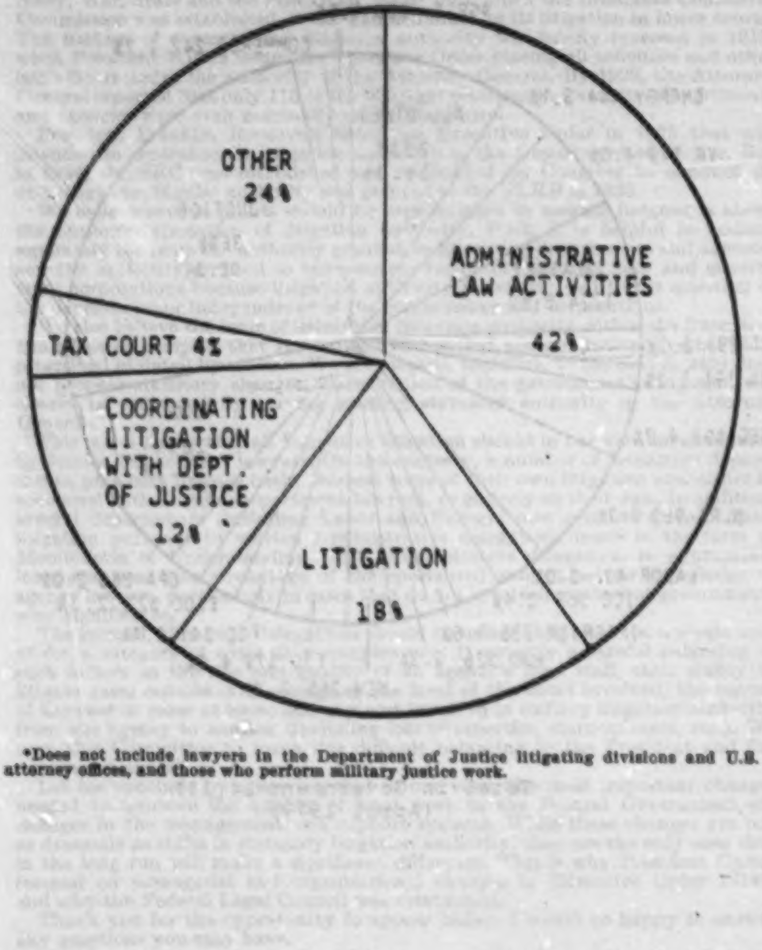
[Charts referring to data collected by the reorganization study are on file with the committee:]

CHART 1.—Location of lawyers in the Federal Government



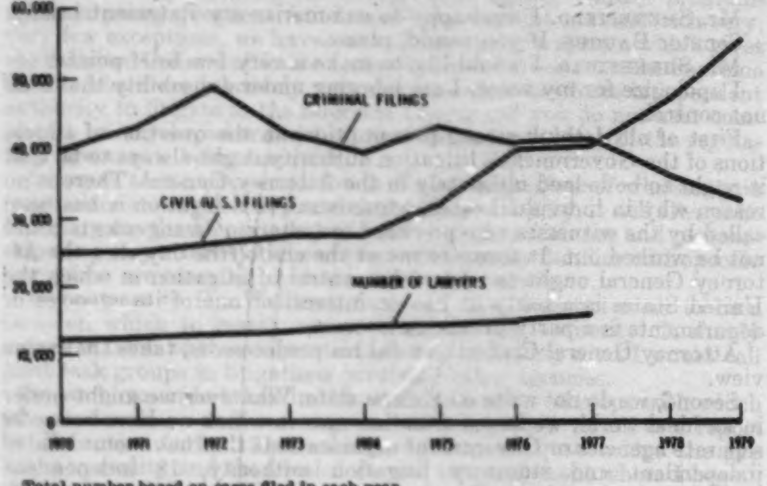
Total in Government 14,387
(April 1977)

CHART 2.—Principal activities of Department and agency lawyers



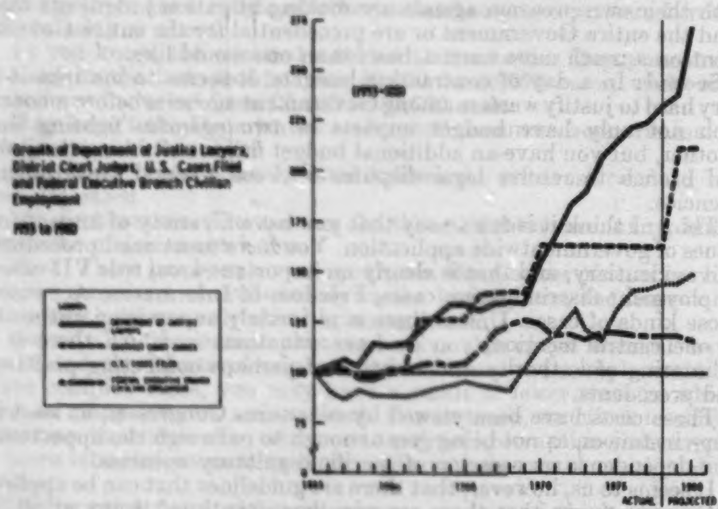
*Does not include lawyers in the Department of Justice litigating divisions and U.S. attorney offices, and those who perform military justice work.

CHART 3.—Growth in lawyers compared to growth in cases involving U.S. Government in Federal court



Total number based on cases filed in each year.
Source: Annual Report of the Director of the Administrative Office of the U.S. Courts, 1977.

CHART 4



Senator BAUCUS. Our next witness is Mr. Shenefield, Associate Attorney General.

Mr. Shenefield, we are very delighted to have you here. We have your statement and it will be included in the record.

STATEMENT OF HON. JOHN SHENEFIELD, ASSOCIATE ATTORNEY GENERAL

Mr. **Shenefield.** I am happy to summarize my statement briefly.

Senator **Baucus.** If you would, please.

Mr. **Shenefield.** I would like to make a very few brief points.

I apologize for my voice. I am laboring under a disability that I do not control.

First of all: I think strong presumptions in the question of allocations of the Government's litigation authority ought always to be that it ought to be lodged ultimately in the Attorney General. There is no reason why in individual cases, administrative delegation it has been called by the witnesses who preceded me, sharing arrangements could not be worked out. It seems to me at the end of the day that the Attorney General ought to undertake control of litigation in which the United States is a party or has an interest or one of its agencies or departments is a party or has an interest.

Attorney General Civiletti, as did his predecessors, takes that same view.

Second, we do not write on a clean slate. Whatever we might prefer in an ideal world, we face a situation now in which we have some 29 separate agencies or Government organizations that have some kind of independent and statutory litigation authority, 18 independent commissions, boards or Government corporations, and 11 executive branch departments or agencies.

It seems to me that that has its costs, and we are simply to account for them and recognize them. We do have situations in which agencies with their own program agenda are making litigation judgments that bind the entire Government or are precedential for the entire Government on a much more narrow basis than one would like.

Second: In a day of contracting budgets, it seems to me that it is very hard to justify warfare among Government agencies before a court. You not only have budget impacts of two agencies fighting one another, but you have an additional budget impact of asking the judicial branch to resolve legal disputes between Federal Government agencies.

Third: I think it is fair to say that you have a variety of impacts on issues of governmentwide application. You have mentioned procedural and evidentiary, and that is clearly an important area, title VII cases, employment discrimination cases, Freedom of Information Act cases, those kinds of cases. Unless there is ultimately supervising authority in one central location, you do have situations in which there is a splintering of authority and creation of perhaps conflicting positions and precedents.

Those costs have been viewed by successive Congresses, at least in some instances, as not being great enough to outweigh the importance of independence on occasion of specific regulatory agencies.

It seems to us, however, that there are guidelines that can be applied.

It seems to me that there are very few situations, if any at all, in which in an ideal world the Attorney General would not control litigation for executive branch departments and agencies.

Also, it seems to me that there ought to be very few cases, if any at all, in which the Attorney General does not control even independent regulatory agency litigation as to those issues which are of governmentwide impact, such as the items I mentioned.

Third: I can see justification on occasion, particularly on occasions where there is historic rivalry between executive branch and independent regulatory agencies for having some agency control programmatic or policy questions, but I would like to point out that with very, very few exceptions, we have not suffered under a system which gives the Solicitor General ultimate authority for submissions to the Supreme Court. There are relatively very few agencies that have independent authority to litigate in the Supreme Court, and you do not hear complaints on any broad scale at all that the independence of the regulatory agencies is being trampled.

It seems to me also—and this is No. 4—regardless of whether you lodge ultimate supervisory and controlling authority, it will always be necessary for the Department of Justice to get assistance and partnership of agency attorneys who are more technically familiar with specific facts, who are more highly trained in special areas.

In contrast to Dr. Wellford, however, that does not seem to be a basis on which to justify removal of litigation authority. It simply argues in favor of the pragmatic necessity of having what I would call joint task groups in litigations involving other agencies.

So we have undertaken in this world a number of steps with which you are familiar—and we can go into this in greater detail as a report on Executive Order 12146—which do something to bridge the gap between reality and the ideal. I do end this statement where I began; that is to say, I think the central and crucial element in this whole equation is reposing ultimate authority in the Attorney General.

Thank you.

Senator Baucus. Before we go into the general subject of this hearing, there are a couple of other somewhat minor matters I would like to ask you about.

As you know, the criminal caseload at the Justice Department decreased in the last decade from 40,000 to 30,000 cases, while civil suits have increased from 25,000 to 55,000 cases.

Why hasn't the Department reallocated resources from criminal to civil in view of this shift?

You know better than I, but I believe the antitrust caseload has also decreased.

Mr. Shenefield. The reasons for those statistics are many, but I think the major ones are two.

First: There has been a vast upsurge in the number of laws providing for some sort of civil remedy in the last 5 years, the impacts of cases which we are only now beginning to see.

Second: To the extent that successive Attorneys General have redirected the efforts of criminal enforcement from simple cases to more complex cases, you may have a result of fewer cases in which just as many lawyers are involved. For instance, an effort to direct attention to white-collar crime or to political corruption just simply is more labor-intensive than bank robbery cases or stolen automobile cases.

On the other hand, the point of your question, I think, is exactly correct, which is, there should be a reallocation of resources, and that is ongoing.

Senator Baucus. Are you aware, too, that the Civil Division itself has a backlog of between 5,000 and 8,000 fraud matters?

Mr. Shenefield. I am. That is down, as I understand it, from a backlog of about 8,000 last August.

Senator **BAUCUS**. I also understand that due to insufficient retrieval and data processing systems, the Department does not really know whether the value of these cases is either a billion or half a billion dollars. The estimates are extremely varied. Isn't that a problem as well?

Mr. **SHENEFIELD**. There is not only a problem on the extent to which those judgments are being collected, but we have two things here. We have fraud cases on the one hand and judgments, fines, and penalties that are uncollected, and then a final problem, the extent to which and how they are accounted for. All of those are problems in the sense that we are not sufficiently aware of what the reality is. To take one example, it may well be—but there is very little money outstanding in the area of judgments and penalties—it may well be that those amounts are being well collected. We do not know, and the accounting system is not adequate as of this point to tell us.

Senator **BAUCUS**. You are taking steps to remedy that?

Mr. **SHENEFIELD**. Yes, sir; we are.

Senator **BAUCUS**. I am interested, too, in the process which the Justice Department decides whether or not to defend a statute that it considers unconstitutional. Isn't it the obligation of the Justice Department to defend the constitutionality of statutes enacted by Congress or should Justice make its own independent determination?

Mr. **SHENEFIELD**. That is an extremely difficult question. A determination not to proceed is extremely rare, for obvious reasons. If the process is one by which the lawyers, if there is an agency involved and also lawyers of the Attorney General do the best and hardest thinking they possibly can, and only in cases where there is an overwhelming—I use that word advisedly—argument that a statute is unconstitutional, and especially in areas of civil liberties, that is one area where we are most chary pressing very marginal arguments, will the Attorney General decide to step back from a particular statute.

Congress has wisely provided that even in those cases, the statute will have adequate court trial by means of special legal counsel.

Senator **BAUCUS**. In how many instances in the past 5 years has Justice refused to defend a statute because, in the view of the Department, it was unconstitutional?

Mr. **SHENEFIELD**. I cannot give you that figure exactly. I will be happy to provide it for the record. I am only aware of one.

[Material referred to above are on file with the committee.]

Senator **BAUCUS**. Which one was that?

Mr. **SHENEFIELD**. That is the League of Women Voters case.

Senator **BAUCUS**. Would you describe that briefly, please?

Mr. **SHENEFIELD**. Yes.

There is a provision of law—I cannot recite the statutory section to you—that in effect provides that no noncommercial television station shall editorialize. Obviously, that raises serious first amendment questions. One therefore has to subject the statute to what is called the strict scrutiny test; that is to say, incursions into first amendment freedoms are subject to strict scrutiny on the basis of compelling Government justification. One looks at the Government justification and, in this case, the one that is most often suggested is the desirability of not having editorial comment, political comment on one side or another of the issue, supported by the Federal Treasury.

Senator **Baucus**. Should not the courts decide which test to apply? I assume in this area of civil liberties the Supreme Court would apply a very stringent test. Should that not be the prerogative of the court rather than the Justice Department?

Mr. **Shenefield**. Well, I think the strict scrutiny test is the test the courts would apply. We do not make up our standards. We try to determine under law what the court would apply, whether there is any argument or whether it is marginal or how marginal it is, and that is what happened in this case.

Senator **Baucus**. It seems to me that whenever Justice decides not to defend a statute on the basis of unconstitutionality, Justice is, in effect, placing itself in the role of a second legislative body.

Mr. **Shenefield**. I concede the force of the argument. The argument on the other side is, once a prosecutor or Government lawyer has decided—and there is very little argument that the particular statute is without constitutional basis or that it is unconstitutional, do you really want your Department of Justice lawyers defending that statute? You have got adjustment, it seems to me, of two conflicting duties, duties to defend and carry out laws on Congress on the one hand, and on the other, the duty of anybody not to act in what they think is clearly an illegal way, particularly when there is an alternative mechanism to test the statute, it may well be that there is no harm lost, no harm in that.

Senator **Baucus**. What is the alternative mechanism?

Mr. **Shenefield**. As I understand it, the Senate has created a counsel who is able, and in this case has undertaken, to appear and provide the defense of the statute.

Senator **Baucus**. But generally, it is up to the courts to decide whether a statute is constitutional or not.

Mr. **Schenefield**. That is correct.

Senator **Baucus**. And it is up to the executive branch to enforce the laws that the Congress passes.

Mr. **Shenefield**. That is generally correct.

Senator **Baucus**. Moving onto another matter, how high a priority does the Attorney General place on activities of the Federal Legal Council?

Mr. **Shenefield**. I think he places it as a very high priority.

Senator **Baucus**. I am asking because you will recall I asked a similar question of Dr. Wellford and asked about the delay in implementing the Executive order. I am curious as to why the first meeting was held so long after the Executive order had been issued.

Mr. **Shenefield**. I think the Attorney General has a clear awareness of the problems of adjusting and harmonizing and organizing legal representation at the Federal Government level, like his predecessor, who felt very strongly about it. I think the major explanation for what might seem to be some delay is that almost every actor in this situation changed during that period of time. There was a new Attorney General, new Associate Attorney General, new head of the Civil Division, and I think that accounted for substantial delay.

Senator **Baucus**. How many positions were allotted and how much have you allocated to the Council thus far?

Mr. **Shenefield**. The Federal Legal Council?

Senator **Baucus**. Yes.

Mr. **Shenefield**. My recollection is that there is approximately $100,000 in the budget for the Federal Legal Council, which is distinct from the litigation notice system, which is also distinct from the organization of computerized research, but my memory on that is not clear. I would like to supply that for the record.

Senator **Baucus**. The figure I have is $170,000 as of March 1.

How many positions?

Mr. **Shenefield**. I cannot give you the number of positions. I believe it is, for all of the three functions I have mentioned, approximately 23.

Senator **Baucus**. It is my understanding only two positions have been filled, and of the $170,000, only $2,000 has been spent.

Mr. **Shenefield**. I am not in a position to answer that.

Senator **Baucus**. If you could get that information for the record.

Mr. **Shenefield**. Be glad to.

Senator **Baucus**. Could you describe for the committee your view of the significance of the proposed litigation notice system?

Mr. **Shenefield**. Yes.

The significance is that up to this point it is possible for an agency to be involved in litigation with impacts that go beyond that agency, without other agencies in Government and without the Attorney General necessarily having any knowledge.

This notification system is designed to prevent that being able to occur.

Senator **Baucus**. Am I correct that of the $390,000 appropriated and 18 positions designated for the litigation notice system, only two positions have been filled and only $17,000, to date, has been spent?

Mr. **Shenefield**. I am not in a position to quarrel with those figures. I think that is probably about correct.

Senator **Baucus**. Could you supply that for the record?

Mr. **Shenefield**. Sure.

[Material referred to above is on file with the committee.]

Senator **Baucus**. If it is true, why has there been so little progress thus far? What would the reason be?

Mr. **Shenefield**. I do not know that there is any very good reason for it. The process of harmonizing the relevant tracking system is a fairly complex one and simply requires negotiation. Once the system is set up, then hiring will take place. Position descriptions for two or three have been written. Hiring is underway; and it seems to me that is entirely logical. You would not hire 20 people and then decide what system you are going to use. You would try to do it the other way around.

Senator **Baucus**. Would you describe what Mr. Slaughter's responsibilities are and how his responsibilities will relate to the Federal Legal Council?

Mr. **Shenefield**. Yes.

You being with the fact that he is Special Assistant for Litigation to the Attorney General. He works with me in my office, and he has broad responsibility for litigation matters across the Department, not so much individual cases as methods of handling and tracking litigation. The Federal Legal Council's responsibility verges on Mr. Slaughter's responsibilities in a couple of ways.

First of all, he is concerned with how to improve coordination of efforts between the Department of Justice and other agencies, client agencies we call them, and that is also something the Federal Legal Council has to do. The litigation notice system, the legal research, computerized legal research system in all of those functions, either part of the Federal Legal Council or related to it, are matters to which his personal attention is directed. He is in effect a Special Assistant to the Attorney General, who is required and has been ordered, directed to undertake firsthand responsibility for these matters.

Senator **Baucus**. Questions similar to those involving the Federal Legal Council can be asked with regard to the Legal Education Institute. I wonder if you can tell me how you view the Legal Education Institute, how much attention you have given to it, and just generally what its status is.

Mr. **Shenefield**. Its status is that it has been assigned to the Attorney General's Advocacy Institute with something called Legal Education Office of the Justice Management—I am sorry—Legal Education Office, which is under the Deputy Attorney General and does not report to me.

I am advised, however, it is under the executive office of the U.S. attorneys, to be specific. I am advised that they are trying essentially to do two things, one of which is to reinstitute classes and courses that were found to be good, welcomed by client agencies government-wide earlier, under the Office of Personnel Management, Civil Service Commission, and try to develop new courses responsive to new needs. Those new needs are being discovered as a result of a survey of all agencies: What is it that you would like to see this institute offer? That survey, I think, is on the way.

Senator **Baucus**. I understand again that out of a sizable appropriation, in this instance, $960,000, and 14 positions, only $22,000 has been spent and only 3 positions filled. Can you tell me why this is the case?

Mr. **Shenefield**. I do not know precisely why. I think, again, it is a question of transition time that will be followed by full implementation of the President's order.

Senator **Baucus**. But do you think that the full amounts will be spent and the positions filled? How important a function is the Legal Education Institute?

Mr. **Shenefield**. It is a very important function. It is very popular with the other agencies of Government. We see it as an important function. I cannot tell you whether all the money will be spent. We are going to try not to waste any.

Senator **Baucus**. Obviously, if the money is not spent before the end of this fiscal year, it might not be available, either this year or next.

Mr. **Shenefield**. Correct.

Senator **Baucus**. I understand that the Federal Legal Council decided not to address the issue of litigation authority. Could you tell me why?

Mr. **Shenefield**. The Attorney General suggested that it was a difficult and highly contentious issue, that it was well to build on the base of the Federal Legal Council step by step, that there were things that could be done without disrupting the Federal Legal Council the first day that it met, and that we ought to proceed with those things under which common ground was possible.

I think we have to realize that on those issues of ultimate legal responsibility for litigation, there simply always will be some tensions. It is not going to be possible for the Council to impose agreements.

Senator **Baucus**. You seem to disagree with Mr. Wellford, who felt that the Council should stay away from that issue. Do you feel that even though there will always be some tension, even though the issue is complex and complicated, it should be addressed?

Mr. **Shenefield**. I think that as the Federal Legal Council becomes an operating mechanism and gets into the habit of cooperation, there may be cases in which it may be useful to turn attention to this question. To raise it at the outset in the form in which it would have had to be raised, that is a general and conceptual matter and would, I think, have doomed the whole effort to failure and would have been regarded as bad faith on the part of the Attorney General.

Senator **Baucus**. How are we going to resolve it? Are you merely going to keep talking about it? Do you need some carrots and sticks? Does the Council need a few incentives?

Mr. **Shenefield**. We are talking now about allocation of legal authority, legal representation authority?

Senator **Baucus**. I am talking about the general question of allocation of litigation authority. How are we going to resolve it?

Mr. **Shenefield**. I think you will never be able to entirely resolve it because of political realities of his situation. If we were dealing with an ideal world, I think I have the solution to the problem, but we are not in that ideal world.

I think the beginning of the resolution is with people who write the laws that remove litigation authority that——

Senator **Baucus**. We have a question of semantics here. What do you mean by resolution? "Resolution" could be a hard and fast rule with no exceptions, or it could be some agreement that in certain instances Justice litigates and in other instances client agencies litigate.

Do you feel that the present system is proper, that it works, that it cannot be improved upon? Or do you feel it can be improved upon?

Mr. **Shenefield**. No. It can be improved on.

Senator **Baucus**. That is the definition of "resolution" I am seeking, some common agreed-upon approach to the issue.

Mr. **Shenefield**. Well, "agreed on" is a different part of the solution. I think to the extent that there is mandatory shared responsibility, either in the form of statute or administrative delegation, the problems can generally be worked out.

To give you an example, between the Department of Justice and—I use the example of the Federal Trade Commission just because I am most familiar with it—there is a clearance procedure.

The clearance procedure necessarily implicates basic interests of the Antitrust Division and the Federal Trade Commission. Over the last 3 years, I am not aware of any serious dispute, once adequate leadership was given from above. Staff are told not to engage in turf battles, and when there is a difficult situation the leadership of both agencies sit down to resolve them.

In areas where there had been a decision as a matter of statute to take litigation authority and put it one place or another, the question was answered, and we did not have any disputes to resolve. We do have a good bit of unhappiness on the side that did not wind up with litigation authority. We do have constant struggle. The Energy Mobilization Board is a good example. There is constant struggle for agencies to get their own litigation authority.

I understand it. Were I a general counsel at one of those agencies, I would probably be doing the same thing. It makes their life easier and you hire better lawyers, probably, and it is much more romantic, at least outside of the courtroom, to be in the courtroom.

On the other hand, there are real costs.

As representative of the Department of Justice, I come down strongly in favor of strong presumptions when you are writing statutes, in favor of lodging that responsibility with the Attorney General; and there are all kinds of good reasons to do it.

Senator **Baucus**. To what extent should the Department delegate litigation authority by the use of memoranda of understanding? You come down on the side of a strong presumption in favor of DOJ litigating authority, yet the Department goes out and negotiates memoranda of understanding.

Mr. **Shenefield**. I think use of memoranda of understanding is a very difficult one; that its use is usually as a result of a kind of blackmail procedure in which it is kind of a last-ditch effort to avoid some statutory excision or amputation of litigation responsibility. They can work when all the parties are willing to live up to them and to enforce provisions within their own agencies with great energy. I myself prefer, a sort of shared responsibility without formal delegation; that is to say, lawyers from the agency and lawyers from the Department of Justice working together as a team but with, I may say, the Department of Justice retaining ultimate litigation authority. Certainly, that can work.

Senator **Baucus**. Do you view these memoranda as binding on the Justice Department?

Mr. **Shenefield**. Yes.

Senator **Baucus**. Could you rescind them or revoke them?

Mr. **Shenefield**. I believe we could.

Senator **Baucus**. Have you?

Mr. **Shenefield**. No.

Senator **Baucus**. Any reason why you have not?

Mr. **Shenefield**. I think the same reasons in general which suggested the advisability of their creation are present, and you will always have people who are interested in getting litigation authority. They have their allies in Congress, and sometimes they even have the votes to do so. If you can make a good-faith showing, if you are trying to share responsibility, you are delegating some kind of cases, you can sometimes avoid that far more extreme action.

Senator **Baucus**. Can you briefly describe ongoing negotiations between Justice and the Department of Energy——

Mr. **Shenefield**. Yes.

Senator **Baucus** [continuing]. With regard to that memorandum of understanding?

Mr. **Shenefield**. We have memoranda of understanding, as you know, that attempt to divide, if you will, responsibility as to certain kinds of cases, attempt to facilitate the division, in a particular area of cases, the division of responsibility for particular kinds of cases, meanwhile preserving to the Attorney General the right to decide ultimately actions which implicate enforcement actions or litigation in Federal district courts.

That is one part of the negotiation. That memorandum of understanding, as one would suspect, has given rise to a number of tensions, disappointments, allegations of bad faith on one side or another, particularly down the line at the staff attorney level.

The General Counsel of the Department of Energy and I are trying to make that memorandum of understanding a document that works without resulting in a lot of complaints and unhappiness.

Senator **Baucus**. Is it working? Do you like it?

Mr. **Shenefield**. Do I like it?

Senator **Baucus**. Yes.

Mr. **Shenefield**. In the real world, I think it can be made to work. I would rather not live in the real world, but that is not a new feeling.

The second part is important. There are new responsibilities under new statutes for the Department of Justice. I have reference particularly to the environmental area and the Lands and Natural Resources Division. There are categories of cases, particularly the Fuels Use Act cases. The Department of Energy would very much like to be responsible for litigating those and, understandably, the Lands Division wants to do litigation. So we have a whole new issue that is in negotiation. Whether or not it will involve delegation, I cannot now say.

Senator **Baucus**. Have either the Justice Department or the Department of Energy delegated any of these cases to U.S. attorneys; that is, any cases that are in the ambit and purview——

Mr. **Shenefield**. The Department of Energy has not, so far as I am aware, and would not. U.S. attorneys are in effect Department of Justice attorneys.

Senator **Baucus**. But has Justice delegated any of these cases yet to U.S. attorneys?

Mr. **Shenefield**. I think I am correct in saying there are some energy cases, energy enforcement cases, that have been delegated to U.S. attorneys, although the Civil Division has remained closely involved. In general, those cases are the larger cases. They are the more sensitive cases, and it would be more likely than not that they would be kept in Washington.

Senator **Baucus**. When Carla Hills was here testifying a short while ago, she stated that the reason the Attorney General negotiates these memoranda of understanding is basically that he was under duress. Is that a fair observation?

Mr. **Shenefield**. I think it is.

Senator **Baucus**. Let me ask you a hypothetical question.

If the Department of Justice entered into a memorandum of understanding with the Commission on Widgets and the Commission on Widgets turned out to be mishandling its litigation, what recourse would the Attorney General have?

Mr. **Shenefield**. He could unilaterally abrogate the memorandum of understanding, and he should. If it is casual or sporadic mishandling, I guess my initial reaction would be to inquire into the matter to see whether it could be changed. If it is institutional or prolonged mishandling, I do not see how the Attorney General can sit still and allow cases to be mishandled in the public's business.

Senator **Baucus**. Let me ask a question about the Energy Mobilization Board.

Is it not true that the administration as a whole has not yet taken a position on that provision in the House bill providing litigating authority to EMB?

Mr. **Shenefield.** I think that is true.

Senator **Baucus.** Is it not true also that during committee consideration of the trucking deregulation bill, the administration as a whole failed to take a position on the provision that would have given the ICC additional litigation authority?

Mr. **Shenefield.** I do not know about the administration as a whole. The Department of Justice was pretty pointed in its view.

Senator **Baucus.** Are you aware of the Bureau of the Budget Circular A99?

Mr. **Shenefield.** No. I heard about it this morning. I think it is a marvelous circular and wish it were better known.

Senator **Baucus.** I am not surprised to hear you say that.

Mr. **Shenefield.** And more frequently adhered to.

Senator **Baucus.** Why do you not circulate it?

Mr. **Shenefield.** I think I will.

Senator **Baucus.** I assume that you and the Attorney General would support it in substance. What efforts are you going to undertake to bring the circular to the attention of the client agencies?

Mr. **Shenefield.** Well, I have not given a whole lot of thought to that, having heard about it this morning for the first time. I do not think it will come as any great surprise to client agencies and other agencies to find out that we support it with enthusiasm. I would like to think about ways in which to persuade people to that position.

Senator **Baucus.** Have you had an opportunity to look at S. 2401?

Mr. **Shenefield.** Yes.

Senator **Baucus.** Do you have any views on it?

Mr. **Shenefield.** I do. I think it is a good, solid step in the right direction. I have one or two observations about it.

Senator **Baucus.** What are they?

Mr. **Shenefield.** One of them is—and maybe it is just a matter of trying to figure out how to do it—but one of them is, as I understand it, there is a requirement that the Attorney General report within 60 days to Congress on any bill that would have implications for the Attorney General's litigation authority. The sheer mechanics of doing that are difficult. I am not sure if it is possible for any Senator to know whenever any such bill is introduced, and it may well be; I just do not know the answer to that—then it would be possible for us to do that job. If there is no line by line computerization of all bills introduced, it may well be difficult.

We would like to be able to know when those statutes are introduced and, if there is a way to do it, we would like to supply you with our comments.

Senator **Baucus.** I do not think there is a computerized line-item process. I do not think the bills introduced go on a computer system, with instant retrieval. There should be.

Mr. **Shenefield.** We would like to try to work with you.

Senator **Baucus.** Are there other ways, though, that the House and Senate Judiciary Committees could be better informed with regard to pending legislation that would affect the Department's litigating authority?

Mr. **Shenefield**. I think it would be highly desirable if there were some rule of the Senate and House that when legislation is introduced and reported to a particular committee for examination that had implications for the Department of Justice in its litigation authority, there was a rule that required the Judiciary Committees to be notified of that. I understand in the past, Senator Eastland and Senator Kennedy and Senator Thurmond have all expressed views that that would be desirable in letters to the majority leader. Whether that has been incorporated in the form of any binding rule, I do not know, but it would be very helpful to have those kinds of procedures in place.

Senator **Baucus**. What about memoranda of understanding? Do you think the provision requiring submission of memoranda of understanding to the House and Senate Judiciary Committees, say 60 days before they go into effect, is proper provision?

Mr. **Shenefield**. I think that could be very helpful, indeed, and through the process of oversight, you would be sure that they were adhered to.

Senator **Baucus**. Then you support that provision?

Mr. **Shenefield**. I think that is a very good provision.

Senator **Baucus**. As you can tell from the tone of my questions, I think it is very important to hear from the Department of Justice regarding its views on pending legislation that affects its litigation authority.

My personal view is that there has been an erosion of litigation authority and that things are out of hand. There are too many instances where the right hand in the executive branch does not know what the left hand is doing. It is causing perceptual problems as well as substantive problems.

On another matter, would you tell the committee under what circumstances you believe the Department should be willing to issue advisory opinions to citizens and businesses concerning whether or not their contemplated conduct would be permissible under current laws?

Mr. **Shenefield**. That is a tough question. I think it is clear that in some areas it is important for citizens to be able to know how the law will be enforced or what, more precisely, what it means so that they can plan being law-abiding; they can plan their activities. There are areas in which it it the general perception—I am not always sure perception is accurate—it is a general perception that the law is, on its face, not entirely clear, and the pattern of law enforcement is not such so as to give the average citizen any basis on which to predict.

The antitrust laws are said to be such laws, and for many years both the Federal Trade Commission and the Antitrust Division have given what are called business reviews or advisory opinions.

As to conduct contemplated; that is, in the future, not yet engaged in, they are willing to state their present enforcement intention. Under the Foreign Corrupt Practices Act, I am advised the Criminal Division has just announced such a scheme of advisory opinions, if you will, in which a businessman can propose a transaction, if you will, or a form of behavior; and as to the Criminal Division, whether its enforcement intention would be to prosecute criminals, and if there are all adequate disclosure, and if everybody is being quite forthcoming, and after investigation—well, I understand under current regulations, the Attorney General has said he is willing to state an enforcement intention.

I should add, in all candor, there is another agency involved in the enforcement of that statute, at least with respect to issuers under the 1934 act, I guess it is, and with respect to those, that dual enforcement, you still might have some confusion, although as a practical matter I would think that would be minimal.

Senator **Baucus**. Does not the issuance of advisory opinions jeopardize the Government's ability to prosecute cases?

Mr. **Shenefield**. I do not think so. At least the standard we always used in the Antitrust Division was one which, by definition, would not result in enforcement. If a pattern of behavior was proposed and, assuming it were true, we would never bring a case in that situation, then it does not seem to me there is any reason why we cannot say that in advance. If it is close, then we would not clear it. I assume the same standard would be applied here.

Senator **Baucus**. All right.

Thank you very much.

Mr. **Shenefield**. I appreciate it.

[The prepared statement of Mr. Shenefield follows:]

STATEMENT OF ASSOCIATE ATTORNEY GENERAL JOHN SHENEFIELD

Mr. Chairman and members of the committee, I am pleased to testify before you today on the Federal Government's ability effectively to coordinate and manage its litigation activities.

I would like first to express my appreciation for the support this Committee has given the Department in our efforts toward that goal. As the Committee is well aware, Attorney General Civiletti, like his predecessors, is committed firmly to the principle that the Attorney General should represent the United States and all of its Executive Branch departments and agencies in any litigation in which the United States is a party or has an interest. We at the Department of Justice believe that the only effective way to coordinate and manage Federal Government litigation is to make the Attorney General responsible for it. As a concomitant benefit, this Committee can then effectively exercise its responsibilities with respect to all federal litigation through its oversight of the Department of Justice.

Two years ago, then Chairman Eastland, Chairman Kennedy and the ranking minority member, Senator Thurmond, wrote:

"* * * Dispersion of litigating authority to other agencies on a piecemeal basis increases the possibility that the Administration's position on important issues of national scope will, at best, be uncoordinated and at times even contradictory. It is more likely that the broader and more uniform legal position of the Administration will give way to the more parochial interests of individual agencies, focusing on narrower concerns and issues.

"* * * Dispersion of litigating authority to agencies inadequately equipped to exercise that authority seems to us not only self-defeating in practice, but also duplicative of efforts which the Department is already making in many fields, (for example, program fraud). It would seem more cost-effective to retain a central litigating function within the Department than to legislate overlapping jurisdiction."

Lastly, as you know, the Committee on the Judiciary has jurisdiction over the Department of Justice and has recently completed a detailed evaluation of the Department's authorisation for FY '79. Any legislation which would affect the Department, its authority, its jurisdiction, or its responsibilities—either directly or indirectly—affects the jurisdiction of this Committee. We are gravely troubled by the fact that the dispersion of litigation authority constitutes an intrusion into and erosion of the Committee's jurisdiction and oversight responsibility.[1]

Again last Spring, during this Committee's hearings on the Department's 1980 budget authorization, Chairman Kennedy and Senator Thurmond indicated that the phenomenon of a "growing number of requests by agencies for their own litigating authority" is "very disturbing and distressing."

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[1] Letter of May 10, 1978, from then Chairman Eastland and Senators Thurmond and Kennedy to Senate Majority Leader Byrd.

The present situation is a confusing patchwork wherein some 29 separate government organizations (18 independent Commissions, Boards or government corporations and 11 Executive Branch departments or agencies) have statutory authority to conduct all or some of their own litigation. Efforts continue further to fractionalize the Attorney General's litigating authority.

As this Committee has recognized, statutory fragmentation of the Attorney General's litigating authority leads to duplication of efforts, inefficiency and dilution of the Attorney General's—and this Committee's—responsibility to see that the United States and its component parts speak in court with a single voice. Otherwise, 29 separate agencies may be arguing different positions in different courts on the same day, each unaware of conflicting arguments being made by the other 28.

The laws of the land should be uniformly applied and enforced. Individual agencies, with their own agendas, should not be obtaining court precedents that bind the entire Government before any other agency is even aware of the litigation. Our citizens are entitled to assurance that conduct condoned by one agency is not condemned by another agency next week, in another case. Nothing short of centralizing the government's statutory litigating authority in the Department of Justice can guarantee that the courts, and the citizens of this country, have the benefit of uniform and consistent positions in the public's litigation. This is not to say, of course, that it would not be appropriate to administratively delegate litigating authority for certain cases or categories of cases to particular departments or agencies.

We are, however, not starting with a clean slate. We recognize that the Congress has intended some regulatory bodies to be independent of the Executive Branch and the President, and that the separate litigating authority conferred on independent regulatory agencies, commissions and government corporations is not likely to be rescinded altogether. This reality should not, however, prevent coordination of federal litigation where one agency's case will affect other regulatory agencies or executive branch departments. As former Attorney General Bell pointed out in his Sonnett Lecture at the Fordham University School of Law just two years ago:

> At the least, an agency should be required to alert the Justice Department in such cases so that the views of the executive branch could be presented to the court.

To address these problems, President Carter directed, in August, 1977, a thorough study of the Federal Government's system for providing legal advice and representation to its departments and agencies. As part of the President's Reorganization Project, this Study became popularly known as "the PRP Federal Legal Representation Study." The Study staff developed questionnaires which were sent to attorneys in the litigating divisions in the Department of Justice, all U.S. attorneys' offices, general counsel and other prominent officials in the headquarters of all except the most highly specialized or smallest agencies, and 334 agency legal offices around the country.

Ninety-five percent of the questionnaires were returned and the data received covered 86 percent of the lawyers performing civilian legal work for the Federal Government. In addition to the questionnaires, PRP staff members conducted hundreds of personal interviews with agency general counsel, agency attorneys, trial and supervisory attorneys both at the Department and in various U.S. Attorneys' offices, federal judges and private lawyers whose practice included substantial civil litigation with the government.

The statistical data, published by OMB, showed some 14,492 lawyers employed by the Federal Government in April, 1977, less than 25 percent of whom worked at the Department of Justice. The statistics also showed that, although civil actions involving the United States filed in federal courts between 1970 and 1977 increased from approximately 26,000 to almost 40,000, the number of lawyers employed in the Federal Government remained relatively constant, rising from 12,500 in 1970 to 14,492 in 1977.

In addition to these statistics, the PRP Study found several areas in which there was general agreement that improvements in the Federal legal representation system could be made. A major defect was the lack of a single entity within the Federal Government responsible for planning and implementing such improvements "across the board." What was found to be needed was some sort of body to function as a "Board of Directors" for the Federal legal establishment.

The Department of Justice recommended creation of a Council, consisting of representative general counsel on a rotating basis, permanently chaired by the Attorney General, who would be responsible for seeing that the Council's recommendations were carried out. Eventually the President adopted this suggestion, and by Executive Order 12146, dated July 18, 1979, the Federal Legal Council was established.

Executive Order 12146 clearly reflects the following seven Presidential decisions:

1. The Federal Legal Council was created to carry out certain functions:

(a) Coordination and communication among Federal legal offices;

(b) Improved management of Federal lawyers, associated support personnel, and information systems;

(c) Improvement in the training provided to Federal lawyers;

(d) Facilitation of the personal donation of pro bono legal services by Federal attorneys;

(e) Use of joint or shared legal facilities in field offices; and

(f) Delegation of legal work to field offices.

2. The Attorney General is to establish and maintain a litigation notice system that provides timely information about civil litigation pending in the courts in which the Federal Government is a party or has a significant interest.

3. Interagency legal disputes are to be settled by the Attorney General. All Executive agencies whose heads serve at the pleasure of the President must submit such legal disputes to the Attorney General for resolution and other agencies are encouraged to do so.

4. All agencies are to make their final legal opinions available to each other and to the public.

5. The Attorney General, in coordination with the Secretary of Defense and other agency heads, is to set up a computerized legal research system that will be available to all Federal law offices on a reimbursable basis.

6. Each agency is to review the management and operation of its legal activities and to report in one year to the Council the steps taken to improve those operations.

7. The Legal Education Institute is transferred to the Department of Justice where it will continue to be responsible for training agency legal personnel.

Since the establishment of the Federal Legal Council, one organizational meeting has been held, resulting in the creation of two committees to begin implementation of the Executive Order. The Committee on Improving Coordination Among Federal Legal Offices, chaired by the Honorable Ralph C. Ferrara, General Counsel of the Securities and Exchange Commission, will be concerned with such issues and problems as the mechanisms for better coordination of federal legal positions, the establishment of a federal legal library system, the preparation of a federal lawyers' manual, and the delegation of legal functions to regional offices.

The Committee on Federal Legal Personnel, chaired by the Honorable Margery Waxman, General Counsel of the Office of Personnel Management, will concern itself with implementation of the attorney performance appraisal system and the establishment and improvement of career opportunities through the implementation and enhancement of the paralegal series, the legal secretary series and the attorney series. Other committees to be established include a committee to make recommendations on pro bono activities of government lawyers, to be chaired by the Honorable Homer E. Moyer, Jr., General Counsel of the Commerce Department, and, perhaps, a committee to advise on federal legal training.

Also at its first meeting, the Federal Legal Council adopted a resolution in support of the position taken by the Department of Justice in its brief in the Second Circuit in *Armstrong* v. *McAlpin* (No. 79-7042), a case involving the disqualification of an entire law firm because one of its partners had been concerned with the matter in issue as a lawyer for the Securities and Exchange Commission. Other similar activities for the Federal Legal Council might include coordinated comment on behalf of federal government lawyers on the American Bar Association's proposed new Code of Professional Responsibility.

In short, the Federal Legal Council has begun to take its place as a means by which federal government legal representation can be coordinated and improved. In that capacity, and together with the litigation notice system and an invigorated Legal Education Institute, it constitutes a major step toward bringing order out of the confusion of conflicting jurisdictions and overlapping responsibilities. But, to end where I began, the central and crucial element in a coherent and coordinated approach to federal legal representation is the support for and enhancement of the Attorney General's responsibility for and supervisory authority over litigation in which the United States is a party or in which it has an interest.

Senator **Baucus**. Our next witness is Mr. Ralph Ferrara. Mr. Ferrara, I want to thank you for coming to testify this morning for several reasons: first, because you represent another view, the view of a client agency, and an agency which, in my judgment, is one of the better agencies in Washington in terms of its professional conduct, its esprit de corps, its talents, and its basic good, tight management.

Second, this probably explains my views and assessment of the SEC, because I used to be an employee of that agency. I want to thank you very much for coming to testify, and if you have any statement, either include it in the record, if you wish, or you can read it, whatever is your pleasure.

STATEMENT OF RALPH FERRARA, GENERAL COUNSEL, SECURITIES AND EXCHANGE COMMISSION

Mr. **Ferrara**. Thank you very much, Mr. Chairman, for the opportunity to appear before this committee today and to offer testimony regarding the function and goals of the Federal Legal Council and the purposes of the proposed Senate bill 2401. I also thank you for the complimentary comments regarding the Securities and Exchange Commission. It is always particularly nice to hear from one of the Commission's graduates.

I would like to have my prepared statement received into the record and then offer a few brief remarks regarding (1) the philosophical basis that should define how the Federal Legal Council goes about accomplishing its goals and objectives, (2) the work underway by one of the Council's subcommittees; that is, the subcommittee I chair on improving coordination among Federal legal offices, and (3) the desirability of pursuing proposed S. 2401 at this time.

Senator **Baucus**. Go ahead. Your entire statement will be put in the record at the end of your oral testimony.

Mr. **Ferrara**. First, let me address the philosophical basis that I believe should define Federal Legal Council and its objectives, and how it should go about accomplishing those objectives.

As you have heard here this morning, Mr. Chairman, for the past 3 years, there has been a considerable amount of effort expended and I think very high quality effort on the question of how to improve the Federal Government's ability to coordinate and manage the Federal legal establishment more effectively. I think the principal force behind that effort over the course of the past few years has, indeed, been the President's reorganization project. That project was contemplated to be very broad-based, and it culminated in the issuance of Executive Order 12146, which in fact created the Federal Legal Council.

One issue emerged to dominate much of the dialog that surrounded that project, an issue that, unfortunately, I think, diverted the attention of those who participated in the project from its broader objectives. That issue is best described as: under what circumstances agencies are authorized to conduct litigation on their own behalf in the Federal courts, the so-called independent litigation authority question.

In the debate that emerged on that question, there was a continuum of opinions, points of view along a spectrum, that can best be summarized as follows:

First: There was the "classical school" of thought typified by those who argued that there needs to be centralization of all litigating authority. To do so meant centralizing the allocation of legal resources and centralizing the management of the legal process; that is, who does what. It also meant that there has to be one arbiter of all conflicts. The rallying cry of the classical thinker was, the Government must speak with one voice.

At the other end of this philosophical continuum, or at the other extreme, is what could best be described as "regulatory existentialists." These are advocates for radical individual freedom for agencies. It is the "me generation" in government regulation. These agencies argued that litigation is a policy formation tool; it is the only way to put teeth into the management of regulatory programs. They also argued that Justice does not have the resources to litigate all the cases of the Federal Government. Some even said that Justice does not have competence to do it. Moreover, they urged that this presents a special problem for independent regulatory agencies.

Then philosophically between those two schools of thought, there came a third school, the "middle-ground folks," what I call regulatory pragmatists, or the regulatory realists, That school argued that decentralization is a fact of life. The ability to engage in effective policy formation for executive and independent agencies is an important thing to preserve, on the one hand; but on the other hand, all agencies of Government, executive and independent, have to live with the fact that when the Zoological Regulatory Authority loses a case, related to APA, all of us have to sit down and write 30-page memos, to our operating divisions on how to live under the newly enunciated rule.

The pragmatists would say, let us try to coordinate and have informed decisionmaking; let us try to coordinate, as best we can positions taken by the Federal Government. The rallying cry should not, be "Government should speak with one voice", but rather that it should speak with a more effective one.

Has the school of pragmatism or realism had any effective experience in Washington?

Yes, it has.

Over the course of the past 18 months or so, a group of general counsels from independent regulatory agencies have been meeting, on an ad hoc episodic basis, to discuss issues of mutual concern, to identify legal questions that will impact on each of us relating, for example, to APA, reviewability of agency actions, ex parte questions, and so on, and we have been reasonably effective in joining together to form common positions in litigation.

We filed a brief representing four or five independent agencies, as I recall, in *Association of National Advertisers* v. *FTC*—the Pertschuk disqualification matter. We were successful in putting together a consolidated front of support before the second court of appeals in *Armstrong* v. *McAlpin*. The general counsels also got together to form a reasonably common front on the Ethics Act, worked together on the Regulatory Reform Act, and have discussed other problem areas like burden of proof, parallel proceedings, and other issues of mutual concern to their agencies.

It has worked. It has been a very loose confederation. We meet now and then. Sometimes we cannot all get there. Altogether we have met probably half a dozen times, but it has worked.

Senator **Baucus**. How often have you met?

Mr. **Ferrara**. I think about a half a dozen times.

Senator **Baucus**. Over what period of time?

Mr. **Ferrara**. Over the course of the past 18 months.

Mr. **Baucus**. Why haven't you included executive agencies?

Mr. **Ferrara**. It began as an effort of the independent regulatory agencies, principally because I think there had been a tremendous amount of mistrust and divisiveness that had been generated out of the independent litigation authority question and that surfaced as part of the legal representation study. I think a lot of that has been diffused now. We felt that as general counsels of independent regulatory agencies banding together, we were coming together as coequals, we all had one vote, nobody had a veto power, and nobody was going to raise the question of being the final arbiter. It has been a truly collegial environment.

I think to his credit, the great genious of Ben Civiletti has been to say that he is going to rise above the pursuit of many of the former Attorneys General from 1870 to date—unlike the captain that pursued the illusory great white whale—of consolidating litigation authority. He said that we are going to put that question behind us for purposes of the Federal Legal Council. It is not going to be on our agenda. He said, that what we are going to do is work at the root problems, fundamental areas of concern for both executive branch agencies and independent regulatory agencies.

I think that is a breath of fresh air into what has been a very knotty and highly divisive problem. I compliment him.

Senator **Baucus**. Maybe he has just given up the effort.

Mr. **Ferrara**. I do not think he has. When you listen to his representatives at hearings such as this, you see that whenever given an opportunity, the Department of Justice will stick to its historic position that in the best of all worlds there should be consolidation of litigation authority or centralization of authority under the Attorney General. I would like to think the present Attorney General comes at the problem of independent litigation authority as a pragmatist and a realist and someone who really wants to do something about the fundamental problem of coordination among Government agencies.

Senator **Baucus**. Maybe he is a pragmatist and a realist because the General Counsel of independent regulatory agencies would not participate in the Federal Legal Council if the issue of litigation authority were included on the agenda. They only agreed to participate with the understanding that those issues would not be raised.

Mr. **Ferrara**. We agreed to participate, Mr. Chairman, before there was an agenda, although I must admit that we participated with much greater enthusiasm when we heard the Attorney General, at the first Council meeting say, "Listen, we are going to stop fooling around with the question of independent litigation authority. We are getting down to the business of interagency coordination." I was greatly relieved, and said it at the time, and repeat it here.

For somebody who has been around this independent litigation authority horn several times now, this is a breath of fresh air. It is a new perspective; it is a new turn in the road.

I hope that this committee and, the Congress, and the executive branch of Government and OMB and the President's Reorganization

Project, and all collective intelligence on this issue, lets the Federal Legal Council get off the ground and see if it can really accomplish something.

Well, moving on, right after that first meeting of the Federal Legal Council, we all received a note from the Attorney General advising us that at least the two subcommittees had been established as organs of the Council, and that I was named as chairman of the Subcommittee on Improving Coordination in Federal Legal Offices.

Our subcommittee met within 1 week or 10 days after our notice from the Council. We have four objectives in the subcommittee.

First: To improve coordination and communication among Federal legal officers.

Second: To promote joint or shared use of legal facilities.

Third: To increase delegation of legal work to field offices.

Fourth: To develop a litigation or lawyers' manual.

The first objective is obviously, by far and away, the most important. That is, to come up with a technique for coordinating legal work in the Federal Government. I think the key to accomplishing that first objective for our subcommittee is going to be to devise, a hopefully computerized, litigation information or case activity tracking system. That, for our subcommittee, is an essential tool in accomplishing the first objective assigned to us by the Attorney General.

How do we go about it?

First: We formed a subcommittee of our committee, composed of the Department of Energy, Department of Justice—both executive branch agencies—the Equal Opportunity Commission and the Securities and Exchange Commission. From our agency we have the best lawyers in my office participating in the work of this subcommittee, and each participating agency is in the process of developing some kind of computerized case activity tracking system. We are going to band together to see if we can come up with a system that makes sense for all of us and all the members of the Council.

What is our agenda? How are we going to proceed?

I think the first step has to be to define the systems requirements of the litigation information system, or case activity tracking system.

By that, I mean we have to have a consolidation of what everyone's objectives are into the system. Those would probably include a capacity to manage all agency litigation, including a capacity for client agencies of the Department of Justice to track how effective the Department of Justice is representing them in Federal courts.

We would also want the system to be able to highlight and identify areas of mutual interest to all members of the Council—for example the APA regulatory questions that are referred to before; to provide a research capacity to all members of the Federal Legal Council; and, finally, to serve as a component, I think an important component, to the litigation notice system that Mr. Slaughter is working on, so that the Department of Justice will be able to identify conflicts and begin an effort to help resolve those conflicting issues.

Once the system requirements are set, then the next question is going to have to be how we go about defining software for the system, how we go about determining what hardware to use, how we go about determining who is going to be facilities manager for the system, how it fits in with the legal notice system, and so on. That is our agenda.

We are going to be meeting within the course of the next 2 weeks with our subcommittee of these our agencies to start pulling hopefully in a positive direction.

The second objective of our subcommittee——

Senator **Baucus**. If you could be briefer on each of those points.

Mr. **Ferrara**. I intend to.

We are going to try to form a model regional office library for executive and independent regulatory agencies that operate in each region.

Next, we formed a working group to come up with a lawyers' manual which is going to be modeled after the U.S. attorneys' manual, very effective tool in this area.

Finally, with respect to S. 2401, I have given detailed comments in my prepared statement with respect to that bill.

Here I would like to ask that the committee seriously consider deferring further action on those aspects of S. 2401 that might be viewed as raising the independent litigation authority question so that the Council can move ahead on these other more positive steps toward improving coordination among legal offices of Government; but we understand also that the proposed bill can serve as a very effective oversight tool for this committee to oversee the activities of the Department of Justice and, to that extent, we certainly do not object to it.

Senator **Baucus**. What about those portions of the bill that aid this committee in exercising its oversight responsibilies? You do not object to those portions?

Mr. **Ferrara**. No. I was just commenting a moment ago that, to the extent that the bill is meant to aid this committee in exercising its oversight responsibilities over litigation conducted by the Department of Justice, we certainly have no objections to it at all.

Senator **Baucus**. You have stated that you view the present Attorney General as a realist and a pragmatist. You characterize his position as one of keeping hands off, at least to a greater degree than prior Attorneys General, the issue of how much litigation the Justice Department should control as opposed to independent regulatory agencies and other executive agencies.

My view is that the more we let this matter go, the more independent regulatory agencies and executive agencies will acquire litigation authority. If we just let things go, won't Congress continue to erode the Justice Department's like it is about to do with respect to the Energy Mobilization Board and the Energy Security Corporation? You do not think that will happen?

Mr. **Ferrara**. Let me draw perhaps a brighter line on this point than I did before.

The Attorney General, as I understand it, has directed the Federal Legal Council not to address on its agenda the question of independent litigation authority. I am confident, after listening to Mr. Shenefield today, that the Attorney General has the question of independent litigation authority very much on his agenda and particularly, I would suspect, with respect to the issue that you just raised, that is the legislation creating new agencies.

The Federal Legal Council that is largely composed of, as I understand it, executive agencies and independent regulatory agencies that do perform some or all of their own litigation is really not the right forum to start opening up that question again. We should be dealing with the problem that already exists: How can we coordinate existing litigation? Let us let someone else worry about what to do with new entities.

Senator **Baucus**. I am not prejudging the conclusion or the result. I am just trying to set up a process by which we can continually address the question.

Mr. **Ferrara**. Yes.

Senator **Baucus**. I think it is a question that should be continually addressed.

Carla Hills, when she testified earlier before this committee, distinguished between questions of general government applicability and questions of expertise stating that in certain security cases SEC should have its own litigation authority. Other kinds of cases—Freedom of Information Act cases, and so forth—involve issues that affect the Government, the country, and our citizens generally.

In those cases, the Justice Department should oversee and would conduct litigation or at least be the authority in deciding how to litigate those cases.

What is your view of that distinction?

Mr. **Ferrara**. Mr. Chairman, certainly with respect to Freedom of Information Act cases, we particularly try to coordinate closely with the Department of Justice, but the distinction between programmatic litigation—that is, for example, for the Securities and Exchange Commission, litigation arising under Federal securities laws—and more generically based litigation, like FOIA, is not all that sharp.

For example, under FOIA, oftentimes whether one determines to assert the confidentiality exemption from FOIA disclosure and how to litigate that question can have severe programmatic consequences to an agency like the SEC.

Senator **Baucus**. When should the SEC not litigate an issue? When should authority be given to the Department of Justice or U.S. attorneys rather than the SEC? What kinds of cases?

Mr. **Ferrara**. If a case arose which really had no management or programmatic impact on SEC, but yet SEC was involved in litigation——

Senator **Baucus**. Give me some examples.

Mr. **Ferrara**. I cannot.

Senator **Baucus**. Can you give me a hypothetical example?

Mr. **Ferrara**. I am thinking about all the litigation that we have engaged in over the course of the past 7 or 8 years, and most of that has been programmatic or FOIA except one or two, and I cannot give you a particular example right now. I will certainly think about it.

Senator **Baucus**. One of your predecessors, Harvey Pitts, stated that the plain fact is that a significant portion of the Commission litigation involves interpretation of laws of general applicablity rather than provisions of Federal securities laws themselves.

I take it from your earlier statement regarding FOIA cases, that you agree with that?

Mr. **Ferrara**. Particularly the FOIA, and the APA, Mr. Chairman, present questions that cut across all of Government but also have significant programmatic effects on the operations of the individual agencies.

Senator BAUCUS. I suppose any independent regulatory agency could make that same argument.

Mr. FERRARA. Yes. Any independent agency that has significant regulatory programs certainly could.

At the same time, those are instances where there is greater need for coordination among agencies and the Department of Justice.

Senator BAUCUS. What about agencies like the NRC, CAB, and other independent regulatory agencies that do not have litigating authority? Is there any sound reason why those agencies do not have litigating authority?

Mr. FERRARA. I am not familiar with what their litigation authority status is.

Senator BAUCUS. Was that just an accident of legislation?

Mr. FERRARA. Nor do I know what their regulatory responsibilities are. I would have to see the organic legislation. I cannot comment on that. Nor do I know if they do have significant regulatory programs that could be furthered by independent litigation authority, or how their regulatory programs have been impacted by the representation that they received from the Department of Justice. I just do not have any data.

Senator BAUCUS. In your testimony, you refer to the fact that the Federal Legal Council adopted a resolution endorsing the views of the Department of Justice in the *Armstrong* v. *McAlpin* case.

Do you think the Federal Legal Council should be in the business of regularly adopting these kinds of resolutions?

Mr. FERRARA. I think the *Armstrong* case is pending before the Second Circuit Court of Appeals. We addressed the question at the first meeting of the Federal Legal Council and took the action we thought was appropriate at that meeting for that case. Certainly, I think we should all work toward coming up with a technique to inform the courts as to what different, or common perspectives exist among members of the Council, on issues that cut across all of government; and if we can do that, I think it will be very helpful.

Senator BAUCUS. Even though you have some reservations with respect to the bill I have introduced, S. 2401, do you not think that the bill will help focus attention on the general question of the proper allocation of litigation authority, and thus serve a proper function?

Mr. FERRARA. If I understand the bill correctly, it certainly does focus attention on the independent litigating authority issue.

Senator BAUCUS. Without attempting to resolve the issue in any particular way?

Mr. FERRARA. That is the question. I do not know that would happen if that bill became law.

Would that mean it would serve as a predicate for reexamining the independent litigation authority of agencies that have it by statute, by executive agreement, by memoranda of understanding?

Senator BAUCUS. Essentially, it is an oversight bill. It would mean that Congress would be better informed as to what agreements, if any, various agencies are making with the Justice Department.

Mr. FERRARA. To the extent it is an oversight bill for this committee to perform its oversight of the Department of Justice, we certainly have no objection to it at all.

Senator **Baucus**. You make the suggestion in your testimony that the Council should be offered an opportunity to inform the Congress of its progress in developing a litigation information system.

I, for one, am very delighted to have the Council regularly report to Congress, and am wondering what you can do to encourage the Council to undertake those kinds of reports.

Mr. **Ferrara**. I will ask them to.

Senator **Baucus**. I would appreciate it if you could do that.

Mr. **Ferrara**. I, frankly, think that the attention that the Council is receiving today, prompted by you, Mr. Chairman, is very healthy and very positive.

Senator **Baucus**. I want to thank you, Mr. Ferrara. You have been very helpful and frank in presenting your views on the issue. I want to thank you very much.

[Additional submissions of Mr. Ferrara appear in the appendix.]

[The prepared statement of Mr. Ferrara follows:]

PREPARED STATEMENT OF RALPH C. FERRARA

I would like to thank this Committee for its invitation to testify regarding the work of the Federal Legal Council, and to offer comments on proposed S. 2401. My perspective on these matters is, of course, influenced not only by my experiences as the General Counsel of the Securities and Exchange Commission, but also as a member of the Federal Legal Council and Chairperson of the Council's Subcommittee on Improving Coordination Among Federal Legal Offices. As you no doubt recall, the Commission, as an independent regulatory agency, has taken an active role both in participating in and commenting upon the work of the Federal Legal Representation Study of the President's Reorganization Project, which culminated in President Carter's Executive Order 12146 establishing the Federal Legal Council, as well as in the previous efforts by the Congress in this area. A great deal of discussion has taken place within the Federal Legal establishment in the past several years as a result of these executive and legislative initiatives, and I believe that this is certainly an appropriate time for this Committee to review the progress that has been made in developing techniques to manage more efficiently the legal resources of government.

Briefly, let me describe where we are and where I think we are going with the Federal Legal Council. The creation of the Council offered the governmental legal community a vehicle for identifying common areas of interest and an opportunity to reach a consensus on resolving the problems with which we are all confronted.

For that reason, I was greatly encouraged by the commitment of the Attorney General, made at the Council's first meeting in January of this year, to foster the Council's efforts to reach such a consensus. To that end, the Attorney General directed that the Council should forego, at least for the time being, any further consideration of the circumstances under which agencies are authorized to conduct litigation on their own behalf in the courts. I believe that he recognized that additional energy devoted to that sensitive question would divert the Council's attention from the more important objectives productive functions set forth by the President in his Executive Order. That approach has been quite encouraging to the other members of the Council and has spurred our efforts to resolve our differences and get the important mission of the Council underway. I believe that the Attorney General has identified correctly the priorities of the Council; foremost among these is the opportunity for the coordination and cooperation that will be afforded by the long-needed improvement of existing communications among federal legal offices. And I am pleased to report this effort is underway.

The successful accomplishment of that goal will provide the confidence and trust among Council members which is necessary to address the more difficult and sensitive questions relating to litigation authority if that appears to be necessary. Thus, I would ask that this Committee permit the Council a full opportunity to develop its program, and urge that the Committee forego legislative initiatives at this time which may prematurely thrust the Council and its members into a dispute over the respective litigating authority of its members.

Moreover, I hope that this Committee will encourage the burgeoning efforts of the Council members and the Attorney General as we go forward, on an experimental basis, with fulfilling the goals established by the President's Executive Order.

As I mentioned, the most critical of these goals is the mandate to coordinate and improve communication within the federal legal establishment so that the government's legal resources may be employed more efficiently and the Government may be enabled to speak, not necessarily with one voice, but, rather, with a more effective one. In that regard, the Executive order provides that "the Attorney General shall establish and maintain a litigation notice system that provides timely information about all civil litigation pending in the courts in which the Federal Government is a party or has a significant interest." [1]

In addition, the order states that the Council "shall provide leadership for all Federal legal offices in establishing appropriate word processing and management information systems," [2] as well as encourage all agencies to share legal opinions, statements of policy, case briefs, etc.[3]

Among the specific areas which I will address is the promising work which the Subcommittee on Improving Communication Among Federal Legal Offices has begun, in coordination with the Attorney General, for the creation of an automated litigation information system. I will also discuss the other efforts begun by that Subcommittee, comment on the provisions of the Judiciary Committee's bill, S. 2401, and respond to any additional questions you may have.

As you know, the Commission is an independent regulatory agency, which is directly accountable to Congress for its activities. The high degree of effectiveness which characterizes this agency, as has been pointed to on numerous occasions by Congressional oversight committees,[4] is attributable, to a considerable degree, to the fact that the Commission utilizes each of the tools at its disposal to assure the success or failure of the regulatory and enforcement programs it determines to pursue. And, an agency's position in civil litigation is as important a policymaking tool as is the promulgation or rules and administrative decisions. "There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947).

With this perspective, let me emphasize that I believe that the Council can fulfill the primary goal of the President's Executive Order, namely, "coordination and communication among Federal Legal Offices" to (1) maximise an efficient and effective operation and management of Federal legal resources and (2) avoid unnecessary litigation, while preserving for the Commission and other agencies similarly situated, all the tools essential for informed and effective policy formation and program management.

In that regard, I believe that the key to accomplishment of the President's goal is the coordination of each agency's efforts, through the Council, with those of the Attorney General to create a litigation information system which will be accessible to agencies and responsive to their needs. At this time, several divisions of the Department of Justice, as well as several agencies, including the Commission, are presently operational or near-operational with in-house case tracking systems. A strong incentive exists to develop compatible systems which not only become effective management tools, but allow each federal legal office to coordinate their respective litigative functions.

There are many benefits to these systems, and they can accrue on a phased basis as the systems develop. First, each agency will possess an effective in-house management tool, which allows tracking of the course of both civil litigation and administrative proceedings. Second, once a coordinating system has been established, each agency will be able to keep abreast of the litigation other agencies are involved with and be afforded an opportunity to address and, where appropriate, participate in matters which are of common interest. Unlike the present practice, agencies would have the information necessary to become involved in litigation, as consultant, intervenor, or even as amicus curiae where appropriate cases arose. Similarly, those federal legal offices whose litigation is handled by the Department of Justice or the various United States attorneys, would be able to determine quite readily how such litigation is proceeding, and what, if any, similar or divergent actions are being taken by other agencies in the same area. Finally, the litigation information system now being developed would advise the federal legal establishment in advance of those areas in which agencies are developing divergent positions and thereby permit, where practicable, early resolution of any potential conflict.

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[1] Executive Order 12146, ¶ 1–601.

[2] *Id.* at ¶ 1–602.

[3] Id. at ¶¶ 1–501 and 2; ¶ 1–601.

[4] *See, e.g.*, House Committee on Interstate and Foreign Commerce, Federal Regulation and Regulatory Reform, *Report by the Subcommittee on Oversight and Investigations*, 94th Cong., 2d Sess. 15–54 (1976). Moreover, the Commission's practice of using its own attorneys in suits brought against the Commission or its employees for activities within the scope of their official duties, has met with consistent judicial and Congressional approval. *See, e.g., Jones* v. *Kennedy*, 121 F.2d 40, 45 (D.C. Cir. 1941); *White* v. *Jaegerman*, 51 F.R.D. 161 (S.D. N.Y. 1970); H. Rept. No 95–640, p. 10 (1977).

Given the myriad management and research uses to which this system can be put by each agency, a strong incentive exists for its development by the Council and for the Council's cooperation with the Attorney General's efforts.

In fact, similar cooperative efforts have worked well in the past. Periodically, the General Counsels of various independent regulatory agencies have met and exchanged information on numerous pieces of legislation, including the Regulatory Reform Act, and explored common interests in amicus curiae participation in various cases.

Recently, for example, several agencies filed a joint brief as amicus curiae before the D.C. Court of Appeals in *Association of National Advertisers* v. *Federal Trade Commission* —— F. 2d —— No. 79–1030 (D.C. Cir., 1979). The plaintiffs in that case had sought to enjoin Chairman Pertschuk from participating in a rulemaking proceeding on children's advertising, because of certain public statements he had made. The Office of the General Counsel for the Interstate Commerce Commission, after consultation with my Office and other General Counsels, wrote the brief filed on behalf of several independent agencies expressing our concern that the adjudicatory disqualification test sought to be applied to agency rulemaking procedures would seriously hamper the legitimate need for public discussion of policy questions which face independent agencies and their members. As you know, the Court of Appeals declined to reach the disqualification issue and permitted the rulemaking proceeding to go forward.

Most recently, the Federal Legal Council adopted a resolution endorsing the views of the Department of Justice and the Commission that appropriate screening procedures rather than firm disqualification should be applied by the Second Circuit in the *Armstrong* v. *McAlpin* case.[5] As you know, the Court granted en banc reconsideration and now has before it the briefs and statements of numerous federal agencies on the serious impact which an alternative solution would have on the Government's legal resources. Prior to the Court's granting of en banc reconsideration but after the panel's decision, the Commission received support for its position from several other independent agencies, including the Interstate Commerce Commission, the Civil Aeronautics Board, as well as the Department of Justice, all of whom filed statements, amicus curiae, in support of rehearing. As these examples demonstrated, the ability to respond quickly and collectively on matters of mutual concern to all agencies is important to the Government's litigation program. I firmly believe this ability will be greatly enhanced once we have the capability to track and disseminate information automatically and on a continual basis.

Before I discuss the particular steps which the Council and its subcommittee have taken in this regard, I would like to respond to the questions contained in your letter of March 10, 1980, and comment on the particular proposals embodied in S. 2401, and how the bill, as currently drafted, affects those efforts.

1. The Council's potential to solve problems of litigation management

For the reasons already set forth, I believe that the Council, particularly with the support of the Attorney General, possesses an extremely high potential for improving litigation management on the agency level, and on a government-wide basis, provided such efforts remain consensual. By coordinating with the Department of Justice in the development of a litigation information system which can become an effective internal management tool, a "built in" incentive will exist for each agency to contribute to and utilize the system.

2. Areas in which the Council can be most useful

I believe that the most useful contribution which the Council can make is the development of an inter-agency automated litigation information system. The

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[5] *See Armstrong* v. *McAlpin*, 606 F.2d 28 (2d Cir., 1979), *en banc* reconsideration ordered Dec. 12, 1979.

Attorney General, and, as I will explain shortly, the Council's Subcommittee on Improving Coordination has already begun work on that important task. In addition, Subcommittees on (1) Federal Legal Personnel, (2) Legal Training and, (3) Pro Bono Legal Services by Federal Attorneys, have also been formed and are beginning to develop recommendations in each of these areas for consideration by the full Council.

3. Specific problems now being worked on by the Council

As I mentioned to you earlier, I was designated chairperson of the Council's Subcommittee on Improving Coordination Among Federal Agencies. On March 21, 1980, a working group of the Subcommittee was organized and held its first meeting. The group was composed of senior level supervisor-attorneys from the respective offices of each committee member and was also attended by Edward R. Slaughter, Jr., Special Assistant for Litigation to the Attorney General and John Komoroske of the Office of Management and Budget.

While there was a considerable amount of discussion with respect to the ultimate uses of a litigation information system, a consensus quickly developed that the Council should concentrate instead on the development and implementation of a system which would have the capacity to accommodate the different users' needs. For the first time, several members became aware that other agencies were in similar stages of developing automated case-tracking systems and that in some divisions of the Department of Justice tracking systems were already functioning.

At the conclusion of our meeting, four task forces were formed to assemble information and develop recommendations for the full Subcommittee and, ultimately, for the Council. The first of these is made up of staff from the Department of Labor, the Department of Energy, the Equal Employment Opportunity Commission, and the Department of Justice, as well as this Commission. Each of those agencies has begun development of in-house case-tracking systems and, as their first task they will design a procedure to develop information from members of the Council as to what data should be included in an inter-agency appellate case tracking system.

One of the other sub-groups of the Committee has begun work on improving joint legal facilities and the development of a model regional library which would constitute all of the materials of common, as well as specialized, interest to each participant. The group will consist of representatives from the Department of Labor, the Interstate Commerce Commission, and the United States Attorney's Office, all of whom have a formidable regional office network.

A third group, composed of the Department of Energy, the EEOC, the ICC, and the United States Attorneys' Office, will focus on the reports called for by the Executive Order to be filed annually with the Attorney General, by various executive agencies, reviewing the management of legal resources and the delegation of legal work to regional offices. Hopefully, the group can develop guidelines to be adopted by the Council, for each agency's response.

Finally, a core group will begin work on a Government Lawyer's Manual. The United States Attorney's Office, which already has an outstanding manual, will head a group from the Commission and the Department of Labor. Their task will be to create a manual to assist litigating lawyers in every branch of the Government, paying particular attention to local and federal court rules and a method of interfacing with local United States Attorney's offices when appearing in local district courts.

4 & 5. Council's role in resolving disputes over litigating authority

With respect to the Council's role in resolving disputes, I would merely reiterate my statement urging that the Judiciary Committee postpone consideration of this sensitive issue until the cooperative inter-agency process, which is now taking place among members of the Council, has been given an opportunity to take hold. Obviously, the Commission is itself extremely sensitive to the existence of this issue and, as I stated earlier, has commented extensively on it in other forums. Nonetheless, I would concur with the Attorney General's recommendation to the Council itself on this matter: that we not divert our energies from the primary objectives set forth in the President's Executive Order at this time.

Instead, I would urge strongly that the Council be permitted to proceed in the area of greatest agreement among its members, namely, the development, upon coordination with the Attorney General, of a litigation notice system and that this Committee nurture those efforts. Once we have developed an acceptable model, then we can take on the more difficult task of defining its use. In the interim, the Council and the Attorney General can work to forestall any areas of conflict.

Before commenting on its particular subsections, I would again urge generally, that this Committee forego any particular legislation at this time so that the efforts of the Council be allowed to take hold. Some of the language of the bill is ambiguous and its proposed impact is unclear. Its introduction at this time might well imperil the current effort of the members of the Council to put aside their differences in an attempt to coordinate the respective legal resources of the Federal legal establishment. To the extent that the bill resurrects the question of independent litigation authority, its introduction is unfortunate and untimely. It is unfortunate because the Council and the Attorney General have agreed to leave that question behind and untimely because it may impair their new cooperative effort.

With that caveat in mind, I will now respond to the particular provisions of the bill.

PARTICULAR PROVISIONS

a. The proposed new subsection (b) provides: "[T]he Attorney General shall submit a copy of any agreement with any other agency which affects the litigation authority of the Department of Justice with respect to types or categories of cases to the Committees on the Judiciary of the Senate and the House of Representatives no later than 60 days before such agreement is effective."

While the thrust of this provision is unclear, we would not object to its terms, if it is only intended to serve as a predicate to the Judiciary Committee's effective oversight of the activities of the Department of Justice.

6. The provisions of S. 2401:

This leads me to your final question concerning the proposed provisions of S. 2401, which is entitled "Department of Justice Litigation Policy Oversight Act." The bill would amend existing law, 28 U.S.C. 516, to add several newsubsections.[6] Nor do we object to this Committee's examination of any future agreements between the Attorney General and various Federal legal offices, but we submit that legislation is unnecessary to assure Committee access to such agreements.

If the provision is intended to confer new statutory authority on the Department of Justice with respect to the execution of such agreements, we are uncertain as to the effect of such a change on both executive and independent regulatory agencies. Thus, I would request that the purpose of the provision be clarified and we be permitted to comment further after weighing such information.

b. Prospective new subsection (c) of the bill would provide: "[U]nless specific statutory authority for litigation responsibility is otherwise provided, the Attorney General shall resolve all legal disputes between two or more agencies, including which agency shall litigate an action."

Once again, this provision seems to raise the question of litigation authority and, for the reasons stated earlier, I would urge this Committee to postpone consideration of it at this time. Secondly, it is unclear whether the provision applies only to executive departments or to independent regulatory agencies such as the Commission as well. If the latter are to be included, the provision raises certain policy questions which, at least for this Commission, the Congress and the Courts have already resolved in a fashion that acknowledges the importance of, and preserves, litigation as a policy formation tool. If the provision applies only to the existing relationship between the Department of Justice and the executive departments, the provision appears unnecessary.

c. Proposed new subsection (d) of S. 2401 provides: "No later than 60 days from the date of introduction of any bill or joint resolution which affects the litigation authority of the Department of Justice the Attorney General shall submit written comments with respect to such bill or joint resolution to the Committees on the Judiciary and the House of Representatives."

We have no objections to this amendment if its purpose is to provide the Judiciary Committee with the resources it needs to oversee the activities of the Department of Justice. However, we are unsure of the effect which such a provision has on the corresponding oversight responsibilities of other Congressional committees, with respect to particular agencies. In that respect, the provision is confusing and should be clarified. Subject to such clarification, and its application only to the Department of Justice, we would not object to adoption of this provision, but I would propose that, in addition, the Federal Legal Council be authorized on behalf of its members, to submit written comments to Congress on such legislation.

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[6] Section 516 of Title 28 of the United States Code currently provides: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

The bill would also strike the third sentence of existing Section 515(b) of Title 28 which now provides that the Attorney General fix the annual salary of a special assistant or attorney at no more than $12,000.

d. Proposed subsection (e) of the bill provides: "If, during the course of any litigation conducted by the Department of Justice, the Attorney General determines that provisions of any Act of Congress which are relevant to such litigation impede the ability of the Department of Justice to effectively represent the interests of the United States, the Attorney General shall, upon completion of the litigation, submit to the Committee on the Judiciary of the Senate and the House of Representatives a description of such provisions, an explanation of the problem, and specific legislative recommendations."

Again, if the purpose of this provision is to assist this Committee in performing oversight of the Department of Justice, we have no objections. While we are not fully conversant with the relationships among various oversight committees of Congress, we are concerned that this provision could raise questions regarding those committees' responsibilities and suggest that the purpose of the provision be clarified.

If the provision is intended to allow the Department of Justice to seek a reexamination by Congress where an individual adjudication has created statutory construction problems which adversely affect areas administered by the Justice Department and executive departments, we have no objections. However, we would request an opportunity to provide additional comments upon clarification of its purpose.

e. Proposed subsection (f) provides: "The Attorney General shall report annually to the Committees on the Judiciary of the Senate and of the House of Representatives with respect to—

(1) the status of litigation authority in the Federal Government, including the extent to which agencies other than the Department of Justice are authorized to litigate and whether such agencies are conducting litigation by formal or informal agreement with the Department of Justice;

(2) the efforts the Attorney General has undertaken in the preceding year and the efforts the Attorney General expects to undertake during the forthcoming year to coordinate activities and resolve conflicts between the Department of Justice and other Federal agencies, and to increase the efficient and effective operation of Federal litigation resources."

We support this provision of the bill as a constructive, non-intrusive method of collecting information for oversight purposes, but again caution that the requirement to provide a report should not be construed as suggesting that the "status of litigation authority" and the resolution of "conflicts" should take on a priority status with respect to the work of the Council. The overall objective to be promoted is, again, the efficient and effective management of Federal legal resources. The effort is broad based and its scope should be defined by objectives beyond those which appear to be the focus of subsection (f). In addition, I would suggest that the Federal Legal Council also be offered an opportunity to inform the Congress of its progress in developing a litigation information system.

CONCLUSION

In conclusion, I would like to stress once again that I am very enthusiastic about the efforts of the Federal Legal Council cooperatively to develop a useful, practical automated litigation information system and I would request that Congress allow the Council an opportunity to further these efforts and to forego any legislation at this time which might impede those promising steps.

The introduction of legislation which directs a particular course for development is premature. The Council's present efforts are necessarily experimental and some latitude is necessary in implementing its goals. I would recommend that the Council be permitted to report its progress to the Congress within a reasonable time, and that further consideration of legislation be postponed until then. I hope that I have been able to convey the enthusiasm of the Council and its dedication to going forward in this area, and I ask that this Committee support our efforts.

Senator **Baucus**. That concludes the hearing.

[Whereupon, at 11:35 a.m., the committee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

April 1, 1980

Honorable Max Baucus
Chairman
Subcommittee on Limitations of
  Contracted and Delegated Authority
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

During your oversight hearings on the Department's litigating authority and Executive Order 12146 last Thursday morning, I promised to furnish further information about the number of times this Department had declined to defend the constitutionality of a federal statute and the amounts appropriated and expended for the Federal Legal Council staff, the Litigation Notice System and the Legal Education Institute. I hope that the following information is responsive to your questions.

I am informed that during the last five years, the Attorney General has declined to defend the constitutionality of legislation enacted by the Congress in the following cases:

Buckley v. *Valeo*, 424 U.S. 1 (1975); the Department declined to defend the constitutionality of the Federal Election Campaign Act to the extent that that Act invaded the President's prerogatives under the Appointments Clause.

Atkins v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert denied*, 434 U.S. 1009 (1978); the Department declined to defend the constitutionality of the legislative veto provision in the Federal Salary Act.

McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1977), cert denied, 434 U.S. 1011 (1978); the Department declined to defend the constitutionality of the legislative veto provision in the Federal Salary Act.

Chadha v. Immigration and Naturalization Service, No. 77-1702 (9th Cir. appeal docketed July 18, 1977, argued April 10, 1978); the Department declined to defend the constitutionality of the exercise of a legislative veto provision.

Nixon v. Solomon, No. 77-1395 (D.C. Cir. filed August 10, 1977) (case settled); the Department declined to defend the constitutionality of regulations promulgated by the General Services Administration pursuant to a statute containing a legislative veto provision.

League of Women Voters, et al. v. F.C.C., Civil No. 79-1562 MML (PX) (C.D. Cal.); the Department declined to defend constitutionality of 47 U.S.C. §399(a).

In addition to the foregoing cases, in Staats v. Lynn, No. 75-055 (D. D.C., November 26, 1975) (dismissed by stipulation), the Department contested the constitutionality of a statute empowering the Comptroller General to initiate litigation against the Office of Management and Budget under the Impoundment Control Act of 1974 and in Clark v. Valeo, 559 F.2d 642 (D.C. Cir.), aff'd sub. nom., Clark v. Kimmitt, 431 U.S. 950 (1977), the United States intervened in litigation brought by former Attorney General Ramsey Clark challenging the constitutionality of the legislative veto provision in the Federal Election Campaign Act to argue that the legislative veto provision was unconstitutional.

As a matter of historical interest, I have learned that between 1787 and 1974, the Department of Justice failed to defend the constitutionality of a federal statute in only four instances: Myers v. United States, 272 U.S. 52 (1926) (a separation of powers issue); United States v. Lovett, 328 U.S. 303 (1946) (a separation of powers issue); Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert denied, 376 U.S. 938 (1964) (a statute incorporating the "separate but equal" principle); and Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir. 1974), (an Executive privilege issue).

With respect to the amounts budgeted for the Federal Legal Council and the Litigation Notice System, the estimated amounts budgeted for these operations for FY 1980 were $171,000, and $393,000, respectively. Through March 31, 1980, I am told that $2,500, of the Federal Legal Council's budget has been obligated for equipment, supplies and printing and $50,000, of the Litigation Notice System's budget has been obligated for salaries, travel, equipment and furniture. Position descriptions advertising for a Staff Director of the Federal Legal Council and a Director of the Litigation Notice System have been prepared and are being circulated throughout the government to recruit the best qualified persons for these jobs. The advertisements close April 16, 1980, and we anticipate having a roster of the best candidates by May 1, 1980. We hope to complete the process and have candidates selected for both positions by the middle of May.

The estimated FY 1980 budget for the Legal Education Institute is $962,000. Through March 31, 1980, $23,000 has been obligated for staff salaries.

I hope this information is helpful to you.

Please let me know if I may be of any further assistance.

Sincerely,

John H. Shenefield
Associate Attorney General

ADDITIONAL SUBMISSIONS OF RALPH C. FERRARA

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

DEC 0 6 1977

Mr. F. T. Davis, Jr.
Director, General Government Division
Office of Management and Budget
New Executive Office Building Room 7225
Washington, D.C. 20503

Dear Mr. Davis:

This letter is in response to your letters, dated October 7 and 25, 1977, and in reference to the President's memorandum to the heads of executive departments and agencies, dated August 25, 1977 (entitled "Examination of the Federal Government's Legal Representation System"). I apologize for the delay in responding to your initial communication, which seems to have been misdirected. You have requested suggestions on how the Government's legal system can be more effectively structured. You have also asked that we designate someone within my office to serve as a liaison with your study effort. In this latter regard, James H. Schropp, Assistant General Counsel in my office, will serve as our liaison; he can be contacted at 376-7170.

At the outset, I want to affirm that the Securities and Exchange Commission shares the President's concern that the legal resources of the Federal Government be used efficiently to prevent unnecessary litigation, forestall administrative delay and avoid duplicative effort. Nevertheless, in considering this question, it must also be borne in mind that, unlike executive departments and agencies, our Commission is an independent regulatory agency, whose important policies are articulated not only by the promulgation of rules and interpretive statements, but also by individual enforcement actions or the defense of lawsuits instituted against the agency. Independent litigation authority, which our agency has enjoyed since its inception, is a necessary attribute of the agency's independence. As the Supreme Court long ago recognized in this context, when the Commission acts in an area in which it brings to bear its "administrative expertise, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the * * * facts," its judgment is one which it is "best equipped to make" and which is "entitled to the greatest amount of weight." Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 209 (1947).

Since its formation in 1934, a prime responsibility of the Commission has been to assure the fairness, honesty and integrity of this Nation's securities markets. In enacting the securities laws, the Congress recognized that, without vigorous and effective enforcement of these laws, the protections they were intended to effect for investors would be illusory. Accordingly, the Congress authorized the Commission, inter alia, to investigate possible violations of the securities acts, issue subpoenas in furtherance of its investigations, to institute administrative proceedings to determine if those engaged in the securities business should be permitted to continue and to seek injunctions in the district courts of the United States to prevent future violations of the law, as well as other forms of equitable, ancillary relief, such as an accounting, disgorgement, or the appointment of a receiver. As the Supreme Court recently observed, the Commission has an "arsenal of flexible enforcement powers" at its disposal, Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976).

The Commission is authorized to conduct, through its own attorneys, civil litigation in the federal district courts and courts of appeals. Criminal prosecutions are, pursuant to statute, referred for litigation to the Department of Justice, although the Commission participates extensively in the investigation of criminal matters and their preparation for litigation. Similarly, by arrangement, most Supreme Court litigation involving the Commission is conducted with the assistance of the Solicitor General; the Commission generally prepares the draft of any brief to be filed, and its staff consults with the staff of the Solicitor General to reconcile any differences of view. While the presentation of agency positions is a matter of discussion between the Commission and the Solicitor General, the substantive policies to be articulated are determined by the Commission. 1/

The Commission's authority to conduct civil litigation on its own behalf in the lower federal courts was upheld in 1935, shortly after the Commission's formation, in Securities and Exchange Commission v. Robert Collier & Co., 76 F.2d 939 (C.A. 2, 1935). The United States Court of Appeals for the Second Circuit concluded in that case that the Commission could, through its own attorneys, maintain an action to enforce the Securities Act of 1933. Similarly, in 1941, in Jones v. Kennedy, 121 F.2d 40, 45, certiorari denied, 314 U.S. 665 (1941), the United States Court of Appeals for the District of Columbia Circuit held that the Commission's attorneys could defend Commission members and officers sued in their individual capacities for acts related to their official duties. Since that time, the Commission's authority to enforce the statutes it is charged with administering, and the Commission's authority to defend itself and its employees in connection with litigation arising out of the Commission's adminis-

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1/ See S & E Contractors v. United States, 406 U.S. 1, 13 (1972).

tration of the federal securities laws, has been well established. 2/

The Commission's authority to conduct litigation lies in the six general categories described below:

1. Actions to enjoin violations of, or to compel compliance with, the federal securities laws

The following statutes authorize the Commission to bring actions to enjoin violations of the various acts involved: Section 20(b) of the Securities Act of 1933, 15 U.S.C. §77t(b); Sections 21(d) and (e) of the Securities Exchange Act of 1934, 15 U.S.C. §§78u(d) and (e); Section 18(f) of the Public Utility Holding Company Act of 1935, 15 U.S.C. §79r(f); Section 321(a) of the Trust Indenture Act of 1939, 15 U.S.C. §77uuu(a); Section 42(e) of the Investment Company Act of 1940, 15 U.S.C. §80a-41(e); and Section 209(e) of the Investment Advisers Act of 1940, 15 U.S.C. §80b-9(e).

Section 20(b) of the Securities Act of 1933 is typical of the various provisions cited above:

> "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the United States District Court for the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title * * *." 15 U.S.C. 77t(b).

2/ See, e.g., White v. Jaegerman, 51 F.R.D. 161, 162 (S.D. N.Y., 1970), which involved a former Commission employee sued for acts connected with his official duties; see also, Skolnick v. Hanrahan, 398 F.2d 27 (C.A. 7, 1968); Weiss v. Bonsal, 344 F.2d 428 (C.A. 2, 1965); Meredith v. Van Oosterhout, 286 F.2d 216, 219-220 (C.A. 8, 1960), certiorari denied, 365 U.S. 835 (1961).

In addition, the Commission is authorized by the following statutory provisions to seek writs of mandamus in order to compel compliance with the various statutes involved: Section 20(c) of the Securities Act of 1933, 15 U.S.C. §77(c); Section 21(e) of the Securities Exchange Act of 1934, 15 U.S.C. §78u(f); Section 18(g) of the Public Utility Holding Company Act of 1935, 15 U.S.C. §79r(g); and Section 321(a) of the Trust Indenture Act of 1939, 15 U.S.C. §77uuu(a).

The Commission's litigation authority under the Securities Exchange Act of 1934 was expanded by the Securities Acts Amendments of 1975, Pub. L. 94-29 (June 4, 1975). Formerly, the Commission was empowered to seek injunctions and writs of mandamus whenever there appeared a probable present or future violation of the provisions of that Act or any rule or regulation thereunder. As amended, Sections 21(d) and (e) of the Securities Exchange Act of 1934 permit the Commission to seek an injunction or writ of mandamus against probable violations not only of the Act and rules thereunder, but also of the rules of any self-regulatory organization.

Finally, Section 7(b) of the Securities Investor Protection Act of 1970, 15 U.S.C. §78ggg(b), authorizes the Commission to bring actions against the Securities Investor Protection Corporation to compel it to discharge its obligations under that Act. The unique role to be played by the Commission in this latter context was expressly recognized by the Supreme Court, and the Commission's independent action was viewed as appropriately precluding the implications of private rights under that statute. See Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975).

2. Defense of suits against the Commission or its employees

The Commission's attorneys defend actions brought against the Commission, and suits against its members or employees for acts arising from the performance of their duties. See, e.g., Jones v. Kennedy, supra, 121 F.2d 40, 45 (C.A. D.C., 1941); White v. Jaegerman, supra, 51 F.R.D. 161 (S.D. N.Y., 1970). Such litigation may involve, for example, suits to enjoin Commission investigations, administrative proceedings or other activities; suits to review the denial of rulemaking petitions or of Freedom of Information Act requests; and claims for money damages against Commission employees.

3. Enforcement of Commission subpoenas

The Commission is authorized by the following statutes to seek enforcement of its subpoenas in the appropriate district court: Section 22(b) of the Securities Act of 1933, 15 U.S.C. §77v(b); Section 21(c) of the Securities Exchange Act of 1934, 15 U.S.C. §78u(c); Section 18(d) of the Public Utility Holding Company Act of 1935, 15 U.S.C.

§79r(d); Section 321(a) of the Trust Indenture Act of 1939, 15 U.S.C. §77uuu(a); Section 42(c) of the Investment Company Act of 1940, 15 U.S.C. §80a-41(c); and Section 209(c) of the Investment Advisers Act of 1940, 15 U.S.C. §80b-9(c).

4. Participation in bankruptcy reorganization proceedings

The Commission is authorized, under 11 U.S.C. §608, to intervene in corporate reorganization proceedings under Chapter X of the Federal Bankruptcy Act. In addition, the Commission is authorized, under 11 U.S.C. §728, to apply for the transfer to Chapter X of arrangement proceedings initially brought under Chapter XI of the Federal Bankruptcy Act, and to participate in such proceedings. See Securities and Exchange Commission v. American Trailer Rentals Co., 379 U.S. 594 (1965). While the Commission is precluded by 11 U.S.C. §606 from initiating appeals in Chapter X cases, it may do so in a Chapter XI case in which it has intervened. Securities and Exchange Commission v. U.S. Realty & Improvement Co., 310 U.S. 434 (1940). It is also well-settled that the Commission may participate in appeals brought by others under Chapter X. See, e.g., In Re Imperial "400" National, Inc., 432 F.2d 232, 234 (C.A. 3, 1970); Ashbach v. Kirtley, 285 F.2d 159, 162 (C.A. 8, 1961). The Commission is also empowered to institute a mandamus proceeding in a Chapter X reorganization. Securities and Exchange Commission v. Krentzman, 397 F.2d 55 (C.A. 5, 1968).

5. Amicus curiae participation in private litigation

The Commission participates on occasion as amicus curiae in private litigation involving significant questions of law concerning the federal securities acts. Such participation is often requested by the court in which the case is pending. 3/ In addition, the Commission receives many requests to participate from parties in private litigation. In recent years, the Commission has received an average of approximately 120 requests annually for its amicus curiae participation, and has participated in about 20 to 30 such cases each year, generally at the appellate level.

6. Review of Commission orders and appeals from injunctive and other proceedings

The Commission conducts litigation in response to petitions for review of Commission orders in the courts of appeals. The statutes

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3/ See, e.g., Tannenbaum v. Zeller, 552 F.2d 402 n.2 (C.A. 2, 1975), and Abrahamson v. Fleschner, [1977] CCH Fed. Sec. L. Rep. ¶95,889 at 91,282 n.13, in which the Court of Appeals for the Second Circuit expressed appreciation for the "helpful" brief submitted by the "SEC in response to our invitation," addressing certain novel issues involving the interpretation of the Investment Advisers Act of 1940, 15 U.S.C. 80b-1, et seq.

providing for review of Commission orders in the courts of appeals are as follows: Section 9(a) of the Securities Act of 1933, 15 U.S.C. §77i(a); Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78y(a); Section 24(a) of the Public Utility Holding Company Act of 1935, 15 U.S.C. §79x(a); Section 322(a) of the Trust Indenture Act of 1939, 15 U.S.C. §77vvv(a); Section 43(a) of the Investment Company Act of 1940, 15 U.S.C. §80a-42(a); and Section 213(a) of the Investment Advisers Act of 1940, 15 U.S.C. §80b-13(a).

The above statutory provisions provide for court review of orders by the Commission. In connection with the Securities Acts Amendments of 1975, Pub. L. 94-29 (June 4, 1975), the Congress determined further to permit judicial review of Commission rules promulgated under specific sections of the Securities Exchange Act of 1934 which relate to the operation or regulation of the developing national market system, national clearing system, or Commission oversight of the self-regulatory organizations. Authorization for such review of rules is now provided by new Section 25(b)(1) of the Securities Exchange Act of 1934. As in the case of Commission orders, a detailed procedure for the Commission's participation in court review of rules is provided.

Finally, the Commission conducts litigation in the courts of appeals, as appellant or appellee, in appeals and other appellate proceedings, arising from actions in a district court to which the Commission was a party.

In your letter of October 7, 1977, you also ask whether the Commission has had, within the past five years, any memorandum of understanding or other express agreement with the Justice Department regarding litigation responsibilities. We have had no such written agreements. Earlier this year, however, we did have a conference with Ms. Barbara Allen Babcock, Assistant Attorney General, Civil Division, and a number of her subordinates including the Chief of the Division's Information and Privacy Section. The subject matter of this meeting was the handling of litigation instituted against the Commission under the Freedom of Information Act, Privacy Act and Sunshine Act. After a thorough discussion of this matter, Ms. Babcock and I agreed that the Commission would continue its practice of representing itself through its own attorneys in litigation instituted under these Acts, and we have in fact continued since that time to do so. Pursuant to our longstanding practice, the Commission forwards the papers in its files in these actions to the Justice Department at the time they are filed in court. The Commission frequently consults with personnel in the Information and Privacy Act Section with respect to the positions to be taken by the Commission.

In addition, upon the filing of any action against the Commission for which notice is provided to the Department of Justice, we customarily receive a letter expressly recognizing the Department's view that all such litigation appropriately falls within the Commission's domain.

We very strongly believe that the Commission's ability generally to conduct and be responsible for its own litigation has contributed to the promotion of the two objectives noted in the President's memorandum of August 25, 1977. Thus, the legal resources available to the Commission are utilized in the area which the Commission best understands. The delay which would otherwise be required to explain either the facts of a particular case or areas of the law to attorneys not thoroughly familiar with them is avoided, and compliance with the Commission's own administrative rules, regulations and guidelines is facilitated through the familiarity with these matters which the Commission's own staff acquires. In addition, bringing this resident body of expertise to bear on the full range of litigation conducted by the Commission clearly promotes the second goal articulated by the President: "to improve the way litigation is conducted in order to ensure better and more uniform application of the law."

This entire issue was recently the subject of review by both Houses of Congress, in connection with pending litigation to curb illegal corporate payments. 4/ During the consideration of this litigation, both Houses were urged to divest the Commission of its independent authority in this area in favor of the Department of Justice. The attempt to restrict this Commission's independence, and vest full authority in the Justice Department, was decisively rejected by both Houses. As the House Committee on Interstate Commerce noted:

> "Since its creation in 1934, the Commission, through its own attorneys, has been solely responsible for the conduct of all civil litigation, both trial and appellate, to which the Commission is a party. This arrangement has been effective and fruitful in insuring the proper discharge of the Commission's statutory mandate to protect the investing public. Accordingly, the committee intends that this arrangement shall not be altered.
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> "The committee found that the SEC was in a far superior position to investigate reporting companies alleged to have bribed foreign officials because of its immediate access to those company's books and Commission

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4/ See S. 305, the "Foreign Corrupt Practices and Domestic and Foreign Investment Improved Disclosure Acts of 1977," and S. Rep. No. 95-114, 95th Cong., 1st Sess. (1977); H.R. 3815, the "Unlawful Corporate Payments Act of 1977," and H.R. Rep. No. 95-640, 95th Cong., 1st Sess. (1977).

filings. Further, retaining SEC jurisdiction in the case of reporting companies will avoid a costly duplication of effort which would result if enforcement of the antibribery statute were made the sole responsibility of the Justice Department.

"Most importantly, the committee recognized the SEC's singular expertise at ferreting out foreign bribery. It was the Commission alone that followed up on the findings of the Watergate Special Prosecution Force in early 1975. On the other hand, it was not until late 1976 that the Justice Department formed a task force to investigate allegations of foreign corporate payments and to review all materials relating to such activities generated by the SEC and congressional committees.

"A further reason for vesting investigative jurisdiction in the SEC with respect to section 2 arises from the Commission's well-deserved reputation for independence in its enforcement efforts. The committee would prefer to have investigations such as these, which may be politically sensitive, conducted by an independent agency responsive to Congress rather than the Executive branch.

"Finally, the committee believes that, by assigning the SEC enforcement responsibilities with respect to Section 2, it will strengthen the Commission's ability to enforce compliance with the existing requirements of the securities laws. Although there may be practical impediments to enforcement in individual cases, proof of bribery and other white collar crimes is often difficult to obtain in domestic cases. Moreover, the Commission's enforcement efforts under existing law demonstrate that it is possible to investigate successfully improper foreign payments made on behalf of American corporations.

"The SEC's responsibilities would extend to conducting investigations, bringing actions, commencing administrative proceedings if appropriate, defending lawsuits against the Commission and its staff arising out of the Commission's obligations under this Act, and referring cases to the Justice Department for criminal prosecution where warranted, just as the Commission currently does with respect to its existing

> responsibilities under the federal securities laws. The Commission, of course, will retain the power to seek all of the existing equitable remedies that have been recognized by the courts under the securities laws, and the Committee anticipates that the commission will continue to tailor remedies to fit the circumstances of specific cases." H.R. Rep. No. 95-640, supra, at pp. 9-10.

The civil actions which are brought by the Commission are, more often than not, extremely complex and require a degree of legal expertise that goes beyond customary, or even advanced, litigation skills. Investigations and subsequent trials often consume a number of years, involve thousands of complex and technical documents, and require the combined efforts of a number of specialized professionals. The utilization of trial and appellate attorneys familiar with the subject investigation and the complexities of the securities laws avoids the necessity for a time consuming, expensive, educative process which would be required if attorneys outside the Commission were to be responsible for the Commission's civil litigation.

Moreover, unlike some areas of the law which only peripherally affect those other than the immediate litigants, when a securities case is litigated the securities industry closely follows the legal positions articulated in the Commission's complaint and monitors the course of the proceedings; the industry will often adjust its activities and mode of business to conform to the court's decision. An improperly tried case, or one decided without a full appreciation of its possible effect on the securities industry, could have long-range detrimental effects on that industry and, possibly, even the nation's economy.

Similar considerations apply as well to those cases in which the Commission is not the plaintiff, but the defendant. Such suits are often instituted, for example, to enjoin the Commission from activities that are allegedly outside the scope of its authority, or pursuant to such statutory provisions as the Freedom of Information Act, the Privacy Act or the Government in the Sunshine Act. These suits, like all of those instituted against the Commission or its staff, are closely related to Commission regulatory action, or its investigations and enforcement actions, and are often employed by the plaintiffs as tactical devices to benefit those who are, or would be, affected by Commission action. Thus, the target of a Commission investigation may institute suits seeking to enjoin the Commission from proceeding with the investigation, on the theory that the Commission is acting outside its lawful jurisdiction. 5/ Alternatively, suit may be instituted

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5/ See, e.g., Touche Ross & Co. v. Securities and Exchange Commission, S.D. N.Y., 76 Civ. 4489 (CBM). In this action, Touche Ross, an

(footnote continued)

under the Freedom of Information Act seeking to learn what information the Commission has obtained during the course of its own investigation. 6/ On occasion, the same party will institute a number of suits on different theories, each having the objective of delaying or impeding Commission enforcement action. 7/

Thus, even in the case of suits instituted against the Commission, we have found that it is essential to the promotion of the substantive work of this agency to be able to react quickly and knowledgably when such suits are instituted. The same considerations that indicate that the Commission must be permitted to litigate suits which

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5/ (continued)

accounting firm, has challenged the jurisdiction of the Commission to bring administrative proceedings to determine if Touche Ross' right to appear and practice before the Commission should be limited in any way. See also, City of Philadelphia v. Securities and Exchange Commission, 434 F. Supp. 281 (E.D. Pa., 1977), appeal pending, Sup. Ct. No. 77-410, in which the City of Philadelphia has sought to enjoin the Commission from conducting an informal inquiry into matters involving the offer and sale of the securities issued by the City.

6/ See, e.g., Merrill Lynch, Pierce, Fenner & Smith v. Securities and Exchange Commission, 39 Ad. L. 2d 254 (D. D.C., 1976). In this case, Merrill Lynch filed suit at the conclusion of the Commission's case in chief in an administrative proceeding, seeking to discover additional evidence—information which the Commission had not presented. Merrill Lynch's request for a preliminary injunction was denied by the court.

7/ For example, on the day before hearings in an administrative proceeding were scheduled to begin in the matter of the Equity Funding Corporation of America, respondents in the Commission's proceeding brought an action in one court under the Freedom of Information Act, and in another court on a theory that proceeding in an administrative context would deprive them of their right to a jury trial in private civil litigation raising the same issues of liability. In both cases, the Commission had to respond to motions for temporary injunctive relief within 24 hours and, in both cases, injunctive relief was denied. John W. Bristol & Co. v. Hills, S.D. N.Y., 77 Civ. 401 (CLB); Boston Company Institutional Investors, Inc. v. Securities and Exchange Commission, D. Mass., No. 77-265-F.

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it institutes and which involve matters touching on the agency's area of expertise, therefore, also support the consistent recognition of the Commission's capacity to represent itself when it (or a member of its staff) is named as a defendant in civil litigation.

With regard to the Commission's authority concerning criminal violations, Section 20(b) of the Securities Act of 1933, 15 U.S.C. §77t(b), is typical of analogous provisions throughout the federal securities statutes:

> "The Commission may transmit such evidence as may be available concerning such acts or practices (which constitute or which will constitute a violation of this title) to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title."

Securities Act of 1933, Section 20(b), 15 U.S.C. §77t(b). 8/ A willful violation of the federal securities laws is a criminal offense for which the violator may be fined or imprisoned, or both. 9/

While we have generally been able to work satisfactorily with the Department of Justice in the prosecution of our criminal cases, we believe they could be handled even more efficiently if, at a minimum, the Commission attorney most familiar with the case were to have significant responsibilities with respect to such actions. 10/ The Commission

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8/ See similar provisions in Section 21(e) of the Securities Exchange Act of 1934; Section 18(f) of the Public Utility Holding Company Act of 1935; Section 321 of the Trust Indenture Act of 1939; Section 42(e) of the Investment Company Act of 1940; and Section 209(e) of the Investment Advisers Act of 1940.

9/ See Section 24 of the Securities Act of 1933; Section 32 of the Securities Exchange Act of 1934; Section 29 of the Public Utility Holding Company Act of 1935; Section 325 of the Trust Indenture Act of 1939; Section 49 of the Investment Company Act of 1940; and Section 217 of the Investment Advisers Act of 1940.

10/ As a matter of policy, the Commission authorizes its staff to cooperate fully with the staff of the prosecutor. Though the practice varies according to the United States Attorney involved, Commission lawyers are sometimes appointed to assist in the presentation of cases to the grand jury and in the trial of criminal cases in court.

attorney may have obtained his familiarity with the case through participation in the investigation and sometimes by preparing an injunctive action concerning the same matters. Generally, in criminal contempt cases brought on behalf of the Commission, the Commission's attorney does play a leading role, often with very satisfactory results. The Government's effectiveness in criminal prosecution would, we believe, be increased if, at a minimum, the Attorney General were to appoint a designated Commission attorney as a Special Assistant United States Attorney, to assist in grand jury investigations and any resulting trials. It is now customary for a Commission attorney to be assigned to a case at the inception of the investigation and to remain with it through all resulting enforcement actions. As a result, a Commission attorney is thoroughly familiar with the legal theories and factual details of each case. If that attorney cannot participate directly in the trial or grand jury proceeding, the benefits of his familiarity with the case are in large part lost to the prosecution.

At a minimum, we believe it should be the normal procedure for a Commission staff member to be appointed as a special prosecutor, at least for grand jury investigations. Such an appointment would enable the staff member most familiar with the case to hear the responses of witnesses as they are given and immediately follow up with additional questions. 12/

We recognize that when litigation responsibility is given to various federal agencies instead of being centralized in a single body, certain problems are created with respect to the need for coordination, so as to avoid the taking of positions that are at odds with government-wide policy positions. Our own experience has indicated quite clearly, however, that, at least in the case of an independent regulatory agency like our Commission, these problems are virtually nonexistent. In the field of Freedom of Information Act litigation, for example, we have, as I indicated above, been most careful to coordinate the positions taken in actions against us with the positions of the Freedom of Information Act litigation section in the Department of Justice.

12/ Over the last three years, for example, the Commission has brought over thirty civil actions against some of this Country's largest corporations for their illegal corporate payments. Those lawsuits have resulted in the entry of injunctions and the imposition of ancillary relief, such as the appointment of new corporate directors and the repayment of misused corporate funds. In the same period of time, although the Justice Department has received our investigative files involving some 400 American companies, it has, as yet, not brought a single criminal action, although we understand that some indictments are expected very shortly.

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I believe that the head of that office will concur in my own view that the liaison that has existed, and which continues to exist, between our two offices has fully enabled the Department of Justice to keep track of the policy positions we were taking or planning to take, while freeing the Department, or a United States Attorney's Office, of the need to provide representation for the Commission in suits instituted against us.

Of course, there will always be situations where two agencies of the Government will disagree on what position should be taken in litigation. One recent example of this occurred in Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976), where the issue involved was whether the narrow venue provisions of the federal banking laws prohibited the institution of an action against a national bank pursuant to the federal securities laws, invoking the liberal venue provisions of that statute. In that case, the Commission filed an amicus curiae brief in the Supreme Court, arguing in favor of the securities laws provisions, while a federal banking agency filed an amicus curiae brief arguing that a bank should be immune to any suit except in the district where it has its principal place of business. The Solicitor General did not take any position on behalf of the Government.

In another recently-decided case, one involving the application of the securities laws to interests in pension trust funds, Daniel v. International Brotherhood of Teamsters, [Current] CCH Fed. Sec. L. Rep. ¶96,141 (C.A. 7, Aug. 20, 1977), the Commission and the Department of Labor set forth their contrasting views on the issues whether the antifraud provisions of the securities laws were applicable to interests in a noncontributory pension plan, and whether recovery under these laws would be inconsistent with or duplicative of national labor law or policy.

And, in 1975, the Commission filed an amicus curiae brief in United States v. National Association of Securities Dealers, 422 U.S. 694 (1975), taking the position that compliance by those engaged in the securities industry with a comprehensive regulatory scheme implemented and administered by the Commission should not result in liability under the federal antitrust laws. In a 5-to-4 decision, the Supreme Court agreed with the position enunciated by the Commission in that case.

The point of these examples is, I would submit, that often a legitimate difference in view may develop between two or more agencies of the Government concerning complex and difficult issues of law, and it is best to test all such views by submitting them to an independent court, rather than by having one central authority impose an artificial unanimity of view upon all. In this regard, it must particularly be remembered that the independent regulatory agencies were created by the Congress to be independent and to exercise an independent judgment with respect to all matters within the confines of their jurisdictions. It would, to a significant degree, make it impossible to fulfill our assigned responsibilities, if the Commission's independent judgment were subject to an executive branch veto in matters concerning litigation. Accordingly, I believe that when different branches of the Government feel they must disagree, it is usually best to permit them to do so, and leave final resolution to the courts.

I hope that this discussion of the subject of the Commission's litigation responsibilities will be useful to you in your examination of the Government's legal representation system. I want to assure you that we at the Commission are acutely aware of the importance of the goals articulated by the President in his August 25, 1977, memorandum and, as indicated above, we have some ideas as to how those general goals can best be promoted. I would be most pleased to participate in any further discussion or consideration of this subject which you plan to undertake.

Sincerely,

Harvey L. Pitt
General Counsel

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

April 17, 1978

James M. Graham, Esquire
Staff Counsel
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Graham:

This is in response to your letter, dated January 17, 1978, enclosing a copy of Volume V of the Study on Federal Regulation, which was recently published by the Senate Committee on Governmental Affairs. You state that the Committee is presently considering what steps should be taken to implement the Study's recommendations with respect to the litigation authority of the independent regulatory agencies, and seek my comments in this regard. You also ask whether there are any "informal understandings" between the Commission and the Department of Justice concerning the Commission's litigation authority. We are pleased to furnish this information to the Committee, and hope that it will be of assistance in its consideration of this important subject matter.

At the outset, you may be interested in reviewing the enclosed copy of my letter of December 6, 1977, to Mr. F. T. Davis, Jr., Director of the General Government Division of the Office of Management and Budget, concerning the litigation authority of the Commission. That letter reviews the extensive existing authority of the Commission to conduct the litigation it institutes or in which it, its officers, or its employees, are named as defendants.

As that letter indicates, we believe that the ability to conduct litigation is crucial to the independence of a regulatory agency such as the Commission. As I pointed out at page 13 of my letter,

> "the independent agencies were created to be independent and to exercise an independent judgment with respect to all matters within the confines of their jurisdiction. It would, to a significant degree, make it impossible to fulfill our assigned responsibilities, if the Commission's independent judgments were subject

to an executive branch veto in matters concerning litigation." 1/

I, therefore, want to note my wholehearted agreement with the conclusions expressed in Volume V of the Committee's Report concerning the litigating authority of federal regulatory agencies. As the report notes at pages 64-65 of Volume V (emphasis in original):

> "Regulatory responsibility was vested by Congress in the agencies for, it is important to recall, a very definite reason. Congress intended that these particular commissions operate outside the supervision and direction of the President and other executive branch officials, including the Attorney General. The commissions are accountable to Congress for their success or failure. The practice of allowing the Justice Department to control agency court proceedings diffuses that accountability, by transferring an important responsibility outside the agency. If the commissions are denied independent access to the courts, if they are instead dependent upon the Justice Department and its lawyers, then in this important regard they function as nothing more than Presidential commissions. Our recommendations on litigation rest on the assumption that these agencies were not established to assist the President in implementation of executive branch policies. The President may, without objection from the Congress, coordinate litigation for those agencies accountable to him. But that should not include the independent regulatory commissions."

1/ The concept of "independence," as it has been applied to the federal regulatory agencies, was extensively reviewed in my letter of December 22, 1977, to Wayne G. Granquist, Associate Director for Management and Regulatory Policy, Office of Management and Budget, concerning the authority of the independent regulatory authorities, a copy of which I have also enclosed for your information and consideration.

These conclusions seem to me to be very sound. Indeed, it is my firm belief that the high degree of effectiveness which characterizes this agency, which has on numerous occasions been pointed to by Congressional oversight committees, 2/ is attributable, to a considerable degree, to the fact that the Commission, in large part, has the litigation authority which enables it to be fully responsible for the success or failure of the regulatory and enforcement programs it determines to pursue. I also believe that the high morale that characterizes our staff at the Commission is due to the fact that it is widely known that ultimate responsibility for the Commission's programs will not be transferred to attorneys unfamiliar with our basic and long-range concerns at the crucial point when an agency program is challenged in court.

In responding to your letter, I also think it important to note at the outset that one accusation frequently made (and in the not so distant past, a reality) is that the Executive Branch of Government may take certain actions for political, as opposed to substantive, reasons. 3/ In order for my responses to be as helpful as possible, it is important to be able to address that danger, and the devices available to protect against it. This is so, because the danger is systemic in nature; and is not susceptible of prevention or correction merely because the individuals who comprise our government are personally trustworthy. I hope, however, that, in addressing this concern, my comments will not be taken as impugning the integrity of any individual, nor as demeaning the fine spirit of cooperation we generally have enjoyed with the Department of Justice.

Concerning your request to be apprised of any informal understandings with repect to litigation which we have with the Department of Justice, I met last year with Barbara Babcock, Assistant Attorney

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2/ *See, e.g.*, House Committee on Interstate and Foreign Commerce, *Federal Regulation and Regulatory Reform, Report by the Subcommittee on Oversight and Investigations*, 94th Cong., 2d Sess. 15-54 (1976).

3/ *Cf.* Subcommittee on Consumer Protection and Finance, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess., *Hearings on Unlawful Corporate Payments Act of 1977*, (Colloquy between Congressman Eckhardt and Secretary Blumenthal).

General of the Civil Division, Department of Justice, and with members of our respective staffs, to discuss the handling of suits brought against the Commission under the Freedom of Information Act, the Privacy Act and the Government in the Sunshine Act. We agreed at that meeting that the Commission would continue in its established, and judicially-accepted, practice of defending itself in actions brought under these laws, and we have in fact done so to the present time. Since the Committee's Report indicated that these were actions which could, "perhaps," be appropriate for central coordination under the authority of the Department of Justice (Report, page 63), I would like to outline briefly the reasons that I believe any attempt to divest the Commission of its existing authority in this respect would reflect an unwise change in policy, and why we have considered it essential to maintain responsibility for the conduct of this type of litigation within the Commission.

Suits brought under these disclosure-oriented statutes are, in almost all cases, closely related to Commission regulatory action, or to its active investigations and enforcement actions, and are often employed by the plaintiffs as tactical devices to benefit those who are, or would be, affected by Commission actions. A frequently-recurring situation, for example, is a suit instituted under the Freedom of Information Act seeking to learn what information the Commission has obtained during the course of an investigation. 3/

Closely analogous to these types of suits are actions brought against the Commission to enjoin it from proceeding with an investigation on the theory that the Commission is acting outside of its jurisdiction, or in an otherwise unlawful manner. 4/ When suits of this

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3/ See, e.g., Merrill Lynch, Pierce, Fenner & Smith v. Securities and Exchange Commission, 39 Ad. L. 2d 254 (D. D.C., 1976). In this case, Merrill Lynch filed suit at the conclusion of the Commission's case in chief in an administrative proceeding, seeking to discover additional evidence—information which the Commission had not then presented, but which might have been used in rebuttal to Merrill Lynch's defense. Merrill Lynch's request for an injunctive relief halting our administrative proceeding was denied by the court.

4/ See, e.g., Touche Ross & Co. v. Securities and Exchange Commission, S.D. N.Y., 76 Civ. 4489 (CBM). In this action, Touche Ross, an

(footnote continued)

sort are instituted against the Commission, we have found that it is essential to the success of our programs to be able to react quickly and knowledgeably. 5/

Thus, the same considerations that indicate that the Commission must be permitted to litigate suits which it institutes and which involve matters touching on the agency's areas of expertise—factors readily recognized by the Committee in its Report—equally support the recognition of the Commission's capacity to represent itself when it (or a member of its staff) is named as a defendant in civil litigation. And the courts have, therefore, recognized the Commission's right to defend actions brought against it, or against its members or

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4/ (continued)

accounting firm, had challenged the jurisdiction of the Commission to bring administrative proceedings to determine if Touche Ross' right to appear and practice before the Commission should be limited in any way. *See also City of Philadelphia v. Securities and Exchange Commission*, 434 F. Supp. 281 (E.D. Pa., 1977), *appeal dismissed*, 54 L. Ed. 2d 746 (1978), in which the City of Philadelphia sought to enjoin the Commission from conducting an informal inquiry into matters involving the offer and sale of the securities issued by the City.

5/ For example, on the day before hearings in an administrative proceeding were scheduled to begin in the matter of the *Equity Funding Corporation of America*, the respondents in the Commission's proceeding brought an action in federal court in one state under the Freedom of Information Act, and in another court in another state on a theory that proceeding in an administrative context would deprive them of their right to a jury trial in private civil litigation raising the same factual issues. In both cases, the Commission had to respond to motions for temporary injunctive relief within 24 hours and, in both cases, injunctive relief was denied and no delay in the administrative proceeding was experienced. *John W. Bristol & Co. v. Hills*, S.D. N.Y., 77 Civ. 401 (CLB); *Boston Company Investor, Inc. v. Securities and Exchange Commission*, D. Mass., No. 77-269-F. These are the types of situations which become virtually impossible to handle effectively if it is necessary to communicate the situation to the Department of Justice and coordinate the defense of the litigation with Department attorneys.

employees for acts committed in the performance of their duties. See, e.g., Jones v. Kennedy, 121 F.2d 40, 45 (C.A. D.C., 1941); White v. Jaegerman, 51 F.R.D. 161 (S.D. N.Y., 1970).

I urge the Committee to reject any legislation which would divest the Commission of this vital authority. At the outset, it must be noted that, even in this more limited area, the divestiture of litigation authority from the Commission necessarily would compromise the independence of an independent regulatory agency. Litigation authority, like investigatory and policymaking authority, could be employed for purposes not germane to the effective implementation of various Congressional enactments. 6/ Accordingly, as a general proposition, it is ill-advised to compromise the independence of the independent regulatory agencies by divesting them of their litigation authority.

Moreover, the factors cited in the Report as militating in favor of the centralization of this type of litigation should not prove persuasive. Thus, the Report notes (page 63) that litigation under the Freedom of Information Act involves

> "a single statute that applies with equal force to each of the commissions, and a court decision concerning one agency is likely to affect all others. Justice Department coordination therefore would tend to encourage more uniform implementation by the agencies of such statutes."

6/ [illegible] difficult to conceive of an administrative decision, based upon political considerations, to cause an independent agency to disclose documents under the Freedom of Information Act that would otherwise properly be exempt from disclosure under that Act.

Similarly, if an independent regulatory agency were dependent upon the Department of Justice to litigate such cases, it necessarily would become vulnerable to pressures by the Administration to render substantive decisions not in accordance with the agency's policy choices. Cf. Subcommittee on Consumer Protection and Finance, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess., Hearings on Unlawful Corporate Payments Act of 1977, 190-192 (1977) (Colloquy between Congressman Eckhardt and Secretary Blumenthal).

But, while all cases brought under the Freedom of Information Act may involve the interpretation of the same statute, I believe the more important considerations are that suits against this Commission under the Freedom of Information Act involve a particular *application* of that Act to particular agency records, in a particular *factual* context existing within the agency, and that the resolution of such suits in a manner adverse to the agency will often have an adverse effect upon our substantive work. In these situations, there is no doubt in my mind that this Commission, at least, can best be represented in court by its own counsel.

The Congress itself has explicitly recognized the particularized impact of the Freedom of Information Act on the work of this Commission in enacting, as part of the Securities Acts Amendments of 1975, Section 24(a) of the Securities Exchange Act, 15 U.S.C. 78x(a). This Section applies the provisions of the Freedom of Information Act to the various types of documents required to be filed with the Commission by the Securities Exchange Act, and provides that the Commission may promulgate rules to govern, *inter alia*, requests from registrants that certain information in these materials should not be publicly disclosed because it is exempt from the disclosure requirements of the Freedom of Information Act. 7/ Pursuant to Section 25 of the Securities Exchange Act, a petition for review of an order of the Commission denying a request for confidential treatment may be filed in an appropriate court of appeals. 8/

Thus, Freedom of Information Act issues have been presented in litigation involving court review of Commission orders authorized by the securities laws themselves—litigation that no one would suggest should be conducted by the Department of Justice. 9/

7/ The Commission has promulgated Securities Exchange Act Rule 24b-2 to provide a means for considering such requests. 17 CFR 240.24b-2.

8/ *Continental Stock Transfer and Trust Co.* v. *Securities and Exchange Commission*, ___ F.2d ___, [Current] CCH Fed. Sec. L. Rep. ¶96,172 (C.A. 2, 1977); *Canadian Pacific Limited* v. *Securities and Exchange Commission*, petition for review dismissed February 24, 1978, C.A. D.C., No. 77-1587. *Cf.* *American Sumatra Tobacco Co.* v. *Securities and Exchange Commission*, 93 F.2d 236 (C.A. D.C., 1937).

9/ Similarly, I believe that the one other type of litigation mentioned in the Report as potentially justifying centralization in the Department of Justice—litigation arising from allegedly discrimina-

(footnote continued)

In addition, it should prove less than compelling that a single statute is being applied in these cases. As noted, the critical criterion, in my view, is whether independent regulatory agencies can remain independent if the Administration must litigate for it. In this context, it is often the case that identical or similar legal concepts are used in the organic statutes of various agencies and, therefore, it is also often the case that a decision involving one agency's statute will have an impact on the interpretation of another statute administered by various other agencies, such as similar subpoena enforcement statutes.

And, of course, litigation involving any agency can turn upon an interpretation of the Administrative Procedure Act or some other statute applying to all agencies, or upon a ruling with regard to constitutional

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9/ (continued)

tory hiring practices—can also best be handled wholly within the agency primarily affected by the litigation or settlement of such actions. These types of suits often touch on crucial areas of internal management—matters which are the ultimate responsibility of the agency, not the Department of Justice. By statute, it is the responsibility of the agency to ensure that its employment practices are free from discrimination based on race, color, religion, sex, age, or national origin. See 42 U.S.C. 2000e-16.

Moreover, the Chairman of the Commission is given authority over a broad range of personnel-related matters at the Commission. See Reorganization Plan No. 10, 15 Fed. Reg. 3175 (1950). ~~When action taken pursuant to that authority is challenged in~~ an action alleging discrimination, the agency itself is in the best position to conduct that litigation, since the agency is most familiar with the underlying facts, and has a direct interest in ensuring that a resolution is reached which will satisfy all parties without jeopardizing internal management objectives.

We believe it would be more difficult for a responsible program of personnel management to function effectively if the crucial questions that are often presented in the context of litigation arising from agency grievance or discrimination proceedings are left to the discretion of an entity other than the agency. It is for that reason that this Commission has represented itself in such proceedings, whether occurring before the Civil Service Commission or in court. See, e.g., Kemp v. Williams, D. D.C., No. 77-2014.

concepts such as due process or illegal search and seizure. Even relatively unusual areas of the law can become involved in particular Commission actions. 10/

The plain fact is that a significant portion of the Commission's litigation involves the interpretation of laws of general applicability, not only of provisions of the federal securities laws themselves.

Legislative Proposals

Finally, you have requested my comments with respect to the question of what steps could appropriately be taken to implement the study's recommendations. I believe that the Committee should approach this question on an agency-by-agency basis, rather than by attempting to deal with all agencies in one statute. There are several reasons for this.

First, the regulatory and enforcement responsibilities of the various agencies vary widely, and it would appear advisable for statutes to deal with these programs on an individual basis. Second, traditions and practices within agencies vary widely, as do the practical, day-to-day, working relationships that each agency has established over the years with the Department of Justice and the Solicitor General.

A legislative program that applied equally to all agencies indiscriminately might do violence to some of these traditions and relationships, and to the extent that litigation authority was transferred with little or no provision for advance preparation, regulatory programs would surely suffer. The Committee should by no means underestimate the time required to build an effective litigating unit and to become familiar with the prob- [redacted]

10/ For example, in one recent Commission enforcement action, an investment adviser subject to the Commission's regulation based his defense on his asserted right, under the First Amendment, to be free of Commission-imposed restrictions on his advertising material. Securities and Exchange Commission v. C. R. Richmond & Co., ___ F.2d ___, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. ¶96,273 (C.A. 9, Dec. 7, 1977). In another, a claim was made that a respondent in a Commission administrative proceeding had a right, under the Sixth Amendment, to the assistantce of counsel paid by the Commission. Peeney v. Securities and Exchange Commission, 564 F.2d 270 (C.A. 8, 1977), petition for certiorari pending.

On the other hand, legislation tailored to existing situations could effect, where desired, a gradual and manageable transfer of authority in those cases where the Congress deems a transfer advisable. Finally, the desires of various agencies may differ, and it may well be that, in some cases, there is no good reason why litigation for a particular agency should not be conducted by the Department of Justice, while in other cases such control would severely undercut agency authority and inhibit the achievement of the Congress' regulatory goals. Legislation which can react to these practical realities seems to me to be required. This is the approach that recently has been followed by the Congress with respect to some agencies. 11/

Accordingly, I have approached your request from the standpoint of what type of legislation would be most appropriate for this Commission, with its particular regulatory and enforcement programs, its own particular traditions, and its history of nearly forty-five years of litigating on its own behalf. In this regard, I believe it would be appropriate to enact the following program:

(1) codification of the Commission's existing and recognized authority to represent itself in court in all cases in which it is a plaintiff or defendant or appears as an _amicus curiae_;

(2) statutory authorization for the Commission to seek or oppose petitions for writs of _certiorari_ from the Supreme Court to the courts of appeals in cases arising from actions in which the Commission is authorized to represent itself in the lower courts, and to conduct litigation before the Supreme Court in cases where a petition for _certiorari_ is granted, in order to codify the existing understanding between the Commission and the Solicitor General; and

(3) statutory authorization to seek and obtain from the Attorney General, or a United States Attorney, appointment of specified Commission attorneys as Special United States Attorneys, in order to participate in grand jury investigations and criminal trials in any case investigated by the

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11/ _See, e.g._, the recent enactments affecting the litigation authority of the Federal Trade Commission, 15 U.S.C. 56, and the Federal Energy Regulatory Commission, Pub. L. 95-91, Sec. 401(i) (1977).

Commission and referred to the Department of Justice for possible criminal prosecution.

The reasons for these proposals are summarized briefly below.

Codification of Existing Litigation Authority

I believe it essential that, at a minimum, any legislation touching on the subject of the litigation authority of the Commission should preserve the existing authority of the Commission to conduct the suits in which it is a party, whether plaintiff or defendant. As indicated supra, the Commission's present practice is to conduct its own enforcement litigation and to defend itself when it or its present or former members or employees are sued. The fulfillment of the Commission's responsibilities will best be promoted by the continuation of this practice; any diminution of the Commission's existing authority would have a severely adverse effect.

Similarly, as noted in the Report (page 62), litigation in the Supreme Court "is still very much the domain of the Attorney General and the Solicitor General." By arrangement, m ost Supreme Court litigation involving the Commission has traditionally been conducted in cooperation with the Solicitor General; but, virtually all the work of drafting the legal papers filed in the Supreme Court is done within the Commission. The Commission generally prepares the draft of any brief to be filed, and its staff then consults with the staff of the Solicitor General to reconcile any differences of view. The manner of presentation of agency position is a matter of discussion between the Commission and the Solicitor General; and for the most part, the Commision has been able to determine the substantive policies to be articulated. 12/

[redacted] authority under its present statute to conduct Supreme Court litigation arising from actions it institutes pursuant to the federal securities

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12/ See S & E Contractors v. United States, 426 U.S. 1, 13 (1972).

Nevertheless, on occasion, the Solicitor General has attempted to effect changes in substantive positions the Commission wishes to articulate. We have generally resisted these efforts, and believe that codification of our authority to litigate on own behalf in the Supreme Court should clarify the inappropriateness of such efforts.

laws. The Commission, of course, conducts its own appellate litigation in the United States Court of Appeals, a practice which readily found judicial approval soon after the Commission was created, 13/ and there is nothing in the Commission's statutes that would distinguish Supreme Court litigation from other appellate litigation. Nevertheless, other statutory provisions, 14/ as well as traditions of long standing, 15/ leave some ambiguities in the actual extent of our authority. This situation is certainly one that appears ripe for legislative clarification, and I recommend the clarification of our authority in this regard.

These two changes—codification of our general litigation authority, and clarification of our litigation authority in the Supreme Court—are embodied in proposed new Section 21(h) of the Securities Exchange Act, set forth in Attachment A to this letter.

Authority With Respect to Criminal Proceedings

With regard to the Commission's authority concerning criminal violations, Section 20(b) of the Securities Act of 1933, 15 U.S.C. §77t(b), is typical of analogous provisions throughout the federal securities statutes. It provides, in pertinent part:

> "The Commission may transmit such evidence as may be available concerning such acts or practices

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13/ Securities and Exchange Commission v. Robert Collier & Co., 76 F.2d 939 (C.A. 2, 1935).

[redacted] the Solicitor General authority to "conduct and argue suits and appeals in the Supreme Court." We believe that the Commission's statutes provide exceptions to this general rule of centralized authority, just as they do with respect to other statutory provisions which vest general litigating authority in the lower courts in the Attorney General. See 28 U.S.C. 516 and 519, which grant the Attorney General general authority to "conduct" and "supervise" all litigation in which the United States or an agency is interested or is a party.

15/ As noted in the Report (page 62), the clerk of the Supreme Court customarily declines to accept any petitions or briefs from the federal agencies which are not associated with the Department of Justice or approved by the Solicitor General.

> (which constitute or which will constitute a violation of this title) to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title." 16/

A willful violation of the federal securities laws is a criminal offense for which the violator may be fined or imprisoned, or both. 17/

While we have generally been able to work satisfactorily with the Department of Justice in the prosecution of our criminal cases, I believe there is a need to increase the government's overall capabilities and efficiency in this area. 18/ We have often been concerned that the high level of demand, from numerous sources, on the resources of the Department of Justice has meant that securities laws violations, as well as other areas of "white-collar" crime, have often received insufficient attention. 19/ In order to assist the Department in alleviating these conditions, the Commission has, in recent years, made available to work with the Department the Commission attorneys who are

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16/ See similar provisions in Section 21(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(d); Section 18(f) of the Public Utility Holding Company Act of 1934, 15 U.S.C. 79r(f); Section 321 of the Trust Indenture Act of 1939, 15 U.S.C. 77uuu; Section 42(e) of the Investment Company Act of 1940, 15 U.S.C. 80a-41(e); and Section 209(e) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-9(e).

17/ See Section 24 of the Securities Act of 1933, 15 U.S.C. 77x; Section 32 of the Securities Exchange Act of 1934, 15 U.S.C. 78ff; Section 29 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79cc; Section 325 of the Trust Indenture Act of 1939, 15 U.S.C. 77yyy; Section 49 of the Investment Company Act of 1940, 15 U.S.C. 80a-48; and Section 217 of the Investment Advisers Act of 1940, 15 U.S.C. 80b-17.

18/ Generally, in criminal contempt cases brought on behalf of the Commission, the Commission's attorney does play a leading role, often with very satisfactory results.

19/ See e.g., General Accounting Office, United States Attorneys Do Not Prosecute Many Violations of Federal Laws (B-178618).

most familar with the details of a particular case, 20/ a practice we have found to have had very salutory results. 21/

The Government's effectiveness in criminal prosecutions would, I believe, be increased if, the Attorney General were to appoint, on an ad hoc basis, a designated Commission attorney as a Special Assistant United States Attorney, to assist in grand jury investigations and any resulting trials related to a particular matter. It is now customary for a Commission attorney to be assigned to a case at the inception of the investigation and to remain with it through all resulting enforcement actions. As a result, a Commission attorney is thoroughly familiar with the legal theories and factual details of each case. If that attorney cannot participate directly in the trial or grand jury proceeding, the benefits of his familiarity with the case are in large part lost to the prosecution.

My suggested legislative provision, therefore, is set forth as a proposed addition to each of the present statutory provisions regarding criminal law violations, and would authorize this practice on a more formal basis. The Commission could seek and obtain, from the Attorney General or the United States Attorney to whom investigatory files are referred for possible criminal prosecution, the appointment of specified Commission attorneys as Special Assistant United States Attorneys for the purpose of participating with and assisting Department of Justice personnel in any resulting grand jury proceedings or criminal trial. I believe that this legislation would indicate the Congress' intention that such appointments be sought and made whenever this would enable the Government to present a criminal case in the most timely, effective and economical manner possible.

20/ These Commission attorneys have usually obtained their familiarity with the case through participation in the investigation, and sometimes by preparing an injunctive action concerning the same matters.

21/ The Commission attorneys who assist the Department of Justice are often given temporary appointments as Special Assistant United States Attorneys.

I hope that these comments will aid the Committee in its consideration of this matter. If I can be of any further assistance to you in this regard, please do not hesitate to call on me.

Sincerely,

Harvey L. Pitt

Harvey L. Pitt
General Counsel

Enclosures

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

CHAIRMAN'S OFFICE
MAILED
DEC 14 1978

The Honorable John Glenn
United States Senate
Committee on Governmental Affairs
Washington, D.C. 20510

Dear Senator Glenn:

This letter is in further response to your letter, dated June 29, 1978, requesting the Commission's comments with respect to S. 3240, the "Independent Regulatory Commission Act" (the "Bill").

The Commission is appreciative of the concern, reflected in this Bill, for insulating the independent regulatory commissions from unwarranted influence from the Executive Branch. Moreover, the provisions of the Bill relating to the selection and tenure of members of such commissions, which are intended to promote merit over political concerns in the appointment and retention of commissioners, represent salutary steps toward ensuring efficient and effective regulation of significant aspects of the nation's commerce. Our comments on the specific provisions of the Bill follow.

1. Section 4 of the Bill provides that the President shall nominate, as candidates for members of independent regulatory commissions, "individuals who by reason of training, education, or experience are qualified to carry out the functions of such commission[,] * * * insur[ing] that commission membership is well balanced with a broad representation of various talents, backgrounds, occupations and experience appropriate to the functions [redacted]

The Commission has no objections to the enactment of a provision such as this. The Commission's present enabling act provides, in pertinent part, that "[n]ot more than three of [the five] commissioners shall be members of the same political party, and in making appointments members of different parties shall be appointed alter- [redacted]

1/ Subsection 4(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78d(a). The Bill does not purport to repeal or amend the Securities Exchange Act or Reorganization Plan No. 10 of 1950. Consequently, we presume that these provisions would continue to apply and would be supplemented by the Bill. If this is not the case, we would object, since we believe the political orientation criteria in Section 4(a) to be useful in preserving the Commission's independence.

the Bill, emphasizing as it does the substantive qualification rather than political affiliation of Commission members, will require the consideration of additional factors in the appointment of Commission members. In light of the complex and far-reaching areas of economic regulation which are within the jurisdiction of the independent commissions, it may well be appropriate to take such factors into consideration.

2. Subsection (a) of Section 5 of the Bill provides that commission chairman shall be appointed by the President with the advice and consent of the Senate.

While this Commission's members initially selected the Chairman of the Commission, that function was transferred to the President by Reorganization Plan No. 10 of 1950; 2/ and, the President currently exercises that function, although without the advice and consent of the Senate. This Commission has no objection to the enactment of this provision, assuming that the Commission would have the authority to provide, on an interim basis, for a Commission member to act as chairman during a vacancy pending such appointment and confirmation.

3. Subsection (b) of Section 5 of the Bill would grant to the chairmen of commissions significant essential executive and administrative functions. Specifically, a chairman would be responsible for (1) the appointment and employment of hearing examiners, (2) the selection, appointment and compensation of personnel, (3) the supervision of commission personnel, excepting the personal staffs of other commission members, (4) the distribution of business among commission personnel and administrative units, and (5) the procurement of the services of experts and consultants.

The administrative functions to be performed by commission chair- [redacted] which were made the responsibility of the Chairman of this Commission by Reorganization Plan No. 10 of 1950. 3/ That Plan, however, reserved to the Commission certain review functions with respect to the Chairman's exercise of his authority which we believe would be appropriate for inclusion in the Bill. Thus, Section 1(b)(1) of the Plan provides that the Chairman shall be "governed by the general policies[,] * * * regulatory decisions, findings and determinations" of the Commission. Moreover, the Commission approves the Chairman's appointment of "the

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2/ 15 Fed. Reg. 3175, 64 Stat. 1265 (May 24, 1950).

3/ We assume that there is no intention to supersede the provisions of Reorganization Plan No. 10. See n.1, supra.

heads of major administrative units." Id., Section 1(b)(2). And, the Commission "revis[es] budget estimates with respect to determining upon the distribution of appropriated funds according to major programs and purposes." Id., Section 1(b)(4). This Commission has found this reservation of review authority over significant administrative decisions to be an efficient means of ensuring that administrative decisions do not impact inadvertently on the Commission's substantive regulatory policies.

4. Section 6 of the Bill provides that "commission [members] may be removed from office by the President for inefficiency, neglect of duty, or malfeasance in office, but for no other cause."

The Commission's enabling statute, unlike the statutes of other agencies such as the Federal Trade Commission, does not contain criteria specifying the circumstances in which members may be removed from office by the President. 4/ We are in favor of clarifying the President's removal authority, but we believe the term "inefficiency" should be deleted from the removal standard since it may be inconsistent with the Bill's stated purpose of preserving the independence of federal regulatory commissions. We believe that "neglect of duty" and "malfeasance in office" are more objectively determinable standards than "inefficiency," which is more open to subjective differences of opinion. 5/

5. Section 7 of the Bill provides for the concurrent transmittal to the Congress of any budget estimate, request or information submitted to the Executive Branch. Section 8 provides that the Executive Branch cannot require an independent regulatory commission to transmit to it any legislative recommendations, testimony or comments prior to the submission of that material to the Congress. To the extent that an independent regulatory commission does submit any such material, intended for the [redacted]

4/ Compare Section 4 of the Securities Exchange Act, 15 U.S.C. 78d with 15 U.S.C. 41.

[redacted] silence on grounds for removal did not constitute grant of discretionary removal authority to President) with Humphrey's Executor v. United States, 295 U.S. 602 (1935) (approving limited removal authority granted the President by the Congress over members of the Federal Trade Commission). We recognize that the formulation of the standard for removal in the Bill is the same as the one which was considered by the Supreme Court in Humphrey's Executor. That case, however, involved a situation in which the President did not rely on the statutory language but rather on a general assertion of incompatibility.

Congress on the initiative of the commission or a member thereof, or at the request of any member of Congress.

The Commission supports this proposal. Although the Commission, as an independent regulatory commission, is not required to clear its legislative proposals or comments through the Office of Management and Budget, it does provide copies of such proposals to that Office. 6/

6. Subsection 9(a) provides that attorneys designated by the commission chairman shall represent the commissions "in any civil action brought in connection with any function carried out by the commission pursuant to law." Subsection 9(b) excludes litigation before the Supreme Court from the coverage of Subsection 9(a), "as provided in Section 518 of Title 28, United States Code, except as it may be modified by Section 2350 of Title 28, United States Code."

James Graham, Staff Counsel of the Senate Committee on Governmental Affairs, previously solicited the views of the Commission's General Counsel with respect to codification of the Commission's present independent litigation authority. For a detailed analysis of the Commission's present authority and the General Counsel's recommendations for codification, see the letter of Harvey Pitt to Mr. Graham, dated April 17, 1978, a copy of which is attached as Exhibit A.

To the extent that Subsection 9(a) reaffirms the Commission's independent authority to be represented by its own attorneys in litigation affecting it, the Commission strongly urges the adoption of this codification of its existing independent litigation authority. We believe that this Subsection should be clarified, however, to preserve the Commission's present practice of using its own attorneys in suits brought against the Commission or its employees for activities within the scope [redacted] judicial and Congressional approval. 7/ We thus recommend that Subsection 9(a) be amended by inserting the phrase "or its employees who are sued for actions taken in the performance of their official duties," after "such commission," and by inserting the phrase "by such commission or against such commission or its employees for actions taken in the [redacted]

In addition, the Commission is concerned that Subsection 9(b), as drafted, does not adequately protect the Commission's independence

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6/ See Section 11 of Public Law 93-495, 88 Stat. 1500 (Oct. 28, 1974).

7/ See, e.g., Jones v. Kennedy, 121 F.2d 40, 45 (C.A. D.C. 1941); White v. Jamgerman, 51 F.R.D. 161 (E.D. N.Y. 1970); S. Rep. No. 95-114, p. 12 (1977); H.R. Rep. No. 95-640, p. 10 (1977).

in this regard. That Subsection would restrict the Commission's litigation authority by placing litigation in the Supreme Court in the control of the Attorney General, pursuant to 28 U.S.C. 518, except as his authority is "modified by section 2350 of Title 28, United States Code."

That latter Section of Title 28 provides, in pertinent part, that an agency may petition the Supreme Court for a writ of certiorari to a court of appeals which has reviewed that agency's final orders or, in some cases, rules. 8/ The only agencies covered by that provision, however, are the Federal Communications Commission, the Federal Maritime Commission, the Interstate Commerce Commission, the Atomic Energy Commission, the Secretary of Agriculture and the Maritime Administration. 9/ Yet, this scheme for court review of action by those particular agencies was patterned after the review procedures set forth in the enabling acts of the Federal Trade Commission and of this Commission. 10/ Thus, the intent of the Congress would appear to have been to provide judicial review for the actions of those agencies comparable to that already provided to other agencies, including this Commission. It is doubtful that the Congress intended to allow only a few agencies direct access to the Supreme Court by way of petition for certiorari. Rather, the apparent intent was to grant those agencies the same authority that other agencies generally had exercised to control, in fact, the positions taken in Supreme Court litigation and in matters affecting those agencies' regulatory and enforcement programs.

The Commission believes it may be appropriate for the Committee to consider at this time whether all independent agencies should not

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8/ 28 U.S.C. 2350(a) (emphasis supplied) provides:

[redacted]

> "An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certio-
>
> [redacted]
>
> Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari."

9/ See 28 U.S.C. 2341(3).

10/ H.R. Rep. No. 81-2618 (1950); S. Rep. No. 81-2122 (1950).

have this limited right of direct access to the Supreme Court, for review of adverse decisions of the courts of appeals, by way of petition for certiorari. The Commission wants to make it clear that it does not dispute the utility of coordinating all government litigation in the Supreme Court through the Office of the Solicitor General in order to obtain the views of that Office, which has a perspective with respect to the government as a whole that any one agency often may not have. In addition, consultation with the Office of the Solicitor General may help to ensure procedural and stylistic consistency in the government's briefs. Yet, the Commission believes that this need for coordination should not be allowed to amount to an administrative veto on whether the Commission seeks Supreme Court review of adverse decisions.

The Commission has benefited from the traditional consultative function of the Office of the Solicitor General in this regard and believes that that Office appropriately should retain that role with respect to all government Supreme Court litigation. The Commission, however, should be able to seek Supreme Court review notwithstanding any opposition by the Office of the Solicitor General. While the Commission, of course, would seek the counsel of the Office of the Solicitor General and, no doubt, often would defer to its expertise, the Commission alone should make the final decision whether to seek Supreme Court review. The Commission can best estimate the potential impact of an adverse decision upon the administration of its regulatory programs. Accordingly, the exercise of its judgment in this regard should not be impaired by administrative veto.

While the Commission and the Solicitor General most often have reached a consensual accord with respect to such decisions, that has not always been the case. For example, in Collins Securities Corp. v. Securities and Exchange Commission, 562 F.2d 820 (D.C. Cir. 1977), the court of appeals ruled that the Commission would have to employ [redacted] tions of fraud and including the possible sanction of deprivation of livelihood. 11/ The Commission recommended to the Solicitor General that the government seek Supreme Court review of this decision, but

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[redacted] Corporation, a registered broker-dealer and investment adviser, and Timothy Collins, its principal, had committed violations of numerous provisions of the federal securities laws. Accordingly, the Commission had ordered that the company's broker-dealer and investment adviser registrations be revoked and that Mr. Collins be barred from association with a broker or dealer, provided that he could reapply

(footnote continued)

the Solicitor General declined to petition the Supreme Court on the Commission's behalf. Thus, it is argued in many of its administrative proceedings that the Commission now must adhere to this higher standard of proof. It is this sort of incident which has convinced the Commission that independent access to the Supreme Court is essential if it is to carry out its administrative functions independently of Executive Branch intervention.

Accordingly, the Commission supports the reaffirmation of its independent litigation authority as set forth in Subsection 9(a), but urges the Committee to consider carefully the potential impact of the restrictions which Subsection 9(b) would place on the meaningful exercise of that authority.

7. Section 10 of the Bill would prohibit any Executive Branch involvement (except by the Civil Service Commission) in the appointment or removal of non-member officers or employees of independent commissions.

The Commission supports this provision. We believe that the appointment or removal of Commission officers or employees should not be the subject of scrutiny by the Executive Branch, excepting appropriate review by the Civil Service Commission of individuals and positions. Political considerations should not be allowed to affect the Commission's selection of its officers and employees. 12/

8. Sections 11 and 12 of the Bill would restrict post-service activities of Commission members and employees at levels GS-16 and above. Specifically, Section 11 essentially would prohibit Commission members, under certain circumstances, from leaving government service prior to the expiration of their terms of office to accept, [redacted] cantly affected by Commission regulation. Likewise, Section 12 would

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11/ (footnote continued)

after two years to become so associated in activities not involving market-making. The court of appeals vacated the Commission's order and remanded the case for reconsideration under the "clear and convincing" standard of proof.

12/ The Commission does not, by its comments, intend any criticism of the present Administration, which is not deserving of criticism in this regard. It is the Commission's view, however, that the principles espoused in this provision are best articulated as a matter of law, rather than remaining subject to the changing policy of different administrations.

prohibit Commission members and "super-grade" employees from appearing before the Commission for one year after leaving Commission service.

We have been informed by the Committee's staff that the concerns to which these proposals were addressed have, in part, been dealt with by the passage of the Ethics in Government Act by the Ninety-Fifth Congress and that the Committee does not intend to revisit these issues. Accordingly, we will not, at this time, comment further on these provisions of the Bill.

The views herein are those of the Commission and do not necessarily reflect the views of the Administration. Our views are being submitted simultaneously to the Office of Management and Budget.

We would like an opportunity to testify on this Bill and appreciate your consideration of the Commission's comments.

Sincerely,

Harold M. Williams
Chairman

Enclosures

cc: James Graham, Esquire
[redacted]

Additional Submissions of Senator Baucus

United States Department of Justice
WASHINGTON, D.C. 20530

DEPUTY ASSISTANT
ATTORNEY GENERAL
CIVIL DIVISION

6 MAR 1980

Messrs. Ken Kay, Bob Ellis, and Bill Shook
Offices of the Honorable Max Baucus
United States Senate
Washington, D. C. 20510

Gentlemen:

Pursuant to your request during your visits to the Civil Division in the past few weeks, enclosed please find a copy of that portion of the Civil Division Practice Manual entitled "Compendium of Departments and Independent Agencies Possessing Power to Represent Themselves in District Court Civil Litigation." You will note that this document constitutes a draft revision of the Compendium which is currently in progress.

Rather than annotating the Compendium itself, I have set forth below a description, as you requested, of those situations that most frequently give rise to disputes with particular agencies over litigating authority. This list is not, of course, exhaustive, but we hope it will be responsive to your inquiry. The page references are to the appropriate portions of the draft Compendium.

1. Federal Trade Commission (p. 22). The Civil Division has had frequent disputes with the FTC concerning the precise parameters of its statutory authority to litigate on its own behalf. Most of these problems arise in the area of actions for pre-enforcement review of the Commission's orders. When a party against whom the FTC has issued an administrative order seeks to enjoin the order prior to Court of Appeals review, by bringing suit in federal district court, the Justice Department has consistently taken the position that under 15 U.S.C. § 56(a) the Attorney General has exclusive authority to appear and defend the Commission. The Commission, on the other hand, has frequently argued that while its statutory authority to litigate such cases is far from clear, it should be allowed to do so because of the possibility that the district court might become involved in substantive areas that are within the agency's own expertise and experience.

2. Interstate Commerce Commission (p. 23). In 1978, when Congress recodified the statutes governing the ICC, the Commission succeeded in having inserted in those statutes certain provisions

which may be read as providing new authorization to bring litigation to enforce those of its orders not involving monetary relief. See, e.g., 49 U.S.C. §§ 10301(f)(1), 11702, 11703. The legislative history of the entire recodification effort, however, clearly demonstrates that Congress had wanted only to modernize the statutory language and that it did not intend any substantive changes in the law, and in signing the bill into law, President Carter accompanied it with a message or order stating that he was approving the legislation with that express understanding. Despite this fact, the Civil Division has had several disputes with the ICC regarding litigation authority for nonmonetary injunctive cases brought to enforce an ICC order. The Department continues to handle, without arguments as to its authority to do so, challenges to ICC orders requiring payment of monetary damages (Civil Division) and certain other cases involving the Commission (Antitrust Division).

3. Commodity Futures Trading Commission (p. 13). Because of the somewhat vague nature of the statutory language pertaining to the CFTC's ability to represent itself in court (see 7 U.S.C. § 4a(c)), there have been in the past a number of disputes concerning the nature of litigation on behalf of the CFTC to be handled by the Justice Department and that which the Commission should be allowed to handle itself. Approximately 18 months ago, Assistant Attorney General Barbara Babcock and the Chairman of the CFTC met to discuss division of litigating responsibilities. It was agreed that the Civil Division would handle Title VII, FOIA, Bivens-type cases and other similar litigation brought against the Commission, while the CFTC would be allowed to handle litigation involving challenges to its orders or regulations. Because of the specificity of this division of subject matter areas, disputes concerning litigation authority since this agreement was reached have been relatively rare; when they have arisen, the Civil Division has taken the position that any suits which raise government-wide issues, as opposed to questions that affect only the CFTC and the matters within its jurisdiction, should be litigated by the Division.

4. The Equal Employment Opportunity Commission (p. 11). The Division takes the position that cases arising under the Equal Pay Act and the Age Discrimination in Employment Act are exclusively within its litigative jurisdiction. The EEOC feels equally strongly that such cases should be litigated by it. I am enclosing some correspondence between the EEOC and the Civil

Division setting out an agreement, for the time being, that without either agency waiving its legal position, the EEOC will handle enforcement actions arising under both Acts and the Department of Justice attorneys will handle defensive litigation arising under either statute.

I trust this is responsive to your request.

Sincerely yours,

THOMAS S. MARTIN
Deputy Assistant Attorney General

BAB:PBlankenstein:mlb Tel.:633-3528
typed 6/28/79

JUN 29 1979

Ms. Eleanor Holmes Norton
Chair
Equal Employment Opportunity Commission
Washington, D. C. 20506

Dear Ms. Norton:

Your letter of June 13, 1979 points out that, effective July 1, 1979, the responsibility for the administration and enforcement of the Equal Pay Act and the Age Discrimination in Employment Act will, pursuant to the President's Reorganization Plan No. 1 of 1978, be assumed by the EEOC. Those functions are, for the most part, now being performed by the Department of Labor. You propose that the existing arrangements between the Department of Labor and the Attorney General concerning litigation authority be continued with respect to the EEOC's enforcement of these Acts. Under those agreements, attorneys from the Department of Labor, subject to the control and supervision of the Attorney General, have the principal litigation responsibility in cases brought by the federal government to enforce the EPA or ADEA, while Department of Justice attorneys handle defensive litigation under either statute.

While we believe that cases under the EPA or ADEA fall within the statutes giving the Department of Justice plenary litigation responsibility, we agree that it would be appropriate, at least for the foreseeable future, to continue those agreements in effect, along the lines described above and in accordance with the operating procedures outlined in the January 18, 1939 letter of Attorney General Frank Murphy, and the March 23, 1969 letter of Assistant Attorney General Edwin L. Weisl, Jr.

Very truly yours,

BARBARA ALLEN BABCOCK
Assistant Attorney General

Assistant Attorney General
Civil Division

Department of Justice
Washington, D.C. 20530

JUL 31 1979

Ms. Eleanor Holmes Norton
Chair, Equal Employment
  Opportunity Commission
Washington, D. C. 20506

Dear Ms. Norton:

Your letter of June 13, 1979, refers to certain discussions between our respective offices concerning litigation responsibility in cases arising under the Equal Pay Act, the Age Discrimination in Employment Act, the Rehabilitation Act, and Title VII of the Civil Rights Act of 1964. Pursuant to Reorganization Plan No. 1, the responsibility for the administration and/or enforcement of those statutes has been, or shortly will be, assumed by the EEOC. Those functions were previously vested in the Department of Labor or the Civil Service Commission.

While maintaining that the EEOC has the statutory authority to represent itself in court in all cases arising under those provisions, you recognize that the Department of Justice takes the view that the Commission's independent litigation authority is more limited and does not empower the Commission to represent itself in any of those cases. In order to amicably settle this dispute, you propose that with regard to matters arising under the EPA or ADEA we follow the existing agreements between the Department of Labor and the Attorney General. Under those agreements, attorneys from the Department of Labor, subject to the control and supervision of the Attorney General, have the principal litigation responsibility in cases brought by the federal government to enforce the EPA or ADEA, while Department of Justice attorneys handle defensive litigation under either statute. With regard to the essentially defensive litigation arising from the responsibilities inherited from the Civil Service Commission, you state that the EEOC is willing, as a practical matter and under certain conditions, to defer to the Department of Justice for representation.

As to your first proposal, in our letter of June 29, 1979, we agreed that it would be appropriate, at least for the foreseeable future, to continue the Labor-Justice agreements in effect. This is to confirm our understanding that in EPA and ADEA cases, attorneys from the EEOC, subject to the control and supervision of the Attorney General, and in accordance with the procedures set forth in those agreements, will handle affirmative litigation under the Acts, while Department of Justice attorneys will be primarily responsible for all defensive litigation.

With regard to your second proposal--to defer to Department of Justice representation in cases arising out of the functions previously performed by the Civil Service Commission, we see no difficulty in our accommodating any request by the EEOC that Commission attorneys appear as co-counsel on briefs and that, where appropriate, they actively participate in court proceedings. Our agreement with this proposal, like our approval of your first proposal, implies no change in our view that the EEOC has no independent litigation authority in cases arising under any statute covered by the Reorganization Plan No. 1 of 1978. However, we, as you, believe that the proposals provide a practical solution which promotes the interests of both agencies as well as the public interest. We are certain that the combined efforts of our agencies will result in the effective handling of those cases.

Very truly yours,

STUART E. SCHIFFER
Acting Assistant Attorney General

OFFICE OF THE CHAIR

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF THE CHAIR
WASHINGTON, D.C. 20506

June 13, 1979

Dear B,

These are the two letters I spoke with you about this morning. The one requesting litigation authority for the ADEA and EPA jurisdictions would simply continue an arrangement that the Justice Department has had with the Department of Labor for 40 years. It allows the Solicitor to do the affirmative litigation of the kind we do by statute for affirmative litigation under Title VII. I cannot see that any new policy issues are raised by simply extending this agreement. Bear in mind that the legal date for transfer of the functions from Labor to us is July 1st, and to avoid any problems that may be raised by any respondents, we believe the agreement should be extended before then.

In the second letter we propose to agree to disagree and let nature take its course. Essentially we would agree to the Department's handling defensive litigation without conceding the legal point, in standard fashion. Thus to avoid institutional problems of appearing to concede jurisdiction, we retain our legal position while expressly recognizing that the Department does not in any way concede its legal position, and acquiesce to the Department's authority, for lack of resources.

Best personal regards.

Eleanor

RECEIVED
JUN 13 1979
Assistant Attorney General
Civil Division

RECEIVED
JUN 13 1979
Assistant Attorney General
Civil Division

Attachments

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D. C. 20506

OFFICE OF THE CHAIR

June 13, 1979

Barbara Allen Babcock
Assistant Attorney General
U. S. Department of Justice
Civil Division
Constitution Ave. & 10th St., N. W.
Washington, D. C. 20530

Dear Barbara :

The Equal Employment Opportunity Commission will be transferred the administration and enforcement of the Equal Pay Act and the Age Discrimination in Employment Act of 1967 on July 1, 1979, pursuant to the President's Reorganization Plan No. 1 of 1978 (F. R. 19807). These functions include all the functions relating to these two Acts now vested in the Secretary of Labor, the Wage and Hour Administrator, and the Civil Service Commission (now the Office of Personnel Management).

While the transferred authority would give Commission attorneys authority to appear for and represent the Commission in any EPA and ADEA litigation, Section 4(b) of the Fair Labor Standards Act (29 U.S.C., Sec. 204(b)) provides that such litigation is subject to the direction and control of the Attorney General. Subject to arrangements dating back to 1938, between the Department of Labor and the Department of Justice, the Department of Labor attorneys have represented the Department in litigation involving enforcement functions under the Fair Labor Standards Act, including EPA and ADEA. In keeping with Reorganization Plan No. I, the Commission believes that it is appropriate that the arrangement reached between the Department of Labor and the Department of Justice be continued, with respect to the Commission's enforcement of these Acts.

Accordingly, the Commission suggests that the operating procedures outlined in the letter of Attorney General Frank Murphy to Administrator Elmer F. Andrews, dated January 18, 1939, and in the letter of Assistant Attorney General Edwin L. Weisl, Jr. to Solicitor Charles Donahue dated March 23, 1968, substituting the EEOC for the Department of Labor, in keeping with Reorganization Plan No. 1 of 1978 be continued with respect to the Commission's conduct of litigation under the EPA and ADEA. If this arrangement meets with your approval, I would appreciate your positive response.

Sincerely,

Eleanor

Eleanor Holmes Norton
Chair

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D. C. 20506

OFFICE OF THE CHAIR

June 13, 1979

Barbara Allen Babcock
Assistant Attorney General
U. S. Department of Justice
Civil Division
Constitution Ave. & 10th St., N.W.
Washington, D. C. 20530

Dear Barbara:

Recently our offices have been involved in discussions concerning the responsibility for handling defensive litigation matters arising out of functions transferred to the Equal Employment Opportunity Commission from the Civil Service Commission and the Department of Labor under Reorganization Plan No. 1 of 1978 (43 F. R. 19807).

Specifically, as we understand the position, the Department of Justice is of the opinion that the EEOC has no statutory right to represent itself in court in defensive litigation arising out of its new authorities, and states that it intends to continue its representation in such matters. It is the position of the Commission, however, that Section 705(b) (2) of Title VII of the Civil Rights Act of 1964, as amended, explicitly grants the Commission the right to represent itself in all cases in court.

In addition, it is clear that as to litigation matters arising out of the Equal Pay Act and the Age Discrimination in Employment Act, Section 4(b) of the Fair Labor Standards Act provides an independent statutory authority for Commission attorneys to defend the Commission in litigation arising in those areas, under the direction and control of the Attorney General. As to defense matters arising out of Equal Pay and Age Discrimination matters, we therefore propose to follow the operating procedures in effect under the agreement between the Department of Justice and the Department of Labor.

As to defense litigation arising out of the functions transferred from the Civil Service Commission — i.e., enforcement in the federal sector of Title VII, the Equal Pay Act, the Age Discrimination in Employment Act, and the Rehabilitation Act — we firmly maintain our position that the Commission has the statutory authority to be represented by Commission attorneys. However, we have carefully reviewed our ability at this time to carry out effectively this authority and have concluded that solely because of a current unavailability of staff resources, we are willing, as a practical matter and under certain conditions, to defer to the Department of Justice for representation on these cases at the present time. This deferral would be expressly conditioned upon the Department's agreement that the Commission appear as co-counsel in any case in which the Commission requests to do so and that such appearances as co-counsel include the right to file joint briefs and to participate actively in court proceedings.

We recognize the Department's position on our litigation authority and that the Department's approval of such an agreement would in no way imply a change in that position. Similarly, as we have indicated, such an agreement would not imply a modification of our position. However, we believe that such an arrangement would provide a practical solution to the question at the present time which would serve to promote the objectives of both agencies and insure furtherance of the public interest in effective defense of suits brought in connection with the functions transferred from the Civil Service Commission.

May I have your response to these two proposals. I would be pleased, should you wish, to meet with you and your staff to discuss these proposals and to draft any further document deemed appropriate to set forth our agreement. Otherwise, your positive response to this letter would be sufficient.

Sincerely,

Eleanor

Eleanor Holmes Norton
Chair

EHN/clb

DEPARTMENT OF JUSTICE AUTHORIZATION IMMIGRATION AND NATURALIZATION SERVICE

WEDNESDAY, APRIL 2, 1980

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m., in room 2228, Dirksen Senate Office Building, Senator Dennis DeConcini (acting chairman) presiding.

Present: Senators DeConcini and Simpson.

OPENING STATEMENT OF SENATOR DeCONCINI

Senator DECONCINI. The Judiciary Committee will come to order.

This morning, in our continuing series of hearings on the authorization bill for the Department of Justice, we will hear testimony regarding the Immigration and Naturalization Service.

Representing the Service is the Acting Commissioner, David Crosland. Mr. Crosland, we welcome you here. If you would like to introduce those at the table and anyone else, please do so.

Your full statement will appear in the record at the conclusion of your oral presentation, and you may highlight it.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. I am glad to welcome you to the oversight hearing in your new role as Acting Commissioner of the Immigration and Naturalization Service. As you know, I have addressed myself to the problems which have confronted your Service in recent years. I trust that your efforts shall eliminate many of your difficulties in the future. I look forward to working with you toward this goal.

You have impressed me by your candor in your statement to this committee. Your Service is the first line of welcome to all who come to our great land for a friendly and lawful purpose. Your Service is the first line of defense against those who do not come as friends, but would do our Nation and our people harm.

Your views expressed here today will be given careful and thoughtful study as we frame legislation to enable your Service to better aid and assist our people.

In the 95th Congress, I supported the legislation which has enabled your Service to confiscate properties of those who smuggle illegal aliens into the United States. I shall continue my support in this area of immigration and naturalization law, as needed.

Again, let me say I am pleased to welcome you and your associates today.

STATEMENT OF DAVID CROSLAND, ACTING COMMISSIONER FOR IMMIGRATION AND NATURALIZATION SERVICE, ACCOMPANIED BY MARTIN DANZIGER, DEPUTY COMMISSIONER; WALTER CONNERY, DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY; JOHN KRATZKE, COUNCIL ON MANAGEMENT IMPROVEMENT; PAUL SAENZ, DIRECTOR, OFFICE OF PLANNING EVALUATION AND BUDGETING, AND TOM PERELLI, BUDGET OFFICER, IMMIGRATION AND NATURALIZATION SERVICE

Mr. CROSLAND. Thank you, Senator.

Senator, I am pleased to introduce this morning Martin Danziger, who is our new Deputy Commissioner. Mr. Danziger started last week with us.

Senator DECONCINI. Welcome. We are very pleased to have you.

Mr. CROSLAND. Also with me today, Walter Connery, who is the Director of the Office of Professional Responsibility.

To the far right is Mr. Kratzke, who is the head of the team from the President's Council on Management Improvement.

Mr. Kratzke has been with us a couple of months now assisting us in analyzing some of the management problems at INS.

On my immediate left is Paul Saenz who is the Director of the Office of Planning Evaluation and Budgeting, and to his left is Tom Perelli, who is the head of the Budget Office.

Senator, I have appeared once before you. My statement, my formal statement I would like to present for the record.

Senator DECONCINI. Without objection.

Mr. CROSLAND. And again, just discuss with you some of the highlights of that statement.

During the past 6 months as Acting Commissioner I have addressed a number of problems of management within INS. Some of the problems, as I have indicated before, stem from a lack of clear accountability by various line managers.

We have attempted to improve the line authority within the Immigration and Naturalization Service by reinstituting authority by the various regional commissioners so that they feel a sense of accountability for what happens in their regions.

By the same token, we have also sought to instill a sense of accountability by the various district directors and sector chiefs for what takes place in their respective districts or sectors.

Within the central office we have worked more closely together. I have used the associate commissioners in a management team concept with the commissioner as the team leader, to work on problems which have affected not only the central office, but also the entire service.

What I consider to be the successful completion of the first phase of the Iranian project, I think is in large part due to our having set out with some specificity, what was expected of the various people in the field, through the regions, down to the districts and the sectors.

The second phase of the Iranian project is in progress.

In November through January, I instituted a hiring freeze within the central office to address the problem of workload excess positions. This freeze resulted in a reduction in some of the positions within the central office, including a reduction of some 12 slots in the commissioner's office, to one special assistant.

It also resulted in each of the associate commissioners having to justify what each of their programs was supposed to do and what it in fact did.

In the area of accountability, we also are concerned about each line manager identifying potential corruption under his—by employees under his immediate supervision.

To that extent, I have asked that each of the regions through the sectors and the districts identify areas of potential corruption and we intend to send out specific guidelines to every line manager as to what type of corruption they should be alert to.

That is not only violations of civil rights, human rights, by individual employees, but also potential corruption in the area of fraud, taking bribes, and so on.

As you know, I have hired Walter Connery as the new head of the Office of Professional Responsibility. Mr. Connery has been with the New York City Police Department for a number of years where he was in charge of prosecution of police officers with the New York City Police Department during a period under Pat Murphy's guidance.

Mr. Connery has 25 years' experience in police work and has already brought a number of innovations to the Immigration and Naturalization Service.

Specifically, he has set up or is setting up offices in each of the four regions where we will have trained INS investigators working on matters of corruption.

One of the problems in the past has been the lack of a timely response to complaints of civil rights violations or of corruption.

This does not serve the public well, nor does it serve our individual employees who are charged with wrongdoing and who must wait months and perhaps years until a resolution is made of the charge.

We have detailed 30 investigators to work on matters of misconduct within INS. These 30 will supplement the 14 already under Mr. Connery's direct supervision.

I would like to mention again the matters that were raised in the New York Times article. There has been a fair amount of press coverage, referring to those series of articles which appeared in January.

The articles, as best we could determine, indicated that 51 employees were identified—as best we could determine—51 employees who were charged with misconduct.

All of the 51 had been investigated as to their conduct prior to the articles in the New York Times; 14 of those persons have been cleared; 5 were terminated or quit; and 25 were disciplined through suspension or admonishment.

The five cases are still pending over at the Civil Rights Division of the Justice Department.

I would like to now turn to the operations of the Immigration Service beginning with the Border Patrol.

Last year, 889,000 apprehensions were made by the Border Patrol. Sixty percent of the apprehensions were made in two border areas. Chula Vista accounted for 338,000 apprehensions, and El Paso, 150,000.

Less than 10 percent of the 2,000 mile border accounts for most of the apprehensions. There are some unique experiments that we are undertaking.

As you know, in the southern part of Arizona, at Lukeville, there is a wilderness area which does not allow for motorized vehicles, including law enforcement vehicles to enter. We have reinstituted the mounted horse patrol in that area.

I was talking with the regional commissioner for the western region last week. He tells me that they intend to add to the number of horses and mounted Border Patrol.

That is the first time in 20 years that we have had mounted horse patrolmen in the Border Patrol.

The Border Patrol has a new head, Buck Brandenmuhl comes from Yuma, Ariz. His hiring represents the first time in over 20 years we have had a Border Patrol sector chief or someone coming directly from the Border Patrol to the central office to head up the Border Patrol.

In the past, we have hired from other regions or from the central office.

I might say that my experience with the Border Patrol has been a positive one. I have had occasions not only as general counsel, but also as acting commissioner, to go out with the Border Patrol. My observation is that for the most part, they are a dedicated, hard-working group of people. They have limited resources, and they have done a great deal to try to expand those resources.

In San Clemente, in January, at the checkpoint there, there was an experiment conducted in which they closed down the checkpoint for about an hour and a half. This allowed time for word to go back to the border, to smugglers, that the highway was clear from San Diego up to Los Angeles.

They reopened the checkpoint and started reexamining vehicles that were coming through. In a very short period of time, they apprehended 518 aliens, some of whom were found locked in trunks of abandoned vehicles.

We seized 22 cars and vehicles and we arrested 35 smugglers.

I was out in Chula Vista with the Border Patrol, in February, and saw about 700 vehicles that were in the parking lot there in the sector headquarters.

Some of these vehicles will be used in INS operations, inasmuch as they are in better condition than many of our cars are.

Turning now to the area of investigations, I think it should be made clear to everyone that investigations is not the same as Border Patrol. Their functions are not the same.

About half of the duties of INS investigators is concerned with casework and fraud on citizenship applications or investigations as to petitions for adjustment.

So, it is not a valid comparison to simply look at the number of apprehensions that are made by investigators and compare that to the number made by a border patrolman and assume that they are less efficient than our border patrolmen. They have different job functions.

Last year, in area control operations, they apprehended 147,000 persons. That was about the same as the preceding year.

In the area of inspections, our international air travel has increased 40 percent in the last 4 years. Miami is the greatest—has experienced the greatest increase in that the arriving passengers have increased by 2½ times in 10 years, and from 1978 to 1979, the air traffic there, alien traffic, increased 40 percent.

We experimented with one stop in citizen operations in some of our cities and are still analyzing where they can be best used. In some places we are not able to use them as well as others, because of the problem of the configuration of the various airports.

In the area of naturalization, we have over 100,000 applications pending for citizenship. We expect over a quarter million applications this year. More than 50,000 Indo-Chinese refugees should be eligible for citizenship very shortly.

We have proposed to the Senate and to the House some legislation including the elimination of two witnesses to be interviewed in connection with citizenship processing. We expect that if this legislation is passed, there will be an increase in productivity of 30 percent in our naturalization proceedings.

In the area of adjudications, our receipts of applications and petitions has reached 2 million this year. It is up 40 percent since 1977.

Our increase has come mainly from relative visa petitions, and applications for permanent residence by Indo-Chinese refugees.

Half of the adjudications now done are done by inspectors during nonpeak hours, at airports.

In the area of detention and deportation, we have made a number of improvements in various detention facilities. In New York we have put in a good many improvements and will in the next few months improve that facility substantially.

The Department of Justice, with INS, is reviewing the standards for temporary holding facilities and that should come out fairly soon.

Last year, we spent about 7,500 hours in overtime in transporting aliens in the Miami area from temporary holding facilities in a 100-mile radius to the Miami office for processing.

This year, in the last couple of months, we have opened a temporary—we have opened a facility using the Bureau of Prisons' facility, in Miami, which will make it much easier for the processing of aliens who are being held there, specifically Haitians who are coming in large numbers to Miami.

It will also make it easier for the Public Health Service to examine those persons and screen them as to their physical condition and make it much easier for voluntary agencies to assist in temporary—in locating temporary housing, for them to interview those persons and locate temporary housing for them.

In the last year, there has been an increased amount of attention to INS. I asked our planning, evaluation and budgeting office to compile accounts or lists of the various audits that are being conducted within INS.

I believe the number now is about 44, that includes audits by GAO, the Department of Justice and our INS units which were requested either by me or by previous commissioners.

We have tried to consolidate some of those audits and to work with other Government agencies, Justice Management Division, in taking advantage of the information that has already been compiled by other investigators.

The President's Management Improvement Council has been working in our offices for the last couple of months under the direction of John Kratzke.

Mr. Kratzke comes to us from the Interstate Commerce Commission, and has focused first on problems of automation within INS.

He will focus on that for the next 6 months or so and then address other problems such as personnel.

We are not, I might say, waiting until a report or recommendation from Mr. Kratzke's team to make changes within INS.

We have initiated a number of changes ourselves. Mr. Danzinger is already taking a very active part in the management of INS. We will work very closely with Mr. Kratzke and his team in implementing further changes that are needed.

We have tried to and are trying to straighten out records in preparation for automated systems. I have sent to New York a team of persons under the direction of Chuck Sava, the Associate Commissioner for Enforcement.

These persons have worked with the people in New York to try to make everyone in New York who has a file in his or her possession to put that file into a system, make them accountable for bringing the file system up to snuff.

It has not been in the past. One of our audits showed that we had 50,000 files lost among 2 million files.

Mr. Sava has done a very good job there. I think very shortly we will have a system which will work and will provide the kind of service that should be provided to the people of New York.

We have had a number of complaints about the lack of access by telephone to the New York office. I had a study conducted some time ago and discovered that 60 percent of the calls were not being answered.

In the middle of March, we put in a new telephone system. I am pleased to say that one can now reach New York at the public number by telephone and get directions as to how to file forms and get the kind of information that will benefit the public and not require the persons to personally and physically have to come down to the New York office to get information.

In closing, I would like to say that the agency has undergone a period of painful self-examination which is helpful, I think.

We have gotten a lot of help from the outside and will continue to do so, but the cure for the patient will come from within. I think we are on the right track to straightening out the Immigration and Naturalization Service and addressing the problems, management, that received a fair amount of attention in the last few months.

Last week I had the regional commissioners in to discuss budgeting problems and possible reprogramming. I made clear to them that we have certain priorities within the Service. One of the complaints sometimes from the field is there is a lack of direction, there is not an immigration policy, people are getting conflicting signals.

One of our priorities is the followup on the Iranian project, and the locating and processing of those persons who fail to report during the reporting period in the fall.

A second will be the support of border patrol on the southern border with manpower and also equipment in order that they can do as an effective job as possible.

We also want to have as a priority the location or adequate staffing with immigration inspectors at heavy ports of entry, whether they be land borders or airports, a sufficient number of immigration inspectors to try to cut down on the waiting period that travelers must experience before they can be processed through Immigration to Customs.

We also want to pay particular attention to detention and deportation in areas where people are held in larger numbers for longer period of time, such as in Miami and in New York. We want to provide adequate clerical support so that our records can be maintained in a proper manner in order that we can find files in an efficient manner.

Finally, the Office of Professional Responsibility will be staffed to the maximum so that we can provide effective policing within our own agency and service not only the public, but also maintain the good name of the employees of the Immigration and Naturalization Service.

Thank you very much.

Senator DECONCINI. Commissioner Crosland, can you review in more detail for us the Iranian students situation? You mentioned it in your statement. I was not aware that it had been so successful. But I have to admit that my knowledge is only from some press releases and a few things I have picked up through the media.

Can you tell us exactly how many students you think there are? How many have been filed upon? How many have been deported? And could you tell us any other specifics that might help the committee to understand the success of that program.

Mr. CROSLAND. Senator, the first phase of the project called for those Iranian students who are in the country to report to either college campuses or to immigration offices.

Almost 57,000, 56,694 persons are students reporting during the time period of from mid-November to the end of December. This included a fairly short interruption where the District Court of the District of Columbia enjoined the reporting process.

Of that number, 6,906 were found to be deportable. Another 839 are still pending verification. That is, they have provided information which is being verified.

We have had a number of asylum requests received. Some 514 requests from those students. Some 1,076 chose voluntary departure rather than going through the deportation process.

We are going through hearings in various parts of the country presently and some of the students have already left the country.

Senator DECONCINI. How many have left out of the 6,906 deportable?

Mr. CROSLAND. We have persons who have been deported, actual deportations, those are people who have actually gone through the hearing and under order of deportation have left. Nineteen of those persons have left.

We have another 58 verified voluntary departures.

Senator DECONCINI. Wait a minute. If I have the figures right, you have 6,906 that are deportable.

Mr. CROSLAND. Right.

Senator DECONCINI. Then you have within that 839 that are pending. Is that additional?

Mr. CROSLAND. Yes.

Senator DECONCINI. Out of the 6,906 deportable, some 1,000-plus have voluntarily left?

Mr. CROSLAND. Been granted voluntary departure.

Senator DECONCINI. Is that right?

Mr. CROSLAND. Yes.

Senator DECONCINI. Some 500 have sought asylum and those requests have either been granted or approved?

Mr. CROSLAND. The asylum requests are pending over at the State Department.

Senator DECONCINI. So that comprises 1,500 or 1,600 out of 6,906. Now in addition to that, can you tell me how many have actually been deported, 19?

Mr. CROSLAND. Yes, sir.

Senator DECONCINI. Why has it taken so long?

Mr. CROSLAND. Senator, the process——

Senator DECONCINI. What is the process?

Mr. CROSLAND [continuing]. Requires or allows for a hearing of record before an immigration judge. A person can obtain counsel. If he is not satisfied with the results of the hearing, can appeal the hearing or the decision of the immigration judge to the Board of Immigration Appeals.

The Board of Immigration Appeals takes a certain amount of time to rule on a case. There could be oral argument at the Board of Immigration Appeals. If the person is not satisfied with the results of the Board of Immigration Appeals decision, then he or she could appeal the decision to the court of appeals or whatever circuit that person resides.

Senator DECONCINI. How many have been heard by your people of the 6,906? less the 1,500 or 1,600? less than 4,000 maybe?

Mr. CROSLAND. Well, we have 321 that have had a hearing completed and were granted voluntary departure. Forty-three were completed with deportation orders issued. I am advised there are 5,519 deportation hearings that are in process in some form.

Senator DECONCINI. Is it fair to ask when you think that your process will be over and the appeals will be out of your jurisdiction?

Mr. CROSLAND. There are many variables. It could depend upon the backlog in a court of appeals.

We are trying to expedite the process so that if a hearing is completed and a person fails to file an appeal, then we can go out and locate that individual and effect their departure.

For those persons who were granted voluntary departures and said in effect, "I don't want to test this," and were given a period of time in which to leave, and those persons have failed to leave, we want to followup on all of those individuals to see if they have in fact left, and, if they haven't, to try to effect their departure.

Senator DECONCINI. When was the order to commence this?

Mr. CROSLAND. November 13.

Senator DECONCINI. November 13. I don't want you to consider this critical of INS but having deported on 19, of 6,906 your program doesn't seem like a great success.

Would you concur with that observation?

Mr. CROSLAND. I think—what I stated was that the first phase of the process, that is the reporting process, required that we put into gear a nationwide effort with instructions down to each district and sector, where sectors were involved, involving interviewing students all over the country.

Bear in mind, we had not in the past instituted a strong student control program. Given the short deadline of about 2 days, I think the INS employees did a remarkable job in completing that part of their charge.

The second phase is the phase which is obviously more difficult, that is finding those students who failed to report, trying to find the best address we can on those students, and to put them into process.

We are a government of laws.

Senator DECONCINI. I understand that.

Mr. CROSLAND. The fact that we have these appellate processes does take time.

Senator DECONCINI. I can greatly appreciate that it certainly isn't INS's fault that the 6,906 or so have not been deported. I understand the process.

What concerns me is why didn't INS have this information prior to November 13. Why did you have to search?

Can you institute a process in the future, if there is a need to deport all Iranian students who are misbehaving or not here properly, which could find them instantly?

Mr. CROSLAND. I think if is fair to say that in the past, the policy of the Immigration and Naturalization Service was based on a theory of cost effectiveness.

Given the resources we had, it was considered to be more cost effective to make apprehensions at places of employment rather than seeking our individual students who were out of status.

However, just looking at the reporting provisions, the results of that, those people who reported, roughly 7,000 out of 6,000 were out of status, who came in voluntarily. I think that is a pretty good day's work. It was cost effective to identify those individuals.

Now as to your second part of the question, what are we doing about it now. We have just published regulations which would require that all foreign students in the Nation report in much the same way that the Iranian students did, by alphabetical order and provide the same kind of information that we have on the Iranian students.

This is the first time that we have had that kind of effort to control the foreign student population in this country.

Senator DECONCINI. Excuse me, Mr. Commissioner. When a foreigner applies for an application, is that a special visa—a student visa?

Mr. CROSLAND. They come in on—yes.

Senator DECONCINI. Then is that manually filed or computer filed? How do you keep those?

Mr. CROSLAND. The paper it comes in on is supposed to be—they come in and when they reach the college where they intend to go to school, the college is supposed to send to us the paper verifying the fact that they are in school.

Senator DECONCINI. What if they do not?

Mr. CROSLAND. Well, in the past, in fact, they haven't. What we intend to do, what we haven't done in the past is to enforce the regulations which would provide for decertification of colleges. A college has to be certified to accept foreign students.

Senator DECONCINI. That has not been done?

Mr. CROSLAND. It has not been done in the past, no sir. But it will be done in the future.

Senator DECONCINI. Are you doing it now?

Mr. CROSLAND. We have investigations going on into a number of colleges as to their practices of issuing I-20's which is a document students have to turn in.

Senator DECONCINI. How long does a foreign student have to get a certification from the school that he or she is there before you employ this new process to decertify them and attempt to deport them?

Mr. CROSLAND. Well, in the past there hasn't been the followup.

Senator DECONCINI. Is there now?

Mr. CROSLAND. There will be, yes.

We have to get all the foreign students who are in the country registered so we know who they are and get certain information on them, the kind of information we have on the Iranian students.

As to all new students who come in, that kind of information will be obtained from them.

Senator DECONCINI. Well, if a new student comes in from Japan and wants to go to the University of Arizona, and you issue him a visa to go to school, how long would it now take for you to take any other actions if the University of Arizona did not send back its form indicating that the student is now enrolled?

Mr. CROSLAND. I can't give you a specific——

Senator DECONCINI. About?

Mr. CROSLAND. If a student comes in and is supposed to go to the school, register, and then assuming——

Senator DECONCINI. Are you setting up some criteria if you don't hear from the school in 30 days or something?

Mr. CROSLAND. Yes. The whole student control program will look to all those kinds of steps.

Senator DECONCINI. Yes.

Mr. CROSLAND. What happens when the student gets here, where they go, what kind of information we have, what kind of a form it is on, how it should be controlled by computer or manually, and what kind of a double check we have on it.

Senator DECONCINI. When can we expect this to be intact?

Mr. CROSLAND. We published 2 weeks ago, I believe, our student regulations which are subject to public comment for 60 days and then, following that, we have to review those comments and then publish them again for 30 days before they are final.

Given all of that which is required by the Administrative Procedure Act, I would guess that we would start the actual process of registration beginning in the fall, because that is when most students will be back here.

Senator DECONCINI. Do you have the personnel capacity to implement this new process, assuming that it was enacted?

Mr. CROSLAND. Well, we did it with the Iranian students in a very short period of time. What we are talking about is pacing ourselves over a period of time, handling it alphabetically over a period of months so that we can handle the workload.

But, it is a one-time major effort to get control over all those foreign students in the country. After that it will be done on a routine basis as students come in.

Senator **DeConcini**. What about the balance of the Iranian students that are not found to be deportable? Is that based merely on the fact that they are going to school and satisfying their visa requirements?

Mr. **Crosland**. They are in school. They are carrying a full load. They are in good standing in the school. They have not been convicted of any crime for which they committed any acts which would constitute a deportable offense, and they are not working.

Senator **DeConcini**. Now based on 56,994, you can't tell me, can you, what the comparison is with Iranian students versus any other foreign nationality?

Mr. **Crosland**. As to specific numbers?

Senator **DeConcini**. Numbers.

Mr. **Crosland**. I don't have a breakdown by nationality; no, sir.

Senator **DeConcini**. Do you have the capacity to retrieve how many students from Saudia Arabia or from Italy or Japan are in this country now?

Mr. **Crosland**. If we did, we would have to do it right now in the same way that we did the Iranian students, that is by hand.

Senator **DeConcini**. Which is kind of difficult.

Mr. **Crosland**. It is a little difficult, yes, sir.

Senator **DeConcini**. And time consuming. When do you anticipate that you will have that computerized and be able to do that in a more expeditious way?

Mr **Crosland**. At the end of the process of the reporting, inasmuch as it would be done on an alphabetized basis rather than by nationality.

The rationale for identifying Iranian students was because of the crisis that existed and still exists.

Senator **DeConcini**. Of the 56,000-plus Iranian students, if a request was made from Justice or anyone else in the Government for an address on the people or where you think they are, No. 1, can you turn that over to them, and No. 2, do you have that information?

Mr. **Crosland**. Yes.

Senator **DeConcini**. Yes to both questions?

Mr. **Crosland**. As to—yes. We have that information.

Senator **DeConcini**. It is not confidential.

No. 2, you have addresses on the 56,000?

Mr. **Crosland**. We have the addresses on the 56,000 students. Addresses of nonimmigrant students can be furnished to other components of the Department of Justice. Nonimmigrants are not "individuals" within the scope of the Privacy Act. Moreover, even if the Privacy Act applied, there is an exemption for intra-agency use of records by employees who need the records in the course of performance of their duties.

Senator **DeConcini**. Can you turn it over to the Department of Justice?

Mr. **Crosland**. Yes.

Senator **DeConcini**. All right.

Mr. Crosland. These are addresses that were provided to us by the individual students.

Senator DeConcini. Yes. If they have moved you don't have any. If they don't take it upon themselves to notify you, you don't have anything.

Mr. Crosland. No, but in our——

Senator DeConcini. Are they required to do so?

Mr. Crosland. Yes. In our change in regulations as to all students, every year they are going to be required to provide certain information to the school and the school is going to be required to provide information to us.

Senator DeConcini. What happens if they fail to report a change of address and you find out? Is that a deportable offense?

Mr. Crosland. I would like to submit that answer for the record, if I could.

Senator DeConcini. Somebody is nodding in the back there.

Mr. Crosland. Well, I would rather not accept a nod. I would rather submit it for the record.

[The material referred to above follows:]

Under section 165 of the Immigration and Nationality Act, aliens in the United States are required to "notify the Attorney General in writing of each change of address and new address within ten days of such change." 8 CFR 265 contains regulations implementing this provision. Section 266(b) of the Act provides that failure to report change of address as required by section 265 shall be a misdemeanor punishable by 30 days imprisonment or a $200 fine, or both. That subsection also provides that, regardless of any criminal conviction for failure to comply with section 265, an alien who has failed to comply shall be taken into custody and deported, unless the alien can establish that failure to comply "was reasonably excusable and was not willful." Section 241(a)(5) of the Act provides for the deportation of an alien who "has failed to comply with the provisions of section 265 unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful." INS Operations Instruction 242.1 (a)(16) provides that an order to show cause charging deportability under section 241(a)(5) shall not be issued unless prior approval for such action has been received from the regional commissioner.

Senator DeConcini. Very well. I don't blame you.

I would be interested in knowing whether or not that is a deportable offense, whether or not in the 6,906, any of those are included, and if not, why not, assuming it is a deportable offense.

I have no problem using technicalities to deport Iranian students. I hope INS feels the same way, if indeed they have violated their rights, to be here.

Are there any other resources directed toward Iranian foreign nationals in this country or means available to INS for tracking or determining whether or not they are here, other than the students?

Mr. Crosland. There are no directives by regulations. As to Iranian diplomats, the President directed that all but some 35 or 36 individuals be required to depart.

Senator DeConcini. Have they departed? Do you know?

Mr. Crosland. Some of those have departed and some of them haven't.

Senator DeConcini. How many diplomats do you think are here?

Mr. Crosland. Well, we were provided by the State Department a list of names of 226 Iranian diplomats.

Senator DeConcini. When were you given that list?

Mr. **Crosland**. This was in January, I believe. I don't have the exact date.

Senator **DeConcini**. Do you know how many of those have left?

Mr. **Crosland**. Yes. I think it might be useful for you to know that the President's directive was toward those Iránian diplomats who represent the present Government of Iran.

Although there are 226, not all those people represent the Government, the present Government of Iran. Some of those represented the previous Government.

Senator **DeConcini**. How many represent the present Government?

Mr. **Crosland**. We assume that on January 1, 1979, was the date, the cutoff date. You have 59 who represent the present Government. Of those, we have located 31 and 28 we have not been able to locate.

The problem has been that the addresses——

Senator **DeConcini**. Twenty-one have been located?

Mr. **Crosland**. Thirty-one.

Senator **DeConcini**. Thirty-one have been located of the 59.

Mr. **Crosland**. Yes.

Senator **DeConcini**. Have they been deported or asked to leave?

Mr. **Crosland**. Of those, 11 departures have been verified; 4 have been granted voluntary departure, and 16 have been reinstated by the Department of State.

Senator **DeConcini**. The President's order was to limit it to 35 total Iranian diplomats? Is that your recollection?

Mr. **Crosland**. That is my recollection. I am not sure how many.

Senator **DeConcini**. So, we have 16 here legally of the present Government; is that right?

Mr. **Crosland**. Twenty-eight we cannot find.

Senator **DeConcini**. Twenty-eight you can't find.

Mr. **Crosland**. That is right.

Senator **DeConcini**. Do you suspect that these people are now underground or hiding from you? Or have you just been unable to locate them?

Mr. **Crosland**. Part of our—part of the burden that we bear is a lack of an effective, nonimmigrant departure control system.

We can tell you, after a couple of months, who has come in, but we rely upon the carriers, the air carriers to tell us who is departing by giving us the I–94 travel document. If they didn't give them to us, then we don't have any way of knowing whether they left.

So, it is possible they have already left.

One of the—the way in which we would enforce the penalty against the carrier for not giving the I–94 to us is to locate the person who left the country, obtain a statement from them that the I–94 was not surrendered or was not asked for, and then effect a $10 fine against the carrier.

We hardly have any enforcement system at all.

Senator **DeConcini**. In the case of a deported person, Iranian or otherwise, does anyone see physically that they leave the country?

Mr. **Crosland**. If a person is granted voluntary departure, then they may leave the country on their own.

If a person is deported and they are under order of deportation, they may be taken to the airport and actually put on the plane by one of our agents.

Senator DECONCINI. Are they taken to the airport by an agent and put on a plane that is not stopping again in the United States before it arrives at a foreign country? If not, could such a procedure be instituted?

Mr. CROSLAND. Well, they could be allowed time in which to depart, even after they are ordered deported. But it is not written in granite that somebody is going to snatch them up by the collar and take them to the airport and put them on the plane.

Senator DECONCINI. Right. I understand that. I realize that people have certain personal things they have to take care of, certainly packing, family, or what have you. But how do you know they are going, unless you physically take them out there 4 days later?

Mr. CROSLAND. Well, as to Iranians, we have set up a nonimmigrant departure control system which means that we know who the person is responsible in each airport to collect the I–94's, the travel documents, from the Iranians departing.

We know who the people are in the various air carriers who are responsible for getting those. So that for that group, we do know who has left and who hasn't left. For those who don't leave, then we want to make sure that somebody goes out and tries to find them.

Senator DECONCINI. Doesn't it make it easy for someone staying in this country to voluntarily agree to leave? Then you never know whether they do or not.

They come in and I guess they sign a consent of voluntary deportation and then you say, "OK. Adios. We'll see you when things get better," and then you don't know that they leave; is that right?

Mr. CROSLAND. Are we talking about people in general? That's correct.

Senator DECONCINI. Yes, sir. Well, how about the 1,000-plus Iranians who voluntarily decided to leave?

Mr. CROSLAND. As to those we would know which ones have left through the ad hoc departure control system that I just described. Some of those might have been allowed 30 days, some might have been allowed a longer period of time in which to depart.

Senator DECONCINI. Would you know if one of that list of 1,000, who let's assume you gave 30 days to leave and who had a ticket to Paris, left this country within that 30 days, or can you not be sure he might be in Los Angeles or some place else?

Mr. CROSLAND. Some of them might still be in Los Angeles or some place else. What I am asking that our Regional Commissioners do is to have every district compare the information we have on those individuals who are granted voluntary departure, as to when they said they are going to leave and whether we have anything that shows that they in fact left.

If we don't have anything showing that they left, then I want some investigators to go out to wherever they live and pick them up.

Senator DECONCINI. What do you need to satisfy you and your District Directors that they have left? What kind of evidence?

Mr. CROSLAND. If we get the I–94 travel document from the carrier at our port of entry, that will show that they left.

Senator DECONCINI. If you don't get that, you then commence the search for them or put them on a list?

Mr. CROSLAND. Yes.

Senator **DeConcini.** I see. Does the I-94 name the person who left?

Mr. **Crosland.** Yes.

Senator **DeConcini.** For how many of the 1,076 now permitted to leave voluntarily, do you have I-94's indicating that they actually left?

Mr. **Crosland.** I would have to submit that for the record.

Senator **DeConcini.** Would you please?

Mr. **Crosland.** Yes.

Senator **DeConcini.** Do you have any estimate? Is it a substantial number?

Mr. **Crosland.** I would rather not.

Senator **DeConcini.** Very well. Would you submit that to us, please?

Mr. **Crosland.** Yes.

[Material referred to above follows:]

As of April 28, 1980, INS has verified the departure of 192 Iranian students who had been granted voluntary departure. However, this total includes students who had been granted voluntary departure by an immigration judge after a hearing as well as those who had been granted voluntary departure prior to a hearing.

Senator **DeConcini.** I am advised, or read, that of Iranian students coming into the country now, some 7,000 have been granted visas to come into the United States since the November order of the President; is that correct?

Mr. **Crosland.** I don't know the number of persons who were granted visas by the State Department at consular offices other than one.

Senator **DeConcini.** How many visas has INS issued?

Mr. **Crosland.** I can give you the number of students or of Iranians who have entered the country and have left the country since November 13.

Senator **DeConcini.** How many have entered?

Mr. **Crosland.** We had enter the country, 14,202.

Senator **DeConcini.** Now are these all to go to school?

Mr. **Crosland.** No, we have 2,865 students; 573 business; 7,417 visitors and 2,275 returning permanent residents, they are Iranian nationals. And then other for 790.

Senator **DeConcini.** Thank you.

In this group of 14,000 who have come in, how many are from Iran?

Mr. **Crosland.** None would be directly from Iran inasmuch as there have been no flights from there since November.

Senator **DeConcini.** And we are not issuing any visas there?

Mr. **Crosland.** No.

Senator **DeConcini.** So they are coming from other countries; is that correct?

Mr. **Crosland.** Right. These would be—most of them have multiple-entry visas. Many would have multiple-entry visas. They may have come, if they went across the border to Canada for example, or Mexico.

Senator **DeConcini.** When you issue a visa to any one of these people——

Mr. **Crosland.** We don't issue them.

Senator **DeConcini.** You don't issue them?

Mr. **Crosland.** The State Department issues them.

Senator DECONCINI. The State Department issues them? You don't have anything to do with them until they come to you from the State Department?

You don't have anything to do with that—does a copy of the visa come to you after the State Department issues it?

Mr. CROSLAND. No. The State Department issues the visas and the person comes to us with the visa.

Senator DECONCINI. The person comes to you with a visa?

Mr. CROSLAND. Appears at a port of entry.

Senator DECONCINI. Now when they come to you with the visa, what can you do to prevent anyone from coming in? What do you have available under the present laws to say, "I'm sorry. You can't come in."

Mr. CROSLAND. What we are doing to Iranians is requiring that every Iranian go into secondary inspection. That means that rather than coming through the line, that they are automatically sent over to be interviewed separately.

Senator DECONCINI. Yes.

Mr. CROSLAND. They are questioned as to why they are coming. If they are students, and they have been traveling around the world, then we want to know, and it looks like they are not really in status, there is no sense in letting them into the country and then later have them report and find out they are not in status and sending them out.

Senator DECONCINI. Right.

Mr. CROSLAND. So, they should be excluded. If they come for a purpose other than what is indicated on their visa, then they are excludable. Or if—they may be excludable for having committed some crime or the number of grounds of excludability which would apply across the board.

Senator DECONCINI. How about political hostility?

Do you have any discretion in that area? If you have any indication that a student has made public statements or been involved in demonstration against the United States and Canada or some other country, and you have some information regarding that, can you exclude them at that time based on that?

Mr. CROSLAND. If the person had commited some act while exercising in this country, first amendment rights, whether he is an alien or a citizen, then, and that act would constitute excludability, yes, he could be excluded.

Senator DECONCINI. An act committed in this country?

Mr. CROSLAND. Well, what I am saying is that a person who makes a statement, we are talking about hypotheticals.

Senator DECONCINI. Yes.

Mr. CROSLAND. But if they made a statement or demonstrated in this country, mere participation in a demonstration would not make them excludable, no.

Senator DECONCINI. It would not. What would make them excludable? Can you give me some examples, besides a crime, for which you could exclude them?

Mr. CROSLAND. If a person were a threat to this country.

Seantor DECONCINI. Can you determine that?

Mr. CROSLAND. The inspector would—is charged every day with the very trying task of examining persons as to whether or not they are a threat to this country.

Senator DeConcini. When they examine the person, if the Iranian is very critical of the United States, very pro the present regime there, is that cause to say, "Sorry, you can't come in. You are a threat to this country."

Mr. Crosland. No.

Senator DeConcini. It is not. What would cause, in your opinion, one of your inspectors to deny someone entrance if they were an Iranian?

Mr. Crosland. If it appeared that they were a terrorist, if they were coming here for a purpose other than stated on their visa.

Senator DeConcini. That is very difficult to know.

Mr. Crosland. If they were coming as a student but they had no intention of going to school. If they were coming as a businessman, but——

Senator DeConcini. Is there any way that you would know that?

Mr. Crosland. By questioning them.

Senator DeConcini. Just by questioning them? If they volunteer some of that information, say, "I am a terr—oops, sorry." "I am a terrorist, but I didn't mean to say that."

Mr. Crosland. We would question them as to—we get information from other agencies, from intelligence agencies.

Senator DeConcini. Then you ask other agencies for information?

Mr. Crosland. On individuals.

Senator DeConcini. Mr. Commissioner, do you know to how many you have denied entrance above the 14,202 since November 1979?

Mr. Crosland. The figure 14,202 is a cumulative total—since November 14, 1979—of Iranians, nonimmigrant and immigrant admissions reported as of March 30, 1980.

In addition, 54 applicants were referred to the immigration judge, 7 applicants were turned back at the border, 66 applicants withdrew their applications, and 1,193 applicants had their inspection deferred to another office.

Applicants who appeared before an immigration judge or an immigration officer at an onward office—deferred inspection—may be admitted or excluded. They may also withdraw before the immigration judge.

For the same period, the immigration judge excluded 44 applicants, 7 were turned back, 67 withdrew, and 37 applicants were excluded during the deferred inspection process for a total of 155 persons.

The total departures during that period were 14,768.

Senator DeConcini. Let me go to one other question. Senator Simpson, do you have any questions on Iranian students?

Senator Simpson. No, Mr. Chairman. You are going, Mr. Chairman. So, I will just hold those. You go right ahead.

Senator DeConcini. I am going to leave for just 5 or 7 minutes. We will just continue the hearing unless somebody else wants a break themselves.

Senator Simpson, please go ahead with any question you may have. I will be right back.

OPENING STATEMENT OF SENATOR SIMPSON

Senator Simpson [presiding]. Thank you very much, Mr. Chairman.

It is good to have you here, Commissioner Crosland, and your staff. I appreciate that. I suppose the Immigration Service has an additional element of interest to Senator DeConcini and I because both of us are on the Select Commission on Immigration and Refugee Policy, which is composed of four Senators, four House Members, for Cabinet members, and four members of the general public.

Senator DeConcini, Senator Kennedy, Senator Mathias, and myself constitute the Senate representation on that Commission. So, we have been conducting hearings throughout the United States, and of course, at almost all of those hearings, a great deal is discussed about your department. You might imagine that.

I was interested in Senator DeConcini's inquiry because the information I saw indicated that some 11,000 Iranian nationals had come in since November 4, 1979. And then, of course, you have given us a breakdown. You paused at the statistic of 790. What was that particular group? You gave us the figures of students, business, visitors, returning permanent residents and 790 what?

Mr. **Crosland**. They could be persons who are in transit through this country to another country, but land temporarily.

They could be foreign crewmen. I don't think they would be in this particular case. I can submit more specifically for the record what the 790 would constitute.

I might say, I did not a while ago, that although 14,202 Iranians entered the country during that period of time, 14,768 Iranians left the country during that period of time. I can give you a breakdown on that as well.

Senator **Simpson**. That is like Wyoming. When a child is born, one guy leaves town. [Laughter.] So you give us the figures on the 790, please.

Mr. **Crosland**. Yes.

Senator **Simpson**. Is there a further breakdown somewhere?

Mr. **Crosland**. I will get one and submit it for the record, if I could. I gave you a breakdown of the 14,768 who have left, if you would like. About that much.

Senator **Simpson**. Yes; I would like that.

Mr. **Crosland**. And 3,424 were students who left; 562 businessmen left; 7,439 visitors left; 1,744 residents, permanent residents left, and from all the other classes, 1,588 left.

I am also advised that the number of Iranians who have come to this country during this time period is down substantially from what it was in the preceding year.

Senator **Simpson**. Yes.

Mr. **Crosland**. Contrary to some news reports.

Senator **Simpson**. Yes; I think that is of concern to the committee, those news reports.

You indicate in your previous questions that the State Department sets the criteria and the policy and you have no input into that with regard to keeping it isolated to this Iranian situation.

Mr. **Crosland**. Well, there has been—you want to keep it isolated to the Iranian situation?

Senator **Simpson**. Yes.

Mr. **Crosland**. There has been coordination at higher levels between the Justice Department and the State Department, and the White House. But I am not in a position to state what those considerations are at this time.

Senator SIMPSON. Have you been involved in those considerations?

Mr. CROSLAND. I have been involved in some discussions as to concerns about persons who are seeking to leave Iran because of fear of persecution. A number of persons who are leaving are persons who are concerned about their own safety there because of membership in certain organizations or certain beliefs they may hold.

Senator SIMPSON. I would imagine that you would have been involved in the discussion somehow at a higher level regardless of what tone the discussion would have taken, whether it was political or what; but you have not.

Mr. CROSLAND. My involvement has been more directly to the concern of issuance of visas to Iranians who are outside of Iran, the consular offices abroad, but it has been focused on concerns of persons as to potential asylum claims and the processing of those persons.

Senator SIMPSON. There was a bit of discussion about I think the phrase is "nonimmigrant overstays." That was discussed, not in connection with the Iranian situation, but in the general review. You talked about having to investigate to see if departure had taken place. I guess I ask a question, in this deportation or voluntary departure procedure, you say you do not accompany the individuals to their carrier. And then you investigate later to see if the departure has taken place.

Is that what you are saying?

Mr. CROSLAND. In some instances there would be an actual carrying of the person, transporting the person to the airport and insuring that they get on the plane. I don't have a specific breakdown as to how many.

Senator SIMPSON. I think I would like to have that breakdown because I am wondering how much excess we spend on the followup procedure to see if they left when it may be simpler and less expensive just to take them. It would be worthwhile to find that out, at least for me. I would appreciate that information very much.

I am well aware in 14 months in this place that there isn't a problem here that can't be solved by more money and more personnel. I am very aware of that, at every level.

I am, however, a little bit puzzled about the 1979 passage of the appropriation bill which authorized increased positions, additional funding for the border patrol. Even though that was signed into law by the President, the administration apparently had no intention of following the congressional mandate.

There was a series of hiring freezes, prohibiting the use of those funds, at a time when I think Congress obviously intended to tote up more bucks to get the job done for an agency that wasn't getting the job done.

Could you give me your explanation of that?

Mr. CROSLAND. Senator, the pattern I think has been for 1979 and 1980, that each year there has been an increased amount authorized, but that each year there has been a ceiling put, placed by the Office of Management and Budget as to how many positions could actually be filled.

That notwithstanding, the number of positions has increased each year. So that we have, although not filling all of the positions that were authorized by Congress, have filled, been allowed to fill more positions than we had the preceding year.

Obviously, we have an interest which is something of parochial interest in enforcing the immigration laws and providing service to the public and present our best estimate as to what we need.

We received support, I think increasing support, from the Justice Department, Justice Management Division, as to what our needs are.

Last year, testimony has already been brought out in the House that the Justice Management Division supported our request for border patrolment. The Office of Management and Budget has a different role. Their role is to look at the various conflicting needs of all the agencies and try to trim here and there and implement a Presidential directive to fight inflation.

Senator SIMPSON. Well, in your remarks you talk about—you give some attention to the border patrol, the necessity of it, the way it is working, the spirit of those who do the work there.

Then you also state that that patrol is frustrated and concerned about what they perceive as a lack of support in Washington. If you could elaborate on that and indicate what it is that the border patrol would particularly like and then tell me, for example, of the number of border patrol positions authorized in 1979 and 1980, how many of those have been filled?

Mr. CROSLAND. All right, sir.

Looking at more general questions as to frustration level, the budget process in Washington is confusing to the participants and it is more confusing to the people who are in the field.

We plan 2 years in advance, many times not knowing that major events are going to occur, and not having planned adequately for those events because we don't have any way of knowing they are going to occur.

What we get from Congress may not be necessarily what we sent from INS to OMB. How it comes may not be in the same order, either. That contributes to the confusion.

There is a limitation on spending out of decision units imposed by Congress, which has caused some consternation by managers in the field. If somebody is not in a particular decision unit they cannot transfer more than 2 percent from one decision unit to another without exceeding the limits put on us by Congress.

Looking at the real frustration, we have spent, "we," being the Immigration and Naturalization Service, in the past, before there were certain restrictions placed on the Immigration Service, money that was plotted for automobiles on other matters which were considered to be important for the Service.

We now have a problem with not having adequate automobiles in the field. We are in the process, in the posture of preparing to come back to Congress to ask for more money for more automobiles.

We are also looking to take some of the automobiles, the vehicles we have seized from smugglers and using some of those.

Senator SIMPSON. I understand you had about 1,000 vehicles picked up through confiscation since the Congress gave you that authority and we might give you additional authority for confiscation. Would that be something you would require?

Mr. CROSLAND. We have authority under the law now to seize vehicles and we are asking for a change in the law so that we basically follow the same thing, the same law the Customs has.

We face certain liabilities if we seize a vehicle that is owned by a third party and there is damage to it. It could be extensive. It could cost the Government money to seize it if we make a mistake on the seizing of it.

Customs has some immunity.

Senator DECONCINI [acting chairman, presiding]. Would the Senator yield for just a minute to ask a question on that?

Senator SIMPSON. Indeed, I will, Senator.

Senator DECONCINI. Now you are talking about the law that Congress passed in 1978, granting vehicle seizures?

Mr. CROSLAND. Yes.

Senator DECONCINI. What is specifically the problem with that law? It was not intended to impose liability. That law was intended to make it easier for you. I suspect Senator Simpson is inclined toward taking corrective measures if necessary.

Can you be specific about what ought to be done or can you supply us with that information?

Mr. CROSLAND. I think we have already supplied something on that. We would be happy to supply it for the record.

[A copy of the Department's proposed revision of section 274(b) of the act, relating to seizure of vehicles dated June 13, 1979, can be found in the appendix.]

Senator DECONCINI. Will you, please?

Mr. CROSLAND. To both of you.

Senator DECONCINI. Has that change in the law given to INS in 1978 enhanced your overall ability?

Mr. CROSLAND. Yes.

Senator DECONCINI. Have you taken more automobiles through seizure?

Mr. CROSLAND. Oh, yes.

Senator DECONCINI. Even with whatever technical problems you have?

Mr. CROSLAND. Absolutely.

Senator DECONCINI. Thank you.

Senator SIMPSON. Thank you. It would be helpful to me if you would furnish that information. As you indicate, you are presenting some other legislation. A copy of that would also be very helpful.

Mr. CROSLAND. As to the numbers of border patrol positions.

Senator SIMPSON. Yes.

Mr. CROSLAND. In 1979, we authorized 2,731 positions, at a ceiling of 2,386. We had on board, at the end of the past quarter, 2,321.

In 1980, authorized 2,915, with a ceiling of 2,798, and presently have on board—excuse me, will have at the end of this year, 2,621 positions.

Senator SIMPSON. What is the reason for that failure to meet what I would call a congressional mandate for border patrol personnel?

Mr. CROSLAND. There was an OMB ceiling as to not hiring more than 2,798 positions. The rationale is that given the work of the Select Commission and the relatively imminent report, I guess in a year or so, to be coming out, that additional positions are not needed at this time.

Senator SIMPSON. Well then, the administration made an additional decision that 177 less than that figure were needed, obviously.

Mr. CROSLAND. There were about 300 total positions. I think there were 160 of the positions that were authorized by Congress, an additional 39 positions, making 299 border patrol positions.

Senator SIMPSON. What was the reason why OMB set 2,798 and the Department has 2,621? Was that because they were waiting for the Select Commission to report in?

Mr. CROSLAND. Yes.

Senator SIMPSON. Is that the sole reason?

Mr. CROSLAND. That was——

Senator SIMPSON. Such awesome power.

Mr. CROSLAND. I would rather not be speaking completely for OMB. That was the position that was stated in the documents that were sent over to the committee.

Senator DECONCINI. Would the Senator yield for a followup question?

Senator SIMPSON. Yes, indeed, Senator DeConcini.

Senator DECONCINI. The numbers that the Congress authorizes and appropriates funds for, I was under the impression, are in the total Justice manpower ceiling; is that correct?

Mr. CROSLAND. That is correct.

Senator DECONCINI. That is correct. So then OMB sets a limit; is that correct?

Mr. CROSLAND. Yes.

Senator DECONCINI. For all of Justice, or does OMB specifically set a number for the border patrol?

Mr. CROSLAND. They set it separately for Department of Justice and the units, as well. So, the border patrol ceiling was set by OMB.

Senator DECONCINI. By OMB?

Mr. CROSLAND. Yes.

Senator DECONCINI. So, when OMB sets the ceiling for Justice and the particular agencies under Justice, INS gets a ceiling set by OMB; is that correct?

Mr. CROSLAND. Yes.

Senator DECONCINI. A number.

Mr. CROSLAND. Yes.

Senator DECONCINI. Does OMB also set a number for the border patrol?

Mr. CROSLAND. Yes, a ceiling was set.

Senator DECONCINI. They were specifically set by OMB or by you or INS?

Mr. CROSLAND. OMB.

Senator DECONCINI. So your hands are then tied on how many you can hire, notwithstanding what the Congress says you shall hire and appropriates money to hire?

Mr. CROSLAND. There is a ceiling on the number of persons we can hire.

Senator DECONCINI. Thank you.

Senator SIMPSON. I understand that limitation. I don't quite understand why you didn't come up to the number of OMB requirement. Why aren't you there?

You have indicated that that, I guess, is because of the Select Commission's policy. I would wonder if that were the sole reason.

Mr. CROSLAND. We try to hire as near the ceiling as possible. We have attritions which result in some delays in hiring people. It takes a while to train particular classes. You have a limited number of persons you can train at a particular class to get them on board.

But, our projection is based on those sorts of considerations.

We also will be facing a freeze. I don't know what effect, if any, the freeze will have.

Senator SIMPSON. I suppose that this employee morale problem which is something you address, some of it must start right here with regard to positions and attrition.

Some of the personnel directives on grooming and so on, I am sure those have had a rather curious effect on the troops, have they not?

Mr. CROSLAND. Well, it depends on which troops you talk with.

Senator SIMPSON. Down there, not here.

Mr. CROSLAND. I talk with the troops down there, too. The living standards, arguably, can help morale. If you have people who are squared away and performing a law enforcement function in uniform, it contributes to espirit de corps if there are grooming standards which are reasonable. The question of course, is whether they are reasonable or not.

Senator SIMPSON. Yes.

Mr. CROSLAND. Yes.

Senator DECONCINI. Senator, would you yield for another question on the border patrol?

Senator SIMPSON, Yes, I certainly will.

Senator DECONCINI. Because of the particular problems, Mr. Commissioner, regarding the funding of border patrol agents and the manpower that is finally given, can you supply to us exactly how much it costs to recruit, train, equip, and pay a border patrol agent, without causing a horrendous burden on your staff?

Mr. CROSLAND. Yes.

Senator DECONCINI. Would you, please? I would like to see that information.

Mr. CROSLAND. Yes. The costs to recruit, train, equip, and pay a border patrol agent are: Recruitment, $1,500; training, $2,460; equipment, $7,535; and payroll, $14,352, for a total of $25,847.

Senator DECONCINI. Thank you.

Senator SIMPSON. I have no further questions at this time. I might, Mr. Chairman, enter into the record, the request to furnish further written questions and request that you respond to those at your earliest convenience. I would appreciate that.

Mr. CROSLAND. I would be happy to.

Senator SIMPSON. Thank you.

Senator DECONCINI. Mr. Crosland, I would like to discuss with you some of your responses to a series of questions submitted to you by Senator Kennedy and myself. It is my understanding that the questions were provided to you a few months ago and that the committee staff members met with members of your staff to discuss the preliminary responses and to discuss areas where the answers were unclear or unacceptable.

In several areas the answers are still not clear. If I may, there were 15 questions for which we could not get what we considered a clear answer.

Let me give you one example. In the discipline section, refer to question No. 11, if you could. Your answer indicates that during fiscal year 1978 INS received 368 allegations of employee misconduct.

During fiscal year 1979 INS received 349 allegations of employee misconduct.

Your figures indicate that 18 and 17 percent, respectively, of those against whom allegations were made and were found guilty.

For fiscal year 1979, 8 were terminated and 11 resigned. What happened to the other 40 people who were found guilty?

For 1978 what happened to the 66 people who were found guilty?

Mr. **Crosland**. We will submit it more fully on the record, if we may. The allegations don't represent people, they represent allegations. They may result in more than one allegation against one person.

[The following presents a summary of that information for fiscal years 1978 and 1979:]

Fiscal year 1978

Sustained cases during fiscal year 1978 (1 multiple subject)	66
Retired	2
Resigned	18
Suspension (145 days total)	10
Removed	13
Admonished or reprimanded	13
No action	8
Administrative remedial action	2
Exonerated	1
Convicted of crimes	4

This report is incomplete as eight (8) of the cases opened during fiscal year 1978 are still active.

Fiscal year 1979

Sustained cases during fiscal year 1979 (some multiple employees)	76
Cases still pending disciplinary action	5
Cases no action taken	11
Cases exonerated the employee of misconduct	10
Cases employee was counseled	7
Cases administrative corrective action	2
Employee retired	1
Employees resigned	14
Employees removed	10
Employee demoted	1
Admonished	2
Reprimanded	10
Suspended for total of 101 days	12
Convicted of crimes	4

This report is incomplete as forty-one (41) of the cases opened during fiscal year 1979 are still active.

Senator **DeConcini**. Some of them are multiple allegations?

Mr. **Crosland**. Yes, sir.

Senator **DeConcini**. If somebody had told us that it would have been very helpful.

Mr. **Crosland**. I agree with you.

Senator **DeConcini**. Did you have a chance to review some of those questions?

Mr. **Crosland**. I must say that I did not review the questions.

Senator **DeConcini**. Who answered the bulk of the questions at the table?

Mr. **Crosland**. Well, the questions—the answers were prepared by Associate Commissioners, and then were routed through the Planning, Evaluation, and Budgeting Office, and then I believe brought up to Ms. Abramowitz, by Mr. Leary, who is the congressional liaison.

Senator DECONCINI. I am interested in a candid answer from somebody as to the questions. Were they overburdensome to your staff? Were they questions that were irrelevant, in your opinion? We are not interested in harassing you. We are interested in finding out the information. I would appreciate a candid answer about the quality of the questions.

Mr. CROSLAND. Senator, we want to be as candid, and I think I have tried to be as candid as I can——

Senator DECONCINI. I believe you have.

Mr. CROSLAND [continuing]. Telling you all of the problems that we face and what we are trying to do about them. Some questions do require more work in obtaining a specific answer than others.

Any questions that you are not satisfied with, frankly, I didn't understand that these answers would be submitted for the record at this time, that there would be additional questions that would be coming from the committee.

Senator DECONCINI. There will be.

Mr. CROSLAND. I would review those questions. In the informal working relationships of staffs, from congressional committees to INS, it is helpful sometime to know what areas of interest and what specific kinds of information is of interest.

A lot of times answers are prepared for me and I know the anwser and I don't prepare it, redraft it at that time, because the answer is for my benefit and responding orally to you.

If there are questions you are not satisfied with the answers that were submitted, Ms. Abramowitz, you are not satisfied with those answers, I would appreciate your identifying them and we will get them back to you.

Senator DECONCINI. We will do so. The reason Senator Kennedy and I ask our staff to submit some questions early is to really expedite these hearings and to make it a little easier on you as to some of the areas we get into. Some of the answers we have identified as unclear. We will resubmit them to you.

Mr. CROSLAND. Fine. Thank you.

Senator DECONCINI. As you know, I have been following the Nogales fence project with some interest. In your testimony before the the Appropriations Committee you stated that the Bureau of Standards was conducting tests to determine if the material used met the specifications, and said that the results would be known within a day or so.

Have the tests been completed, and what are the findings?

Mr. CROSLAND. Well, the day or so was longer than I anticipated. We have not heard from the Bureau of Standards and have not—therefore, do not have an answer for you.

Senator DECONCINI. What is your best estimate of when you will know?

Mr. CROSLAND. I will check at the end of the hearing as to when we can get the answers.

Senator DECONCINI. Very well. Will you let us know?

Mr. CROSLAND. I will.

Senator DECONCINI. When you feel certain there will be a reply?

Mr. CROSLAND. Yes.

[The following was supplied for the record:]

BUREAU OF STANDARDS REPORT

[EXCERPT]

APRIL 7, 1980

The following summarizes the findings of the Bureau of Standards Report on the expanded metal portion of fences being installed at El Paso, TX; San Ysidro, CA; Nogales, AZ, and San Luis, AZ.

The report analyzed various factors concerning the material against the specifications for the expanded metal used at the various sites along the border. These tests were run on samples obtained from each site. It was found that material at three of the four sites did not meet the specifications from two standpoints. One, meeting the weight requirement of three pounds per square feet. Samples indicated that in three cases the material did not meet specifications with the galvanized coating on. Two, the primary rolling direction of the material was not in accordance with the shearing direction. These two specification deficiencies were evident in the fence projects at El Paso, TX, San Luis, AZ, and Nogales, AZ. All other test criteria were according to the specification, i.e., MIL-M-171940.

Senator DeConcini. Mr. Commissioner, on March 28, 1980, you issued a policy with regard to enforcement operations during the period from April 1, 1980, through July 1, 1980. It is my understanding that the policy might hinder the efforts of INS to locate and return undocumented illegal aliens and that it is in effect in order to assist the census in identifying and counting illegal aliens.

Will you please explain the new policy, how it differs from the normal policy, and what factors were important in deciding to implement the temporary policy?

Mr. Crosland. Let me start with the last part, first. There is a perception which is erroneous, but it still exists, that information from the census might somehow be used by the Immigration and Naturalization Service for enforcement purposes.

We have not in the past used information from the census. We don't intend to use information from the census now or in the future.

I testified in October, in New York, for Ms. Holtzman, in support of a resolution by her and Congressman Garcia, that any information obtained by the census, if somehow reached or came to INS could not be used in any hearing of deportation.

There still is a concern as to the enforcement of immigration laws adversely affecting the count. As you know, the count goes not just to those who are citizens, but to those who are here.

We have—we are concerned about that, the Justice Department and INS, not only from the standpoint of the census, and making sure that everything possible is done to have a valid census, but also to allow our employees to enforce the law, to carry out their responsibilities under the law.

Obviously, this is a difficult balancing act.

What we have done in effect is to say that during this time period the enforcement officers, except for routine casework, those involved in routine casework such as investigators who are finding Iranians, for example, should obtain a search warrant to go to a place of residence or to a place of employment and should rely on specific, articulable facts as to the kind of people they expect to apprehend in those places. It is only as to apprehension.

Therefore, we are asking that they work closely with the offices of the U.S. attorneys around the country and in carrying out this directive.

If there is an exception to that, then they should get the exception from the office of the U.S. attorney.

I think it is important that our people be protected as well. It is hard to disprove a negative. I want our people to be protected from false charges that they acted outside of the law rather than within the law. And by obtaining warrants to go to places of employment or to places of residence during this time period, they should be protected by the law.

Senator DECONCINI. Let me see if I understand this. The policy now is that you must have some lead based upon specific, articulable facts, indicating the presence of aliens who are in the United States in violation of the law. Is that the basic policy?

Mr. CROSLAND. That is basically it.

Senator DECONCINI. What is your policy, what was your policy before that?

Mr. CROSLAND. Well, the policy before was that they would not have to have a warrant if they could obtain permission to enter a place.

Senator DECONCINI. From the employer? Admission from the employer?

Mr. CROSLAND. From the employer or the person who is the occupant of the residence.

It is unlikely however, in the cases for example, of smuggling, that in a drop-house situation, that the person who maintains the drop house, even if admitting immigration enforcement personnel, would voluntarily invite them to look through the closets and under the beds if there are people there.

So, I think it is to their benefit.

In fact, often the U.S. attorney is consulted, has been consulted in the past. So for some law enforcement efforts it puts on paper what we have already been doing. In others, it does put in the requirement that we get a search warrant or a civil order or clear it with the U.S. attorney.

Senator DECONCINI. You have to have a search warrant, then, to go in?

Mr. CROSLAND. I am sorry.

Senator DECONCINI. Under normal circumstances, you have to have a search warrant?

Mr. CROSLAND. Prior to this directive our practice had been at places of employment, to try to obtain——

Senator DECONCINI. A waiver?

Mr. CROSLAND [continuing]. Consent first.

Senator DECONCINI. If you couldn't do that, then you had to get a warrant?

Mr. CROSLAND. Yes.

Senator DECONCINI. Yes.

Mr. CROSLAND. Or an order, civil order.

Senator DECONCINI. Now last week in Phoenix there were substantial raids, as I think there were in other places. I think the one in Phoenix involved some 800 illgeal aliens in an industrial raid.

Do you know if there was any illegal activity other than being in the country undocumented that was involved in that case?

Was there any drug smuggling or anything else involved in that case?

Mr. CROSLAND. A number of persons were—indicated they were here having been smuggled in, and although we made no apprehension of smugglers, they are investigating leads as to smuggling operations based on the interviews of the persons who were apprehended.

There were 800 persons who were apprehended. All of these were in places of employment.

Senator DECONCINI. How many places of employment were there?

Mr. CROSLAND. I can give you a breakdown. We have 25 restaurants, 10 food processing plants, 10 hotels, 9 fruit packing sheds, 6 tree nurseries, 6 auto body shops, 5 janitorial services, 4 lumber companies, 3 general construction, 2 railroad construction, 1 hospital, and 33 at a race track.

Senator DECONCINI. How many of those types of raids of that magnitude have been conducted in the Phoenix area in the last 6 months?

Mr. CROSLAND. Probably none because the request for assistance came in September, to the district director, because of the large number of complaints that had been received from the Phoenix area.

During the last 12-month period, we had received 1,276 telephone report worksheet complaints. Of those, 90 percent were from private citizens, 8 from local governments, and 2 from local police.

Senator DECONCINI. Let me just express an opinion. I have no quarrel with INS doing those raids. I am glad you are doing them. I think that they need to be done. My quarrel is that they are being done at this sensitive point of the census. It causes a great deal of apprehension for legitimate people, as well as for those here illegally.

I wonder whether, in the decision to go and do the raids during this sensitive period of time, that was considered? Did you then decide that you had to go do them now?

Mr. CROSLAND. I had no knowledge of the operations until after the completion of the operations. Every single one of these, with the exception of the race-track contact, the apprehensions were small numbers of persons, 10, 11, average size. It was not that they went to one place and got 300 people, it was only a small group of people.

Senator DECONCINI. Yes.

Mr. CROSLAND. The purpose though of part of, one of the underlying purposes of this directive for this particular time period is that we follow certain well-recognized law enforcement practices in obtaining warrants with the participation of an outside agency in effect, the U.S. attorney's office, not part of INS, reviewing the information that is provided and that if there is an exception that the—to the practice of not getting the warrant or the civil order, then the district director or the section chief notify the head of enforcement here in Washington.

Senator DECONCINI. How many of those were consensual entrances? Do you have that information?

Mr. CROSLAND. All of them.

Senator DECONCINI. All of them?

Mr. CROSLAND. Yes.

Senator DECONCINI. Now the problem I would like to underline for you, Mr. Commissioner, is that the work of the border patrol is very important, certainly in the Southwest. It is important that undocumented or illegal aliens be apprehended and returned.

When you are in a sensitive period of time as we are here with the census, would it not be wise maybe not to try to pick up 800 or more people, and do it on a smaller scale instead?

What happens is that the fallout effect with the media publicity almost caused some very active Hispanic groups to boycott the census. A number of us, including the Governor and myself and other members of the Government, attempted to persuade the border patrol that it would not be beneficial to the Hispanic community or the State of Arizona or the city of Phoenix. So far they have not done that.

Their answer is that when you do a big raid like that, it scares a lot of people. We don't need to have a census under fear. It is not a proper way.

Now I realize it is a matter of degree, but I wonder if any consideration is being given by INS, and the border patrol, not to attempt to pick up 800 at a time in 1 day or 2 days but to spread it out so you would not have this tremendous fallout.

Mr. **Crosland**. This, of course took place in 2 weeks. It was a fairly concentrated period of time. I am sensitive to your concerns and the concerns expressed by various Hispanic leaders and civil rights organizations. We hope that the effect of this will be to assuage those fears by groups that activities would avdersely affect the census.

I don't think that there would be as concentrated an operation with a large number of people coming in to one area in this sort of a situation that has occurred here.

This was really in response to a request that came back in September. It is somewhat is incidental to the fact that the census was about to begin.

Senator **DeConcini**. That is my point. Isn't it important to consider that?

My other question is, in the planning of such a raid, did the border patrol have some estimate of how many they might be able to pick up?

Mr. **Crosland**. Yes.

Senator **DeConcini**. Did they anticipate they would pick up hundreds?

Mr. **Crosland**. I am sure they did, because they had a number of telephone worksheets which would——

Senator **DeConcini**. Is there a reason why you go to all of these places at once? If you pick them off one by one, do you lose them in the other places? What is the justification or reasoning?

Mr. **Crosland**. I would assume that it was something that was planned some time ago, but there wouldn't necessarily be a relationship between one restaurant or another or a lumber company.

I would also assume that the effect of this is that there will not be the kind of larger scale effort going and concentrating in one place. It will be spread out.

Senator **DeConcini**. Well, if you have a number of complaints against an auto body shop or a race track or a place like that over a period of time, does the border patrol decide to just go to that one place and pick up anybody they think is there, or is there a pattern of putting them all together and doing it in 1 day?

Mr. **Crosland**. Well, it could vary. Under this—under the new directives there will be a requirement that there be consultation with the U.S. attorney, including either getting a warrant and order or getting a waiver on that. But there is no requirement that everything be done at that time.

Senator **DeConcini**. It appears to me that the border patrol is subject to some severe criticism for doing some 60 different businesses in 1 day.

Obviously, they received some great publicity. That indicates they sure are doing their job, they picked up 800 and hooray. And, indeed, it is good that they picked up 800, but it seems to me they might have been able to do it over a long period of time and not have caused the problem that might arise concerning the census.

Would you agree that there might be a better way to go at it than trying to do it all in one swoop?

Mr. **Crosland**. Yes. We want to avoid activities which would adversely or could adversely affect the census, but still enforce the law in a way——

Senator **DeConcini**. Based on your concurrence with my observations, can we expect a less flamboyant effort by the border patrol, without a less determined effort?

Mr. **Crosland**. Yes.

Senator **DeConcini**. Thank you.

Mr. **Crosland**. I might add that the U.S. attorneys were alerted to this effort as well. They are very sensitive, or being made sensitive, of the concern about the effects.

Senator **DeConcini**. I thank you. I want to leave it very clear. I don't want to leave an impression, at least from this committee member, that I object to the border patrol doing the work. I applaud them. I am glad to see that they are following up on those complaints and taking positive action.

What I am concerned about is the manner of doing it all at once and perhaps disrupting the census which will be over in a short time.

Are you familiar with a recent raid in Phoenix? It was a residential raid involving 15 to 20 people.

Mr. **Crosland**. I don't have all the facts. I have some of the facts. My understanding is that the local police were investigating a burglary and saw a couple of people, questioned them, found a number of other people. There was a van involved. I am not clear as to how many people were in the van or not in the van. There was an arrest.

Senator **DeConcini**. My office has called Danziger; is that right? Do you have any other information since yesterday?

Mr. **Danziger**. We are trying to get those facts.

[The material referred to above follows:]

The occurrences of April 1, 1980 in Phoenix, was not a residential raid.

Two Officers of the Phoenix, Arizona Police Department observed a white Chevrolet Van (registered to Derick Williams, of Tucson, Arizona) parked in front of 632 South 10th Place, Phoenix. This address is in a semi-residential/semi-commercial area of Phoenix, located near the railroad yards. Indigenous to this area are large numbers of transients. The address in question had been burglarized in the past and at the time in question was on the Phoenix P.D. Burglary Stakeout List. The address is occupied by two elderly people who rent out several small apartment-like buildings in the rear, to supplement their income.

On that date the Phoenix Police Officers observed two males coming from the rear area of the house. The Police Officers questioned these suspects and ascertained that they were from Mexico and illegally in the United States. They located two more male suspects in the van who were also believed to be aliens in this country illegally.

After securing the four aliens in their Police car, the two officers checked the rear area of the house for signs of forceable entry or burglary. At this time they noticed that the door to one of the apartments was open and a large group of people were clearly visible. The police Officers discovered that this group consisted of twelve more male suspects, believed to be from Mexico and in the U.S. illegally. The Police Officers then called for INS assistance and Investigators from the Phoenix District Office responded.

It was then ascertained positively that all sixteen male suspects were from Mexico and in the U.S. in violation of law and they were taken into custody by the INS Investigators. The aliens stated that they had been in Phoenix for only one hour prior to their arrest and that they had all pooled their money to purchase the van for $1,800.00. The driver was subsequently identified and on April 2, 1980 the U.S. Attorney's Office authorized a criminal complaint charging him with violation of 8 U.S.C. 1324. The registered owner of the Chevrolet Van was contacted and stated that he had sold this vehicle. The Van has been seized by INS.

Phoenix District Office states that illegal aliens have been apprehended in the past after having been housed in the apartments in question at 632 South 10th Place, Phoenix. The investigation continues.

Senator DeConcini. Fine. I would appreciate hearing from you.

Mr. Danziger, I know that you are new on the Commission. You have had an opportunity to sit through these hearings today. Do you have any comments on what you plan to do as a Deputy Commissioner to make some improvements?

Mr. Danziger. I was very impressed, sir, by the questions that you, the other Senators and your respective staffs submitted. I thought they were excellent, well thought through and very thorough.

I think working with you and your associates, over time, will permit responses to those questions in a manner that befits a committee of this stature. This effort will be very beneficial for the Service and for its future.

I would ask you to bear with us and give us adequate time because the questions are so basic to the Service's mission that attempting to answer those questions too quickly, not thoroughly enough, will not satisfy either your needs or the Service's future.

My own identification of mission, if you will, over the next several years really, is to assist your efforts which have been quite substantial, to develop greater credibility for the Service and a greater sense of integrity.

Were we to achieve both of those things, I think we would have made major steps forward in the viability of the Service's efforts.

Senator DeConcini. I agree, Mr. Danziger. I am very frustrated, and I suspect that some of you in the Service are extremely frustrated also.

I know many of you and talk to you. Mr. Crosland has been extremely candid and Mr. Saenz and many others have been helpful.

It is just such a discouraging operation to sit on these authorization hearings and appropriation hearings and see a good arm of Justice go down hill like a roller coaster.

I don't know that it has stopped. I hope that you have the ability and I hope we can assist you. It is the most discouraging thing I have had to deal with on the Judiciary Committee. Year after year I see the border patrol and INS not able to get a grasp of the problem.

I know it is not all your fault. Some of it is Congress fault. Some of it is the administration's fault. Quite frankly, a lot of it is the Justice Department's fault.

I just want to tell you that I will continue to work with you and truly hope there are some improvements. Perhaps there already are. I hope we can succeed in getting the Justice Department to consider this agency as important as the DEA or the FBI or some of the other agencies in that Department.

I have a statement from Senator Thurmond and a statement with questions from Senator Cochran, and questions from Senator Gravel, which we will submit to you at this time, as well as additional other questions which we have not been able to get to this morning.

[Questions referred to above and answers of Mr. Crosland can be found at the end of today's hearing.]

I do thank you very much for your backup and your attempts to answer our questions. I complement your staff work, and appreciate the time they had to put into this.

Commissioner, let me assure you again, we stand ready to help you, not to tear you down. We hope that you will continue to respond and work with our staffs and this committee so that maybe some improvement can be achieved.

Mr. Crosland. Thank you very much, Senator.

Senator DeConcini. Thank you.

[The prepared statement of Mr. Crosland follows:]

PREPARED STATEMENT OF DAVID CROSLAND

Mr. Chairman and members of the Subcommittee, it is a pleasure to appear before you and to present the 1981 authorization request of the Immigration and Naturalization Service. I am accompanied today by Deputy Commissioner Martin Danziger, Associate Deputy Commissioner Paul Saenz and Budget Officer Tom Perrelli. All members of the INS Management Group are also in attendance.

I'd like to begin by addressing concerns about mismanagement and corruption in the INS which have been a favorite topic in some of the news media recently.

It has been apparent to me that many of the management problems have stemmed from a lack of clear authority and accountability of managers for their programs. Since I became Acting Commissioner on October 1 I have attempted to improve accountability of managers by re-establishing line authority through the INS Regions to the District offices and Border Patrol Sectors.

The Management Group concept, which was not functioning properly, is now working well. Key managers in the Central Office meet regularly to discuss openly their own programs and how they relate to others. Communications both within the Central Office and between Washington and field offices have been improved considerably.

The successful completion of the first phase of the Iranian student project demonstrates that, given a clear understanding of what is expected of each manager, the Service can discharge its responsibilities efficiently and effectively.

We have recently completed an exercise in the Central Office which has been very beneficial. We instituted a hiring freese, from November through January. Each program manager and the supervisors reporting to him were required to explain their programs and justify before the Management Group the need for filling the vacancies. As a result some excess positions were indentified and not filled, while others were relocated to areas of greater need.

For example, the nearly dozen Special Assistants assigned to the Commissioner's office I have reduced to one. The Deputy's office staff was trimmed in half, as we had been without a Deputy since October until last week. The accountability approach is being brought to bear against the problem of corruption, which has received so much publicity. We are trying to instill a sense of responsibility in all managers and supervisors for all that occurs within their areas of jurisdiction. We are also asking managers to identify potential problem areas—areas of possible corruption or temptation—and to take special steps to guard against misconduct in those areas.

We are placing a great deal of emphasis on preventive measures, rather than responding to misconduct solely after it occurs. We have hired Walter Connery to head our internal affairs unit, the Office of Professional Responsibility (OPR). Mr. Connery is an experienced and respected officer from the New York Police Department, where he specialized in internal investigations.

I have directed that 30 investigators be detailed to OPR to resolve cases which have been pending for months, or even a year or more. We are also opening regional OPR offices to assist with the internal policing of INS and to enable us to respond more quickly when problems occur in the field.

I would like to comment specifically on the New York Times articles, because they gave the impression that corruption and violation of civil rights are a way of life in the INS. Our analysis of the incidents related in the Times showed 51 separate allegations of misconduct. These allegations, incidentally, covered a 15 year period, although the Times gave the impression that all were recent events.

All the identifiable incidents had already been investigated by INS, with 14 persons cleared of any wrong doing; 5 employees were terminated or left before disciplinary action could be taken against them; 25 were disciplined through suspension or admonishment, 4 were indicted; and 5 cases are still pending for action by the Civil Rights Division of the Justice Department.

I would like now to address the major operating divisions within INS, beginning with the Border Patrol. In fiscal year 1979 the Border Patrol apprehended 889,000 undocumented aliens, a small increase over the previous year. Nearly 60 percent of these apprehensions occured in two volatile stretches of the United States-Mexico border. They are the approximately 30-mile section immediately south of San Diego, called the Chula Vista Sector, and a similar section at El Paso, Texas. Apprehensions in Chula Vista totaled 338,000, and at El Paso the number was 150,000.

While there is almost 2,000 miles of border between the United States and Mexico, there are only a few miles, certainly well under 10 percent of the border, that account for the bulk of the illegal crossings. It is in these areas that we must continue to concentrate our resources and improve our capabilities.

Both as General Counsel and as Acting Commissioner I have accompanied the Border Patrol in their operations. I have come unannounced upon Border Patrol agents apprehending and questioning aliens. I have been impressed by the professional manner with which these officers conduct their work. Never have I seen any signs that the aliens who have been arrested are afraid of the agents—a fear that would almost certainly exist if beatings and brutality were to occur on a regular basis.

My impression of the Border Patrol, arrived at over the past three years, is one of a dedicated, hard-working group who are frustrated and concerned about what they perceive as a lack of support by Washington.

Given the difficult circumstances under which they operate, the officers of the Border Patrol perform admirably and make the most of limited resources.

The San Clemente checkpoint in Southern California provides a recent example. On a Sunday evening in February the checkpoint was suspended for about an hour and a half—time enough for work to reach the border that the checkpoint was not in operation. The checkpoint was then quickly reinstated, with additional Border Patrol officers staffing the lanes. Each car was closely examined.

Within a very short time 518 smuggled aliens were found, and 35 smugglers were arrested. In addition, 22 cars were found abandoned near the checkpoint. Many had aliens concealed inside. This operation will become standard procedure at that checkpoint in the future.

The recently enacted legislation giving INS authority to confiscate vehicles used in smuggling aliens has been very helpful to our enforcement program. To date, more than 1,000 vehicles have been confiscated, including motor homes, vans, camper trucks and cars. Many are nearly new, usable vehicles, which we plan to incorporate into our own operations. Certain modifications in the law would make it an even stronger tool. We have submitted them for congressional consideration and urge early passage.

Next is the Investigations program. Approximately half of investigator time is spent on casework which includes investigating fraud, verification of citizenship applications, required background for private bills, and investigation of visa irregularities. Combatting smuggling of aliens occupies another large part of investigative time and resources.

The other major activity is area control, i.e., — the apprehension of undocumented aliens, primarily in places of employment. Last year apprehensions arising from area control operations totaled just over 147,000.

Dramatic increases in workload have also occurred without commensurate staff increases in inspections, the next program area I will discuss. International air passenger traffic to the United States has increased by more than 40 percent over the last 4 years. At some airports in particular, growth in international air traffic has outpaced the national average by a considerable margin. For example, in Miami the increase over the past 4 years has been 70 percent; in San Francisco, 90 percent; in Los Angeles, 100 percent; and in Atlanta, 160 percent. Last year more than 274 million persons were inspected at ports of entry and nearly 1 million inadmissible applicants were refused entry—13 percent more than 1978.

In addition, inspectors at airports and other ports of entry handled adjudication of 800,000 alien applications and petitions during non-peak hours. This is a 20-percent increase over the previous year.

Despite such innovations as one-step inspections, which has been coordinated with the Customs Service, and the expansion of pre-clearance, increases in the number of persons that must be processed by INS inspectors are continuing to outrun our capabilities. This results in increasing delays to the public and inconvenience to both airlines and international travelers.

Naturalization is another area in which we are hard-pressed to satisfy the growing demand for service. Since the end of the last fiscal year pending naturalization applications have grown to more than 100,000, and we project more than a quarter million applications this year. In addition, we expect more than 50,000 Indochinese refugees to begin to apply for citizenship when they become eligible this spring. Because of the benefits which citizenship grants in allowing persons to bring in relatives from abroad refugees can be expected to apply promptly. It is in our mutual interest to process these applications rapidly.

Certain legislative changes would bring about more than a one-third increase in naturalization productivity with no increase in personnel. These measures (H.R. 5087 and S. 1763 and 1773) remove unneeded but time-consuming requirements for naturalization and would result in prompter processing of citizenship applications.

In the Adjudications program, receipts of petitions and applications have also been at record-high levels and are now approaching two million a year. The increase since Fiscal Year 1977 is nearly 40 percent, primarily in relative visa petitions and applications for permanent residence for Indochinese refugees and Western hemisphere aliens.

The use of task forces in offices where backlogs are greatest and continued increases in forwarding petitions to inspections stations for adjudication have helped us keep pace. Over half of the adjudications are now performed by INS inspectors at ports of entry during non-peak hours.

In the Detention and Deportation program, we need holding facilities in Miami and improved facilities in New York. In Miami, holding space is required for an average of 120 aliens per day in facilities more convenient to INS that local detention space currently in use. In fiscal year 1979 more than 7,500 hours of overtime were expended in transporting undocumented aliens to holding areas.

The Bureau of Prisons is providing an interim solution in Miami. Space for 200 persons, for 5 months has been made available to INS. Longer range alternatives are being examined, including renovation of an abandoned missile site within 14 miles of the Miami District Office.

Improvements are also being made in the New York detention facility, which was in a state of decay at the time we began using it in 1975. These include painting and renovating of interior and exterior, purchase of dining room equipment, establishing a visiting area where direct contact between visitors and detainees is permitted, purchase of recreation equipment, adding carpeting and curtains, installing new infirmaries and improving privacy in the toilet area.

I should add that we intend to move into new detention facilities on Varick Street in New York during the next fiscal year. We are also developing new written standards on 17 different items of detention policy and practice, which will be applied nationwide.

A serious problem in New York, with which many of you are familiar, involves service to the public. On occasion, I have tried to call the listed number for the New York Immigration Office and have received no reply. Telephone surveys have shown that as many as 60 percent of the calls to the New York office are not completed.

To resolve this we have installed a new telephone system in New York and we are providing staff to answer the phones. In many districts we are installing automated systems, which provide recorded information to callers while they are waiting for answers to specific questions. In other offices recorded tapes provide detailed information on specific immigration subjects, such as how to replace a lost document, or petition a close relative.

We recognize there are many problems in New York in addition to our inability to answer telephones. In the last two months I have sent two separate teams to New York to look into these problems and recommend ways to resolve them.

Last month I sent a team of records specialists to New York under the direction of INS Associate Commissioner Charles Sava who has broad management experience. This team has the responsibility and the authority to resolve the serious records problem in the New York District Office.

The problems of INS are well known. A comprehensive management analysis, authorized by the Congress for fiscal year 1980, holds great promise, we believe, for approaches and solutions. The management analysis is being done by the President's Management Improvement Council under the direction of Mr. John Kratske. The first stage is a review of INS automation programs and plans directed at achieving automation of Service operations in an effective, sound manner over the next 3 to 5 years.

The House Government Information and Individual Rights Subcommittee, chaired by Congressman Preyer, has frozen INS funds for purchase of additional automation equipment pending completion of such a plan for automating the agency.

The automated system we will install will be one which takes into consideration the overall needs of INS and has the growth potential for future expansion. We are working closely with Chairman Preyer to resolve his concerns and to develop a plan that will benefit both INS and the public over the long-term. Our effort to straighten out agency records and files is part of our preparation for introduction of comprehensive automated systems.

At the same time, Mr. Kratske and INS managers are working more closely with the Department of Justice Management Division (JMD) on ways to improve personnel, procurement and other management practices. One example is a joint agreement that JMD approve all INS contracts over $10,000.

INS' problems are solvable. They have been allowed to grow in the dark, while little attention was sought or given. Some of the problems result from past failure by INS to ask for adequate resources, and from failure to document adequately the need for requested funds and personnel.

Major changes in the law in 1965 resulted in considerably more paperwork for the agency, and it was not and has not been equipped to cope with it, either through systems and procedures or through automation. At the same time, immigration to this country has been increasing substantially, and we now find ourselves in a hole from which it will not be easy to extricate ourselves.

We are going through a painful period of self-examination as well as examination from outside INS. This is important and necessary. We are looking at our problems from as many perspectives as possible. A vehicle task force, for instance, is trying to make some difficult decisions so that it can recommend the best course of action to take in replacing our worn out fleet with the most economic and efficient vehicles in the future. We are currently using horse patrols in a remote area of Arizona desert along the Mexican border. In other areas we use helicopters, small planes and motorcycles, as well as 4-wheel drive vehicles.

This, like most management problems, requires planning and good supervision to reach the right course of action.

I am committed to making changes in the INS that will bring the agency into the 1980's in both a management and a service sense. I look forward to your assistance and cooperation in doing so.

Senator **DeConcini**. At this time we will hear from Michael Harpold, president of National Immigration and Naturalization Service Council.

I understand Mr. Blaylock is here also.

PANEL OF UNION OFFICIALS:

STATEMENTS OF MICHAEL HARPOLD, PRESIDENT, NATIONAL INS COUNCIL; KENNETH BLAYLOCK, PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; AND RICHARD BEAVNES, PRESIDENT, BORDER PATROL COUNCIL

Mr. HARPOLD. Thank you, Senator DeConcini.

I listened very intently to the questions and the discussion of the previous witnesses. I must say that I am pleased, one, with the depth of the questions asked by the committee, and also, the responses of the previous witnesses, from the agency.

The INS employees, the Border Patrol employees have been raising these issues to my personal knowledge, since 1970. I think we are now reaching a period for the first time the agency is admitting that they do have problems. I see that as a good sign; some of them serious.

I think your closing remarks, as you were trying to identify where the problems are coming from, it would be my personal opinion, in representing INS employees, Border Patrol employees, employees in the Bureau of Prisons and the U.S. deputy marshals, all agencies under Justice, I think you are on target when you say an awful lot of the problem comes from the Justice Department itself.

There seems to be a lack of concern, and also at times a capping of processes for each one of these agencies. A lot of it is outside the control of the agency itself.

I don't think we have ever had a Commissioner in INS who was more concerned than Castillo was about the problems of INS. Yet, he finally gave up in disgust because he could get no support from Justice.

Mr. Chairman, I would like to just summarize my short statement, in view of the time that we have.

Senator DECONCINI. We will put your statement completely in the record at the conclusion of your oral presentation.

Mr. HARPOLD. Thank you very much.

Mr. BLAYLOCK. Mike could probably add some meat to some of the comments that I will make. We also have Dick Beavnes, who is president of the Border Patrol Council, with us this morning in case you may have questions in those areas.

Mr. Chairman, we have—AFGE, like any other—all the other labor organizations, we do have a keen interest in the U.S. immigration and refugee policy. It has impact on the American workers. It has economic implications for the country and obviously, there is a humanitarian interest.

We are also concerned about the policy as it relates directly to the day-to-day working conditions of the 9,400 INS employees whom we represent across the bargaining table.

Because of the special concerns that we have for our employees and for our members, in the very recent AFL-CIO executive board meeting that took place in February, there were several key unions, my union, the Textile Workers Union and a couple of other unions that were very concerned that this country needs an updated, comprehensive immigration policy. We think it is going to take legislation to do that.

We adopted a statement of policy for the AFL-CIO at that board meeting. That is also attached to my comments and testimony and will be in the record for your review.

I would like to just summarize that statement though that pretty well puts together the position of labor in this country, organized labor, as far as the policy is concerned.

The preamble of the statement, the AFL-CIO supports an immigration policy for the United States consistent with the Nation's compassionate and humane traditions.

As members of a nation of immigrants, and as representatives of workers who built unions to escape exploitation, we deeply sympathize with those who seek a better life in our country.

To that end, the American labor union movement supports legislation that one, would penalize employers of illegal aliens.

Two, provide for an adequate identification system for all workers.

Three, provide for a program of adjustment for illegal immigrants with a demonstrated attachment to the community in which they currently reside.

Last, and most important, provide adequate resources fund strengthened border control inspection capabilities to stop illegal entry into the country.

In recent years, in spite of increasing numbers of legal and illegal immigrants entering the United States and growing international refugee problem, staffing and appropriation requests dropped.

The backlog of cases has increased many hundredfold, and the morale of employees sunk to new lows, which has resulted in an alleged increase in violence and corruption in the agency.

Once again, as we review the administration's 1981 budget request, we find that funding levels for the 1981 fiscal year have come in below minimal requirements for adequate management of the agency.

They propose a reduction of 199 border patrol positions, 10 detention officers, and 68 inspectors and clerical personnel charged with the preparation and issuance of entry documents for aliens.

The sole purpose—the sole proposed increase is 15 inspectors for Miami, Fla. These proposed decreases come hard on the heels of a reduction of 574 positions in fiscal year 1980 budget, which included the loss of 158 criminal investigators and 115 inspectors, despite the fact that the Congress saw fit to restore 293 border patrols and increased that again to 495 positions in the fiscal year 1980 budget.

The administration, by internal action chose not to fill 385 of those positions. As justification for its action, the administration now states that the simple addition of positions and resources will not improve the enforcement of the immigration laws.

At best, given the 15-year history of underfunding and staffing of the INS, the administration's rationale is an untested premise.

At most, certainly no justification for emasculating an agency to the point where it can no longer carry out its statutory functions.

We concede that legislation that may be enacted in the future may affect the budget of the INS. But to not fund the agency in the interim can only further exacerbate the already bad illegal entry problem and cause further deterioration of the agency.

These problems will cost far more to solve in the future than they will if immediate action is taken.

We consider the fiscal year 1979 funding and staffing levels for INS as enacted, constitute a good starting point for considering present and future levels for the INS.

The fiscal year 1979 budget which was passed by the Congress and signed by the President on October 10, 1978, set the staffing level at INS at 10,977 positions.

We recommended that the INS be restored to that level.

Included in such a restoration would be the 115 inspectors, 158 criminal investigators and 15 training positions cut in fiscal year 1980.

We would further recommend that the committee concur in the House Judiciary Committee's recent action in increasing the border patrol by 311 positions.

Other increases are also warranted in the administration's fiscal year 1981 budget request which would bring INS staffing more in line with that intended by the Congress in the fiscal year 1979 enactment.

The addition of 100 examiners and 100 investigators would significantly assist these branches in coping with their increased workload.

While we are well aware of the desire of this Congress to cut expenditures and balance the budget, the $5.4 million increase over and above the fiscal year 1979 level should be considered a small price to pay for efficiency which will reduce cost, corruption, and disorganization in the future.

This year the administration was forced to ask for $1.5 million, a figure increased to $3 million by the House, to investigate police-alleged corruption within INS.

This is an expensive and saddening remedy when the kind of modest increases we propose today would have kept employee workloads within reasonable bounds and prevented further collapse of the employee morale and administrative efficiency.

In short, Mr. Chairman, it is the people of the Immigration Service who will make the difference in the 1980's, and it is only through the support of those people and the leadership of this Congress that the critical problems of immigration policy and enforcement will be solved.

That concludes the summary of my statement, Mr. Chairman.

I would just like to add that you say you were very frustrated over this whole situation. And, of all the Federal workers that we represent, and all of them are frustrated to a degree when they are trying to do a job for the American public and it seems like that one way or another they are sorted out as scapegoats for the inefficiencies and ineffectiveness of government and the problems the country has.

But I would say that the employees working for the Department of Justice that we represent are the most frustrated. These people, as I stated earlier, since 1970, have been identifying the problems of management policies, of agency procedures that would not allow them to do their job.

They are charged by law with locating, detaining and processing illegal aliens in this country. They swear to an oath to do that. Yet, they find policies and procedures and programs of the agencies that on every hand seem to frustrate their ability to do that job.

Now either the country believes in an immigration policy that is now in law or they don't believe in it. But whatever the situation, these people are charged with carrying out that law.

On the one hand, they must comply with the agency policy, or they are in violation and they lose their job, and on the other hand, if the procedures of the agency don't allow them to do that, then that also can be used against them.

So they find themselves damned if they do and damned if they don't. The frustration levels are very high, at this point, and getting higher. There is no doubt about it.

We are going to be dependent upon the Congress, I think, to straighten it out. The administration has pretty well demonstrated they are not going to straighten it out.

Senator DECONCINI. Mr. Blaylock, let me tell you, I appreciate your organization and the fact that you and your people have consistently brought what I consider credible and objective suggestions to Congress, to INS, and to Justice.

Quite frankly, even though working with you, we have not succeeded in improving the problems there. I have just about concluded that until the Attorney General of the United States decides to take this under his wing and direction, that we are not going to have a real improvement. It may be temporary on one particular issue such as the automobile problem or one thing that comes up, but it is not really going to get to the heart of this problem in this agency. It is a damn shame to see a fine agency and the dedicated employees that you represent who have worked many, many years and done a lot for their country, not have a decent environment and morale, and particularly in the case of the Border Patrol, the equipment to do their job.

But when you continuously have setting of ceilings by OMB, the Justice Department only allocating some of those authorized positions, and INS management being hamstrung, notwithstanding that Congress has appropriated the money and the people, it just absolutely has me at my wits' end.

Mr. Harpold, do you have a statement or a summary?

Mr. HARPOLD. I think since Mr. Blaylock supplied all the meat and potatoes, I guess it is up to me to provide a little bit of overview.

Senator DECONCINI. If there is some, yes, sir.

Mr. HARPOLD. The purpose for our being here is really to draw attention to a very severe and deepening morale crisis within the INS work force.

We have been attempting to get the attention of the administration for over a year now. We are here this spring attempting to get the attention of the Congress. We are very thankful for this forum to do so.

There are several ways that employees express frustration and morale. Unfortunately, one of those ways is to express their frustration against the people that they deal with. I think we would all agree that this is a very negative thing.

The other alternative is for their leadership to do precisely what this leadership is attempting to do and that is to get the attention of the administration and get the attention of Congress and hope to achieve some sort of redress.

Senator DECONCINI. Let me interrupt you a minute. What specifically has your organization done to get the attention of the administration?

Mr. HARPOLD. We spent almost 1 year attempting to get an audience with the Department of Justice.

Senator DECONCINI. When you say the Department of Justice, do you mean with the Attorney General?

Mr. HARPOLD. Well, we started even lower than that. We tried to get an audience with the Attorney General. We never could. Then we tried to get an audience with the Associate Attorney General. We were denied that.

Finally, through the intercession of Senator Kennedy, we were given an audience with the Acting, then Acting Associate Attorney General, Mr. Shenefield, in December.

Senator DECONCINI. In December?

Mr. HARPOLD. In December. As I recall, it was December 5.

Senator DECONCINI. What kind of time were you permitted with Mr. Shenefield?

Mr. HARPOLD. Mr. Shenefield gave me a little over an hour. It was a very cordial meeting.

Senator DECONCINI. What was the reaction of Mr. Shenefield?

Mr. HARPOLD. Well, he expressed a good deal of concern and in fact invited me to come back with an agenda.

Senator DECONCINI. Did you come back with an agenda?

Mr. HARPOLD. Yes; I did.

Senator DECONCINI. Did you meet again with him?

Mr. HARPOLD. No, not until after his confirmation, not until after we had to raise a little heck with him on his confirmation. Finally, as a result of that, of having to get his attention during his confirmation process, we were accorded a followup meeting with him in February.

Senator DECONCINI. Did you have a feeling that you were being put off after the December meeting? Is that the reason you had to apply whatever efforts you did regarding his confirmation?

Mr. HARPOLD. Yes; very definitely.

Senator DECONCINI. Which obviously indicated that nobody cared a whole lot; right?

Mr. HARPOLD. That is right. We were looking for one thing. We were looking for a simple statement from Mr. Shenefield, a simple statement from the Department of Justice that the Department of Justice acknowledged a responsibility for the Immigration and Naturalization Service and some sort of responsibility for the morale of the employees.

Senator DECONCINI. Did you ever receive that?

Mr. HARPOLD. No, not really.

Senator DECONCINI. Go ahead.

Mr. HARPOLD. I think it is obvious that the sole reason that the INS is functioning today is because of morale and the dedication of the employees.

That morale is affected in three general ways. It is first affected by the mission of the agency, our perception of our job, the state of the law we administer and enforce. When there is uncertainty over that law, when there is uncertainty over the backing we are getting, well then, we get problems with frustration.

We have a problem with dignity. It is not very dignified and we do not feel very dignified in our jobs when we don't get the proper backing either from the country or from the administration to properly fulfill those jobs that go with that law.

The last must be viable, of course, and as the chairman will remember, we did testify here last fall concerning the revision of the law to permit the entry of Mexican families.

Other things must be done. We are not satisfied with simple answers that we can wait for the Select Commission. I do believe that there are a lot of changes in the law that can be enacted before the Select Commission finally comes forward with its report.

I think that these things should be done and I am referring to the efficiency package and other things of this nature.

Another big thing that adversely affects——

Senator DECONCINI. Excuse me, Mr. Harpold. Does your statement set out specifically those things?

Mr. HARPOLD. Some of those things, yes.

Senator DECONCINI. Will you supply us with the specific things you think should be done prior to the Select Commission issuing its report?

Mr. HARPOLD. Yes, sir, I will.

Senator DECONCINI. Thank you.

Mr. HARPOLD. Another thing that affects us very deeply is policy decision. Referring to the decision you had with Mr. Crosland concerning the policy that has been implemented on the census. The policy effectively curtails our enforcement efforts during the next 3 months. That policy just makes it impossible for us to continue our search operations and our operations of industries.

Of course, it pains us very deeply that that policy possibly came about because of bad management decisions.

I think we would both agree it was untoward to conduct such a massive raid in such a critical time. We regret that we must lose the opportunity to continue in our work for the next 3 months, possibly because of such a bad decision.

The next largest area affecting our morale, of course, is the lack of resources. It is difficult to feel good on a job when you can't possibly cope with the job, when all you can see is the backlogs in whatever your work may be, your case work, your adjudicative work just simply growing, and then growing to the point where you must reduce the quality of work and then your job simply becomes a clerical or a ministerial function.

We went into rather deeply, and in my testimony I go into the budget history of the INS, and the fact that this is the third year in a row that either by the administration's request to the Congress or by the administration's own actions that the INS or the Department of Justice or the OMB have reduced the Immigration and Naturalization Service.

But I think the area we are most concerned about, and this is the third and final area, is the seeming refusal, in fact, I will say the actual refusal of the Justice Department and the Immigration and Naturalization Service to address employee problems.

The Service has taken on the union as an adversary, and rather than joining with us in attempts to resolve employee problems, seems more intent to simply to attempt to drive the union out of business.

We feel that in representing our people, our single most important objective is the protection of morale. It is with a great deal of regret that we view that management does not seem to join us in those efforts.

In remedying the situation, I think that the administration at all levels, at the Department of Justice level, at the INS level, must acknowledge that there is an employee morale problem. I think that is the first and most important step, the simple acknowledgment and I haven't heard it anywhere this spring in any of the series of hearings, I heard it best expressed here today. But in the House side and in the other hearings, the administation simply is not admitting that they may have a problem of employee morale.

I think once admitting it, then I think the Service and the union have got to join together in designing ways to cope with employee morale. One of the first things has got to be improved communications at all levels.

Also, I think that morale must be considered, not only in working conditions, but in almost every operational decision that the INS or the Department of Justice may make concerning INS operations.

Senator DECONCINI. Mr. Harpold, in your statement you make reference to some policies that are of interest. I quote from your statement. You say, "Recent nationwide directive was issued." It said, "Effective immediately, because of severe budgetary constraints, please take whatever steps necessary to implement the following: No Government vehicles may be driven to and from work by any INS employee."

You further go on to say, "It will cost the Government more in the long run due to increased private vehicle mileage costs."

Am I to assume that it is your understanding that employees of INS are paid to go to and from work in their own automobiles?

Mr. HARPOLD. No.

Senator DECONCINI. How is it going to cost more if the INS employees are not permitted to take cars home? How is it going to cost INS any more? I realize how it is going to cost the employees more.

Mr. HARPOLD. Let me elaborate a little bit. There are operational reasons for allowing the taking of vehicles to a person's residence.

For example, a weekend or night-duty officer frequently has to use a car to go to a local jail or local nearby communities to pick up aliens in jail.

Senator DECONCINI. What about a non-weekend, and what about someone who has no emergency calls on their time? Are there employees who are permitted the privilege of taking an INS automobile home?

Mr. HARPOLD. No.

Senator DECONCINI. There are not.

Mr. HARPOLD. No.

Senator DECONCINI. I mean prior to this directive?

Mr. HARPOLD. Prior to that directive?

Senator DECONCINI. Yes.

Mr. HARPOLD. No.

Senator DECONCINI. Prior to that directive, only people who were subject to being called for emergency duties were able to take automobiles home?

Mr. HARPOLD. That is correct.

Senator DECONCINI. Is that true in the management area as well or do you know?

Mr. HARPOLD. To the very best of my knowledge. Now some managers, chief patrol agents and others that do have a need to have a car at their residence.

Senator DECONCINI. So your point is that emergency personnel or people who are subject to being called into an emergency situation under this directive are deprived of having an INS automobile taken home?

Mr. HARPOLD. That is right.

Senator DECONCINI. So if they are called, INS is going to reimburse them for driving to the local community or driving back down to the office; is that correct?

Mr. HARPOLD. Well, if, for example, as an inspector, I had to travel from my place of residence to a nearby seaport to inspect an arriving vessell, I am entitled to use a Government car for that transportation.

Senator DECONCINI. I see. If you don't use a Government car you are entitled to be reimbursed.

Mr. HARPOLD. I am entitled to be reimbursed for the mileage.

Senator DECONCINI. What if they call you on a Saturday and say, "Hey, we are going to have a special meeting of inspectors down here at the office that you work at every day." Are you entitled to Government reimbursement for going to that?

Mr. HARPOLD. No.

Senator DECONCINI. Only when you have to go out to some special——

Mr. HARPOLD. Yes. Only when you have to go away from the office to the nature of your duties, for emergency assignment or routine assignment such as inspections or things of this nature.

Senator DECONCINI. How many automobiles do you think we are talking about that are affected by this directive? Do you have any idea?

Mr. HARPOLD. Well, the directive, when initially issued, and I might say that Mr. Crosland this morning informed us that he has rescinded it.

Senator DECONCINI. Oh, is that right?

Mr. HARPOLD. That is right. We were finally listened to on one issue. But——

Senator DECONCINI. I meant to ask him that as one of the questions we are submitting to him. I didn't get around to asking him.

Mr. HARPOLD. He just this morning informed us it has been rescinded.

It affected the use of all vehicles for whatever operational reasons. In other words, one of the most common examples is an investigator who does case work, and suppose he is doing a background investigation in a naturalization or a fraud case, he will be working through the evening hours making calls, interviewing people, interviewing witnesses and things of this nature. He may work until 9 or 10 o'clock.

He is customarily assigned at an area where it is close to his residence, that is just a matter of convenience.

Previously, he was permitted to take the car to his place of residence, because he was using it during the evening.

Senator DECONCINI. And out to some other assignment away from his major work.

Mr. HARPOLD. Right.

Senator DECONCINI. But the directive stopped that. He would have to come down to get the car to go out.

Mr. HARPOLD. He would have to take it all the way back to the office, take his private all the way out again.

Senator **DeConcini.** Have there been examples, to your knowledge, of abuse of automobile use by employees? Have they abused it for personal use?

Mr. **Harpold.** Yes; there have been abuses. But I don't think the abuse is something that would warrant such a practice.

Senator **DeConcini.** Would you care to comment?

Mr. **Beavnes.** Yes; if I could address that. It is very closely monitored. A very, very small percentage of employees, and I believe if I am not mistaken, every 30 days authorization to take these vehicles has to be renewed and a close look is taken at the situation to see if it is still justified, whether the job you are performing——

Senator **DeConcini.** Every 30 days it is reviewed?

Mr. **Beavnes.** Yes.

Mr. **Harpold.** In my office which is San Francisco, permission to take a car after duty hours is obtainable only on a day-by-day basis.

Senator **DeConcini.** So you have to get permission every day to take your car home?

Mr. **Harpold.** Every single day.

Senator **DeConcini.** Your supervisor gives you that or he does not.

Mr. **Harpold.** Yes; that's correct.

Senator **DeConcini.** It becomes pretty routine, I take it, after a while?

Mr. **Harpold.** Not really.

Senator **DeConcini.** No?

Mr. **Harpold.** Because we have a shortage of vehicles for one thing. The supervisors do make judgments as to who needs the vehicles.

Senator **DeConcini.** You can't abuse it if you don't have cars; right?

Mr. **Harpold.** That's right.

Senator **DeConcini.** Let me just ask so I can understand it. In your particular case, do you take your car home every night?

Mr. **Harpold.** No.

Senator **DeConcini.** You ask when you think you may be called on or when you have to go out the next morning to some place other than the main office.

Mr. **Harpold.** Right. For example, my duties with the Immigration are as an examiner, but I also do inspections, nights and weekends. I ordinarily commute on public transportation. I commute by bus.

If I am, for example, assigned to take a shift in say Richmond, Calif., which is a big refinery on the north side of the bay, if I have to take a ship at midnight, then when I leave the office that night, I will take a Government car to my place of residence, go out and inspect the ship and bring it back.

Senator **DeConcini.** That is how you think it is done throughout Service; is that right?

Mr. **Beavnes.** Mr. Chairman, I would like to make a comment on this. Aside from the merits of whether they use a vehicle or whether they don't, I think this is just another example of the way the management of INS is operating.

Now this order went out I am told as a result of the Justice Department sending to all of their agencies, a directive that cites the budgetary problems, the overage on gasoline costs and a lot of different things.

They identified about six or seven different areas that each agency ought to look at as to where they could make possible savings. That is what motivated this. It got down to Immigration and this order went out with apparently no contact with the field managers, no contact or consultation with the union, I might add, at all, which is required by the contract. A one sentence order just went out that said, "No Government vehicles may be driven to and from work by INS employees."

Now that has resulted in having to be rescinded. It has caused all kind of confusion out there with the field managers, all kinds of confusion with the INS employees.

You know, it is just an example. We know they have automobile problems and having a sufficient number. We know we have budget crunches.

Just recently, down in Laredo, we had another one of these things that affects morale just as much as the automotive problem. There all the employees were asking for was a parking space at two different duty stations so they could drive their own vehicle back and forth. INS's answer to that is to send two GS-13 level types from here in Washington, D.C., down to challenge the issue and say that local doesn't have a right to represent that person. They never got to the merits of the thing.

Well, now, in the final resolution they said we will make a Government vehicle available, but that vehicle is used to go to the airport to pick up incoming people and what have you. It is not always available.

I think it just illustrates the mentality of the management of INS, and Justice as to how they deal with these things. That is where the real problem is.

Senator DECONCINI. Mr. Blaylock, you made some reference to Mr. Castillo. I agree with you. I thought he was really outstanding and tried very, very hard and was faulted one time and another.

Do you think things are worse since he left?

Mr. BLAYLOCK. Yes.

Senator DECONCINI. That is due to not having a Commissioner for some period of time now.

So, would you agree with me that one of the things that ought to be done is to appoint a Commissioner?

Mr. BLAYLOCK. Yes, sir.

Senator DECONCINI. Get him nominated and in place so at least there could be a leader.

Mr. BEAVNES. The immediate approach is that we made to the administration, Mr. Chairman, when we found out Mr. Castillo was leaving was that that position needed to be filled immediately, just as soon as possible.

Senator DECONCINI. Do you think Mr. Castillo's problems were the fact of not having support from main Justice?

Mr. BEAVNES. Yes, sir.

Senator DECONCINI. Mr. Blaylock, I have read the resolution that you submitted in the record here. Is Jack Otaro a member of that same board as you?

Mr. BLAYLOCK. Yes.

Senator DECONCINI. He is a member of the Select Commission. He read that resolution to us. We are glad to have it in the record here.

We appreciate your taking the time this morning to demonstrate your concern on behalf of your members and your council.

Thanks also, to both of you gentlemen for calling these problems to our attention. I wish I had some quick-fix solution. I assure you we will keep plugging away, and keep mandating everything we can. I am going to do what I can to get the attention of main Justice to see if some cures, or at least a reversal of the attitude of management could be achieved.

We thank you very much for your testimony.

Mr. **Beavnes.** Mr. Chairman, Jack was one of the participants when we developed that. I will tell you the thought behind that was that if we could get representatives of the Hispanic community and the different dynamics of the labor unions such as my own union that is representing the employees, such as the other unions who have adopted a policy that says, we are going to organize the illegals so they can't be exploited.

We felt if we could get all of these groups together, because we know the divergent interests cause a lot of political conflicts with people like yourself and other people that do have to deal with it, that it would be at least a step in the direction to help resolve it. That was our intent.

Senator **DeConcini.** Yes.

Mr. **Beavnes.** We think we have it together now. We are moving on.

Senator **DeConcini.** It is going to be a very difficult job for the commissioners to struggle at the guesswork and program and amnesty and national ID card. There are so many different opinions.

I think it is helpful to know what your position is. You have a member on the Select Commission who articulates the position of organized labor very well and is at least willing to take back other ideas for reconsideration.

I am afraid you are going to have some positions one way or the other, and so am I.

Thank you very much.

Mr. **Blaylock.** Thank you, Mr. Chairman.

[The prepared statement of Mr. Blaylock follows:]

Prepared Statement of Kenneth T. Blaylock

Mr. Chairman, the American Federation of Government Employees, which represents over 700,000 government personnel is pleased to have the opportunity to appear and comment before your Committee on the 1981 Appropriations for the Immigration and Naturalization Service. AFGE, through its I&NS Council, represents the employees of the Service. I have asked Michael Harpold, President of that Council, to join me here today for this presentation. I would like to review with you AFGE's involvement in the development of a National Policy on Immigration for the AFL-CIO, and discuss in general terms our budgetary recommendation for the Service in 1981, and ask Mr. Harpold to discuss in more detailed operational recommendations.

AFGE, like many other labor organizations, has a keen interest in United States Immigration & Refugee Policy, because of the impact on American workers and the economic implications for the country as a whole. More specifically, however, we are concerned with that policy as it relates directly to the day-to-day working conditions of the 9,400 I&NS employees whom we represent across the bargaining table.

Because of the special concern for our employees, AFGE was deeply involved in the development of a resolution passed by the AFL-CIO at its Executive Board Meeting in February. As a member, and the I&NS employee representative on that board, I am pleased that the AFL-CIO, as the voice of the American labor, moved a step closer to a sane and more importantly to our employees, enforceable policy and immigration into the United States. I would like to submit that resolution for inclusion in the record (attachment) and summarize from that document:

"The AFL–CIO supports an immigration policy for the United States consistent with the nation's compassionate and humane traditions. As members of a nation of immigrants, and as representatives of workers who built unions as the means to escape exploitation, we deeply sympathize with those who seek a better life in our country."

To that end, the American Labor Union movement supports legislation that would:

Penalize employers of illegal aliens;

Provide for an adequate identification system for all workers;

Provide for a program of adjustment for illegal immigrants with a demonstrated attachment to the community in which they currently reside;

Lastly and most importantly, provide adequate resources fund strengthened border control inspection capabilities to stop illegal entry into the country.

The AFL–CIO also calls upon the Justice Department and the Congress to strengthen and improve the Immigration and Naturalization Service, so that it can adequately carry out its mission. The last recommendation, of course, for the employees of the I&NS is the most critical factor.

In recent years, in spite of an increasing number of legal and illegal immigrants entering the United States and growing international refugee problem, staffing and appropriation requests dropped. The backlog of cases has increased many hundredfold, and the moral of employees sunk to new lows, which has resulted in an alleged increase in violence and corruption in the agency. And once again, as we review the Administration's 1981 budget request, we find that funding levels for the 1981 fiscal year have come in below minimal requirements for adequate management of the agency.

They propose a reduction of 199 border patrol positions, 10 detention officers, and 68 inspectors and clerical personnel charged with the preparation and issuance of entry documents for aliens. The sole proposed increase is 15 inspectors for Miami, Florida. These proposed decreases come hard on the heels of a reduction of 574 positions in the fiscal year 1980 budget which included the loss of 158 criminal investigators and 115 inspectors. Despite the fact that the Congress saw fit to restore 293 border patrols and increased that again to 495 positions in the fiscal year 1980 budget, the Administration, by internal action chose not to fill 385 of those positions. As justification for its actions, the Administration now states that the simple addition of positions and resources will not improve the enforcement of the immigration laws.

At best, given the 15 year history of under funding and staffing of the I&NS, the Administration's rationale is an untested premise. At most, certainly no justification for emasculating an agency to the point where it can no longer carry out its statutory functions. We concede that legislation that may be enacted in the future may affect the budget of the I&NS. But to not fund the agency in the interim can only further exacerbate the already bad illegal entry problem and cause further deterioration of the agency. These problems will cost far more to solve in the future than they will if immediate action is taken.

We consider that the fiscal year 1979 funding and staffing levels for the I&NS as enacted constitute a good starting point for considering present and future levels for the I&NS. The fiscal year 1979 budget which was passed by the Congress and signed by the President on October 10, 1978, set the staffing level for the I&NS at 10,977 positions. We recommend that the I&NS be restored to that level. Included in such a restoration would be the 115 inspectors, 158 criminal investigators and 15 training positions cut in fiscal year 1980. We would further recommend that the committee concur in the House Judiciary Committee's recent action in increasing the border patrol by 311 positions.

Other increases are also warranted in the Administration's fiscal year 1981 budget request which would bring I&NS staffing more into line with that intended by the Congress in the fiscal year 1979 enactment. The addition of 100 examiners and 100 investigators would significantly assist these branches in coping with their increased workload. And while we are well aware of the desire of this Congress to cut expenditures and balance the budget the 5.4 million dollar increase over and above the fiscal year 1979 level should be considered a small price to pay for efficiency which will reduce cost, corruption and disorganization in the future. This year the Administration was forced to ask for 1.5 million dollars, a figure increased to 3 million dollars by the House, to investigate and police alleged corruption within the I&NS. This is an expensive and saddening remedy when the kind of modest increases we have proposed today could have kept employee workloads within reasonable bounds and prevented further collapse of the employee morale and administrative efficiency.

In short, Mr. Chairman, it is the people of the Immigration Service who will make the difference in the 1980's, and it is only through the support of these people and the leadership of this Congress that the critical problem of immigration policy and enforcement will be solved.

Mr. Chairman, that concludes my statement. I would now like Mr. Harpold to review with you some of the specific recommendations which our I&NS employees have developed for your consideration.

STATEMENT BY THE AFL-CIO EXECUTIVE COUNCIL ON IMMIGRATION POLICY—BAL HARBOUR, FLA., FEBRUARY 25, 1980

SUBSTITUTE FOR CONVENTION RESOLUTION NO. 30

The AFL-CIO supports an immigration policy for the United States consistent with the nation's compassionate and humane traditions.

As members of a nation of immigrants, and as representatives of workers who built unions as the means to escape exploitation, we deeply sympathize with those who seek a better life in our country.

The overwhelming majority of illegal immigrants come to America to support themselves and to take a responsible role in society. Too often, unscrupulous employers prey upon these newcomers, forcing low wages upon them and substandard conditions in an atmosphere of fear.

These problems are of acute concern to the U.S. Labor movement which insists on safeguarding its hard-won standards of life and work. Unfortunately, illegal aliens are highly vulnerable because they are without many of the basic legal rights enjoyed by citizens and legal resident aliens.

This potential for economic exploitation, coupled with the labor movement's historic compassion for the unfortunate, gives great importance that there be a strong, yet fair, U.S. immigration policy.

This policy should foster re-unification of families and haven for refugees from persecution, while taking a realistic view of the job opportunities and the needs of U.S. workers. An immigration policy must also deal effectively and fairly with the problem of illegal immigration.

To achieve these goals, the AFL-CIO will support legislation that would:

1. Provide effective penalties for employers who knowingly hire illegal aliens, including criminal sanctions and injunctions to prevent repeated violations.

2. Protect workers from employer discrimination by creating a system of identification for work purposes. Two fundamental safeguards are necessary for eventual implementation of a standard identifier: (1) a requirement that no person eligible under the law be denied documentation; and (2) a further requirement that no documentation can be revoked if issued according to the law. Because it is recognized, familiar and already required in job applications, the Social Security card could be used if improved and made counterfeit-proof.

Until such a card is developed, other evidence could be used. The alternatives could include a birth certificate, naturalization certificate, alien registration card, voter registration, U.S. passport, or immigration or registration document. The employer should certify with a checkmark on a regular form, such as the W-4, that such identification has been examined.

3. Provide for a program of adjustment of status for illegal aliens with a demonstrated attachment to the community to allow them to become legal residents. While the length of time an alien has lived in the United States is one factor to be taken into consideration, subjective values such as compassion for the families involved are also of great importance.

4. Provide adequate funding to strengthen border control inspection capabilities and antismuggling activities to stop illegal entry. There must also be more effective enforcement of the Farm Labor Contractor Registration Act.

5. Enhance enforcement of existing anti-discrimination laws to eliminate any possibility that employers may discriminate against U.S. citizens or resident aliens with Spanish surnames and other minorities.

The Justice Department should do much more to strengthen and improve the Immigration and Naturalization Service. Administration and employee morale would be enhanced by improving benefits, by resolution of long-standing labor-management problems and the long-overdue appointment of a commissioner. Increased resources and technology for border enforcement and better control over the issuance and use of visitors' visas to the U.S. are needed.

The Labor Department should step up enforcement of labor standards legislation in areas and industries where significant numbers of illegal aliens are employed. Stiff fines and speedy prosecutions should be implemented against repeated offenders.

In addition, measures should be taken to insure that I&NS activities do not impinge upon the rights of all workers—regardless of resident legal status—to engage in actions for the purpose of collective bargaining.

The AFL-CIO reiterates its support for the Refugee Act and America's continued acceptance of refugees as an essential part of this nation's immigration policies. No nation in the world accepts as many refugees as the United States. This responsibility should be shared to a much greater degree by the other nations of the free world.

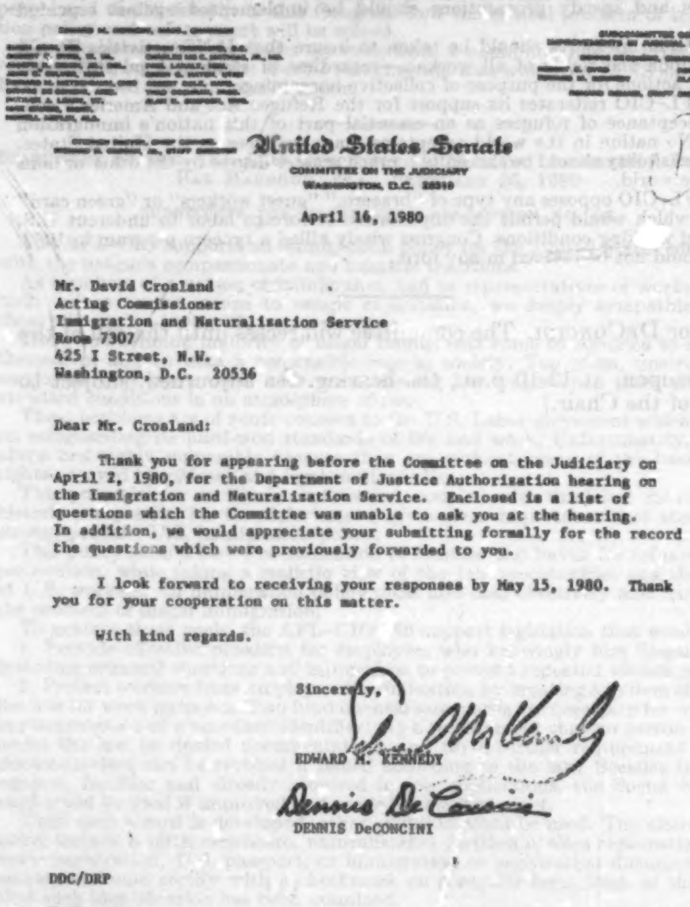
The AFL-CIO opposes any type of "bracero," "guest workers" or "green card" program which would permit the importation of foreign labor to undercut U.S. wages and working conditions. Congress wisely killed a bracero program in 1962, and it should not be revived in any form.

Senator **DeConcini**. The committee will recess until the call of the Chair.

[Whereupon, at 12:10 p.m., the hearing was adjourned, subject to the call of the Chair.]

APPENDIX

QUESTIONS AND ANSWERS



United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

April 16, 1980

Mr. David Crosland
Acting Commissioner
Immigration and Naturalization Service
Room 7307
425 I Street, N.W.
Washington, D.C. 20536

Dear Mr. Crosland:

Thank you for appearing before the Committee on the Judiciary on April 2, 1980, for the Department of Justice Authorization hearing on the Immigration and Naturalization Service. Enclosed is a list of questions which the Committee was unable to ask you at the hearing. In addition, we would appreciate your submitting formally for the record the questions which were previously forwarded to you.

I look forward to receiving your responses by May 15, 1980. Thank you for your cooperation on this matter.

With kind regards.

Sincerely,

Edward M. Kennedy
EDWARD M. KENNEDY

Dennis DeConcini
DENNIS DeCONCINI

DDC/DRP

Enclosures

I. Questions Submitted by Senator DeConcini

A. Nomination of a New Commissioner

1. On March 11, 1980, Attorney General Civiletti testified before this Committee on the Justice Department Authorization Bill. In response to a question regarding the naming of a new commissioner, he stated that a replacement would be named within the next ten days. For the record could you provide us with your best estimate of when this will occur as well as your understanding of the reasons for this delay?

B. Office of the Special Investigator

1. With regard to the Office of the Special Investigator, it is my understanding that a special investigator has not yet been appointed. When will someone be named to fill this position?

2. What areas will this office be overseeing? What will be its duties? How will it relate to the Office of Professional Responsibility?

C. Nogales Fence

As you know, I have been following the Nogales fence project with some interest. In your testimony before the Appropriations Committee you stated that the Bureau of Standards was conducting tests to determine if the materials used met specifications and that the results would be known within a day or so.

Have the tests been completed?

What are the findings?

D. Cost of a Border Patrol Agent

Over the last three fiscal years, we have authorized and funded fairly substantial increases in border enforcement manpower, only to discover later that the funding provided was insufficient to cover the costs of fielding positions we intended to add.

Exactly how much does it cost to recruit, train, equip, and pay a border patrol agent?

E. Castillo Report on Violence at the Southwest Border

I would like to discuss with you certain findings of the study done for Mr. Castillo on violence at the Southwest border and their implications for INS operations. (The report is entitled "Border Relations Task Force Report", dated June 5, 1979).

1. The study found that one of the factors conducive to border violence was the inexperience of the officers assigned there. Yet INS has and continues to plan to assign new officers to the Southwest border. a) Why has INS chosen to disregard the findings of its own internal study in allocating its personnel?

b) What will INS do to bring more experienced officers to the border?

c) What is INS doing about it; i.e., is it changing its recruitment and selection procedures?

d) Is it revising its training program?

The Castillo study also found that a factor in violence was that "journeyman officers transfer out of these stations as soon as possible, leaving the more inexperienced officers to train probationary officers."

1) What is the turnover rate at the border of line officers, journeymen, and supervisors?

2) What incentives can INS establish to encourage good officers to stay and go to the border?

The study recommended that "the policy of wearing sidearms at ports of entry be reassessed." It also stated "that if it is determined to continue the present policy, INS should establish stricter controls over types of weapons, qualifications and where weapons may be worn." Earlier in the study, INS recommended that INS "make more use of non-lethal weapons such as night sticks and mace."

a) Am I correct in assuming that these recommendations, when taken together, suggest that the need of INS officers to be issued weapons routinely may be questioned? (aliens aren't criminals)

b) Am I also correct in assuming that the report suggests that officers currently are misusing deadly force?

c) Is training in this area sufficient?

d) Can the rules be strengthened? Can enforcement of the rules be improved?

F. Testing of Law Enforcement Personnel

The Border Relations Task Force Report (p. 16) indicated ..."that all applicants for law enforcement positions be psychologically tested as to their suitability for such positions." Has this recommendation been implemented? If not, why not?

G. Relaxed Recruiting Practices and Procedures

The Task Force further indicates that relaxed recruiting practices and procedures imposed by the Office of Personnel Management have an adverse effect on the quality of new law enforcement employees. Could you explain what OPM has imposed on INS and how it has resulted in an adverse effect on the quality of law enforcement employees?

H. Contact with Local Press

The Task Force recommends that each district and sector have one officer responsible for maintaining continuing active liaison with all local U.S. and Mexican news media, and for furnishing them information, as appropriate. What is the INS response to such a recommendation?

I. Verification and Destruction of Proffered Documents

In response to written questions submitted to you by the Committee staff, INS stated that documentation presented to INS is assumed valid if presented by the rightful owner. The answer further states that:

> In cases when documents are suspect, further examination and verification is necessary. Many times questioning of the presenter will suffice, however, if verification is necessary from another source such as a foreign or other federal, state or local government agency, delays of final actions are necessary.

This answer indicates that a rather formalized procedure exists for verification of suspect documentation. However, recent stories in the New York Times depict situations where suspect documentation has been destroyed on the spot by INS personnel and the persons refused entry into the country. In one instance the person presenting the documentation was a U.S. citizen, the document was in fact valid, yet the man was "deported" on the spot by the INS by putting him on a flight out of the country.

I would like to know if you have detailed, written procedures that are issued to all examining officers. If you do I would like copies submitted for the record. I strongly urge that, if you have not done so, you issue instructions that suspect documentation is not to be in any way damaged or destroyed. Can you outline for me now the procedures used to verify suspect documentation?

Can you outline or give a profile of what documents are suspect? In other words, are there certain types of documents as opposed to certain physical characteristics of a document that are immediately suspect?

Is there a profile of a type of person likely to use a false document to enter; in other words, do INS officers look for a certain type of person in examining documents?

In the instance mentioned in the news accounts, was disciplinary action instituted against the agents who destroyed the documents?

J. **Brutality Charges**

In a recent case in San Diego, two Border Patrol agents (Bruce Brown and Jeffrey Otherson) were convicted on charges involving violations of the civil rights of illegal aliens. The convictions came as a result of the discovery of an organized brutality ring. While not wanting to discuss the particular instances of brutality, it suffices to say that they represent extremely brutal conduct. The sentences on the two cases were $1,000.00 fines and 3 years of probation, with a requirement that the agents do 750 hours of community service work.

I am interested in your views on this case. Are you satisfied that this was only an isolated incident? If not, do you believe the sentences in the case are adequate as a deterrent to others whose activities are less than professional? Given the various statements issued by the Attorney General and the President, what more can be done to deter this illegal conduct?

K. **Use of Government Vehicles By INS Employees**

In Mr. Harpold's prepared statement, he states that a recent nationwide directive was issued that stated

"Effective immediately, because of severe budgetary constraints, please take whatever steps necessary to implement the following: No government vehicles may be driven to and from work by any INS employees."

For the record, could you explain this directive? Could you supply the Committee with the reasons why any INS employee should be driving a government vehicle to and from work?

Mr. Harpold continues in his statement that "...[it] will cost the government more in the long run due to increased private vehicle mileage costs..."

Correct me if I am wrong, but does this mean INS employees will be reimbursed for their mileage when they drive their own vehicles to and from work?

Isn't this both a misuse of travel funds and a "hidden" fringe benefit?

L. **Corruption**

The INS has recently been criticized for what many believe is both an ineffective and inhumane policy toward illegal aliens. I have also been made aware of the fact that there is evidence of corruption within the INS. An example of the corruption involves stories of visa-selling in foreign countries, so that foreign nationals can gain admittance to the United States.

What is your office doing with regard to problems within the INS? Where do you plan to focus most of your efforts in the next year? How can this committee, and the Senate as a whole, help your office in making the INS a better organization?

M. Management Study

One area of major concern to me is the management problem at the INS. It seems to me that once the management problems at the INS are solved, many other problems will fall into line.

Describe for me the scope of the management study you are overseeing. Why was there so lengthy a delay in setting up the study? When do you expect the study to be completed? How can this committee, and the Senate as a whole, help you in improving the INS?

N. Automation

Each year we in the Senate look at the INS with the hope that more money, more creativity, and more effort will result in a better operation of INS. In general, what we see is delay after delay after delay. The responses to the series of questions prepared by the committee demonstrate a lack of computer capability by INS. What steps are being taken in the broad area of automation to improve the capability of INS?

O. Drugs

The drug abuse problem in America is very serious. Much of the abuse results from easy access to illicit drugs smuggled over our national borders. What involvement does the INS have with the agencies, especially DEA, charged with enforcing our drug laws? Are there ways in which the INS could better assist with the drug enforcement effort?

P. Iranian Students

Mr. Crosland, in your statement you mentioned the successful completion of the first phase of the Iranian student project. With all due respect, I was not aware that the effort was successful. Please fill me in on the details of the project. I am especially interested in any difficulties you had in locating and identifying Iranian students; in short, did your system work, and how?

Q. Miscellaneous

1. For the record, could you provide the Committee with a full explanation of the INS procedure regarding illegal aliens who are taken into custody and are either injured while taken into custody or prior to being taken into custody?

2. How many Hispanic border patrol agents are there? Of these how many are assigned to the southwest border? Of these how many are Mexican-American?

3. I have been advised that a couple of years ago an on-duty border patrol agent who was not in uniform shot an illegal alien in the back resulting in a subsequent criminal and civil suit. We have been advised that border patrol agents received a $125 clothing allowance for a uniform which is required yet costs more than $125.00, and that border patrol agents frequently wear jeans in the desert while on duty. What is the clothing allowance for border patrol agents now? Are border patrol agents frequently on duty yet out of uniform? What can we do to avoid situations like this in the future?

[See page 587ff. for responses.]

II. Questions Submitted by Senator Thurmond

A. What percentage of your increased workload will computerization absorb?

What percentage will require additional personnel?

B. When will the new management techniques, both computerization and additional personnel, need to come on line to serve your needs?

C. What plans do you have in mind to have greater accounting for all non-immigrants, foreign students, tourists, visitors, and businessmen? In other words, can we control the overstays and other illegals?

D. What are your feelings in regard to work permits or other documentation to assist your Service in the performance of your duties on behalf of our citizens and immigrants, and yet protect the rights of all of our people?

E. What impact will the Administration's new budget have on your Immigration and Naturalization Service? By way of service to the Nation? By way of new Management procedures?

[See page 587ff. for responses.]

III. Questions Submitted by Senator Cochran

A. Do you agree with the suggestion in the March 14, 1980 GAO report, "Illegal Aliens: Estimating their Impact on the United States," that illegal aliens may pay more in taxes than they receive in social services? If not, upon what studies do you base your conclusion?

B. The same March 14, 1980 GAO report on illegal aliens states that, "available data indicates that illegal aliens are employed in low-skilled and unskilled jobs that most legal workers may be unwilling to take." Do you have any recent evidence which would refute this contention? Consequently, has the Immigration and Naturalization Service taken a position on whether illegal aliens displace or augment the American work force?

C. Gilbert Cardenas, in a 1976 study on Mexican illegal aliens, found that illegal aliens were holding jobs that legal workers had chosen not to take due to the nature of the job and working conditions. Do you have any evidence which shows that illegal aliens from countries other than Mexico may be following the same trend?

D. Your statement given before the Judiciary Committee on April 2 cited Border Patrol FY79 statistics of apprehended undocumented aliens. It is my understanding that the Border Patrol often apprehends illegal aliens who must be released due to insufficient funds for physical deportation. Is this a widespread problem or is it isolated in its occurrence? (i.e., is it occurring in all regions throughout each fiscal year, in specific regions only at the end of given fiscal years, etc.) Do the statistics which you cited, however, apply to the number of apprehended undocumented aliens only, or to the number apprehended and actually deported? If these statistics are those reflecting apprehended aliens only, would you please give statistics on how many of those aliens were actually deported? How many were granted "voluntary departure"?

E. In the instance where undocumented aliens are apprehended and detained, but where insufficient funds preclude their deportation, it is my understanding that the Service has no alternative but to release them. Can you provide statistics as to how many illegal aliens have been apprehended and released? Can you identify the total cost to INS of such persons including situations where they are apprehended, released and apprehended again (during the past fiscal year)?

F. It is my understanding that the Immigration and Naturalization Service has a study underway on the labor displacement and estimate of Mexican illegal aliens in the United States. Who specifically is conducting this study, what issues are being focused upon, and when do you anticipate its completion?

G. Future U.S. population estimates and employment trends suggest that imported labor may be needed in this country. If such a labor shortage should occur, particularly among unskilled workers, what legislative or policy adjustments would you advocate?

[See page 587ff. for responses.]

IV. Questions Submitted by Senator Gravel

A. What are preinspection stations and where are they located?

B. How many requests for steamship preinspection does the Immigration and Naturalization Service receive per year in Vancouver and Victoria?
What percentage of these requests are filled? How does this compare with requests for steamship preinspection at other stations such as Montreal, Bermuda, and the Bahamas?

C. How many airline preinspections does the Immigration and Naturalization Service perform at each of its preinspection stations?

D. Requests for preclearance are filed by transportation lines before their passengers may be preinspected by immigration officers. Such requests, however, do not guarantee that preinspection will be performed for steamship lines. A 1974 bilateral agreement between the U.S. and Canada (25 UST 763) specifies airline preinspection procedures and guarantees of performance. This agreement provides airlines with assurances that preinspection will be performed under given conditions. Have any steps been taken to amend this agreement to include steamship preinspection?

E. What, if any, is the cost to steamship companies for preinspection? For example, are these companies charged overtime fees for the service and, if so, are overtime fees also charged to airlines requesting preinspection? What is the disposition of fees collected for provision of preinspection?

F. In testimony before the House Judiciary Subcommittee on Immigration, Citizenship, and International Law on September 10, 1975, former INS Commissioner Leonard Chapman indicated that INS would welcome an expansion of the preinspection process but had been unsuccessful in gaining approval for such. What personnel increases have you requested for preinspection for FY81 and FY82?

G. What amount of money does INS currently allocate for its preinspection program and how is it divided between the various preinspection stations? What percentage of the money is devoted to airport preinspection as opposed to steamship preinspection? Does INS have an overall plan by which it makes these budget determinations, including criteria for choosing the steamships that will be preinspected?

H. On March 10, 1980, David Crosland, Acting Commissioner of INS, indicated in a letter to the Honorable Mike Gravel of Alaska that the following four cruise vessels would not be preinspected at Vancouver: Prinsendam, Cunard Princess, Veendam, and Fairseas. What cruise ships bound for Alaska are preinspected in Vancouver, and how are the determinations made as to which ships are preinspected?

I. Some steamships serving Alaska are not granted preinspection by INS in Canada and therefore must go through immigration at Alaskan ports of entry. What has INS done to increase the number of immigration inspectors available at Alaskan ports, such as Ketchikan, to facilitate entry of passengers on these ships?

J. In some instances, customs officers are assigned the authority to act as immigration officers and perform functions that include examining arriving aliens. Immigration officers, likewise, can in some circumstances act as customs officers. Such dual assignment would be useful in some Alaskan ports such as Valdez where no immigration officer is assigned. What is the procedure used for assigning dual duties to customs officers in such instances?

[See page 587ff. for responses.]

ADDITIONAL SUBMISSION OF DAVID CROSLAND

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

June 13, 1979

The Speaker
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

There is transmitted herewith a bill "To amend section 274 of the Immigration and Nationality Act relating to the seizure of vessels, vehicles, and aircraft by the Immigration and Naturalization Service."

These amendments are necessary because of severe problems which have become apparent with respect to enforcement of the vehicle seizure authority conferred on the INS by P.L. 95-582, 92 Stat. 2479, enacted November 2, 1978. That law places onerous burdens on already taxed INS enforcement resources which are not placed on any other Federal enforcement agency with vehicle seizure authority. It is our view that these requirements are unnecessary and will preclude the effective utilization of the vehicle seizure authority as a deterrent to alien smuggling.

There are also some obvious drafting problems with the current law. For instance, the plain language of section 274(b)(1)(A) of the Act evidently protects a guilty owner of a vehicle used in a smuggling operation if the vehicle is being driven by somebody who had no knowledge of the illegal activity. This clearly is not the congressional intent. See Congressional Record, daily ed., October 14, 1978, H 13079 (Remarks of Congressman Wiggins and Congressman Danielson).

There are three main objectionable features of the current law which the bill eliminates. First, because of inartful drafting, the current version of section 274(b) puts the burden on the Government to determine whether or not the owner was involved in the illegal activity before seizing the vehicle. If the owner was innocent of the unlawful use of a seized vehicle, the INS seizure would be in violation of the statute. As a practical matter, in most situations it will be virtually impossible for an immigration officer encountering a vehicle containing smuggled aliens in a border area to make such a determination on the spot. However, in cases arising under the customs and drug laws, the situation of the innocent owner is dealt with through the administrative procedures for remission or mitigation of forfeiture. 19 U.S.C. 1618; 21 U.S.C. 881(d). Current Department of Justice regulations applicable to customs and drug seizures provide that an owner who satisfactorily establishes his non-involvement in the criminal activity may receive remission of the forfeiture. See 28 CFR 9.5, 9.6, 9.7.

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The second objectionable feature of the current law is the provision of section 274(b)(2) which requires the Government to bear administrative and incidental expenses where an innocent owner is involved even though there was a reasonable ground or probable cause for the seizure. No other enforcement agency with vehicle seizure authority is subjected to this type of liability. This provision conflicts with 28 U.S.C. 2465, which provides that a successful claimant of seized property shall not be entitled to recover costs so long as there was reasonable cause for the seizure. Under customs law, the burden of proof is upon the party claiming seized property, provided that the Government can show probable cause for the institution of forfeiture proceedings. 19 U.S.C. 1615. The burden of establishing non-involvement under administrative remission procedures should properly be upon the owner, since the facts surrounding the use of the vehicle normally would be within his knowledge. The INS should not be affirmatively required to arrange for return and pay costs when its officers act in good faith.

The third objectionable feature of the current law is the requirement that the INS satisfy any valid lien or other third party interest in the vehicle without expense to the interest holder. Under the customs and drug laws, the lienholder is required to demonstrate good faith and non-involvement in the criminal activity in order to receive remission or mitigation of forfeiture. See 28 CFR 9.5(c). A lienholder's interest in the vehicle should be satisfied only after the Government's costs associated with the seizure and forfeiture have been deducted. 28 CFR 9.7(h).

As amended by the bill, section 274(b) of the Act contains five sections. Amended section 274(b)(1) sets forth the basic violation for which forfeiture can be imposed under the Immigration and Nationality Act, which remains unchanged from present law. The exceptions to forfeiture have been redrafted so that they conform to the "common carrier" and "stolen vehicle" exceptions contained in other laws. See 21 U.S.C. 881(a)(4); 19 U.S.C. 1594. As in the Controlled Substances Act, the burden would be on the owner invoking the "stolen vehicle" exception to establish the applicability of that exception to his case.

Amended section 274(b)(2) of the Act relates to the obtaining of warrants and is identical to the current section 274(b)(3).

Amended section 274(b)(3) is similar to the current section 274(b)(4). It states that all procedures of the customs law not inconsistent with the section shall apply. It also specifies the applicability of customs procedures relating to disposal of vehicles, remission or mitigation of forfeitures, compromise of claims, and award of compensation to informers.

Amended section 274(b)(4) sets forth procedures for the disposal of seized conveyances and is similar to provisions contained in the Controlled Substances Act, 21 U.S.C. 881(a).

Amended section 274(b)(3) establishes the burden of proof in forfeiture cases. The provision was derived from 19 U.S.C. 1615 regarding burden of proof in customs proceedings. As in customs proceedings, the burden of proof lies on the claimant so long as the Government can establish probable cause for the institution of the proceeding. In order to forestall any possible claim that the Government must detain all undocumented aliens involved in any particular smuggling incident for production at the hearing, the section further provides that prima facie evidence of the alien's unlawful status may be shown by records of administrative or judicial proceedings, official INS records, or testimony of an immigration officer having personal knowledge of the alien's case.

This bill is urgently needed in order to bring the INS into conformity with the vehicle seizure procedures utilized by other Federal enforcement agencies. Without such legislation, the INS will be at a severe disadvantage in using their vehicle seizure authority as a deterrent in the anti-smuggling effort. Therefore, we respectfully urge that you give this matter your favorable consideration.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the submission of this legislation to the Congress.

Sincerely,

(Signed) Patricia M. Wald

Patricia M. Wald
Assistant Attorney General

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AN ACT

To amend section 274 of the Immigration and Nationality Act relating to the seizure of vessels, vehicles, and aircraft by the Immigration and Naturalization Service.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 274(b) of the Immigration and Nationality Act, as amended (8 U.S.C. 1324(b)), is amended to read as follows:

"(b)(1) Any vessel, vehicle, or aircraft which is used in the commission of a violation of subsection (a) shall be subject to seizure and forfeiture, except that --

"(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to the illegal act; and

"(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

"(2) Any conveyance subject to seizure under this section may be seized without warrant if there is probable cause to believe the conveyance has been used in a violation of subsection (a) and circumstances exist where warrant is not constitutionally required.

"(3) All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for the violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof: Provided, That --

"(A) duties imposed on customs officers or other persons regarding the seizure and forfeiture of conveyances under the customs laws shall be performed with respect to seizures and forfeitures carried out under the provisions of this section by such officers or persons authorized for that purpose by the Attorney General; and

"(B) proceedings instituted under this section respecting vessels shall be subject to the Supplemental Rules of Certain Admiralty and Maritime Claims.

"(4) Whenever property is forfeited under this section the Attorney General may --

"(A) retain the conveyance for official use; or

"(B) sell the conveyance, in which case the proceeds from any such sale shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs;

or

"(C) require that the General Services Administration take custody of the conveyance and remove it for disposition in accordance with law.

"(5) In all suits or actions brought for the forfeiture of any vessel, vehicle, or aircraft seized under this section, where the conveyance is claimed by any person, the burden of proof shall lie upon such claimant; Provided, That probable cause shall be first shown for the institution of such suit or action. In determining whether probable cause exists, the following shall be prima facie evidence that an alien involved in the alleged violation was not lawfully entitled to enter, or reside within, the United States:

"(A) records of any judicial or administrative proceeding in which that alien's status was an issue and it was determined that he was not lawfully entitled to enter, or reside within, the United States; or

"(B) official records of the Immigration and Naturalization Service showing that that alien was not lawfully entitled to enter, or reside within, the United States; or

"(C) testimony by an immigration officer having personal knowledge of the facts concerning that alien's status that the alien was not entitled to enter, or reside within, the United States.".

ADDITIONAL RESPONSES OF

United States Department of Justice

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

WASHINGTON, D.C. 20530

AUG 11 1980

Honorable Edward M. Kennedy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

During hearings on Immigration and Naturalization Service 1981 authorization, the Committee asked the Department to respond to various questions. Our responses to most of these questions are attached, with the response to question I. G. to be forwarded later.

Sincerely,

Alan A Parker

Alan A. Parker
Assistant Attorney General

BORDER PATROL

Cost of a Border Patrol Agent

I. D. *Over the last three fiscal years; we have authorized and funded fairly substantial increases in border enforcement manpower; only to discover later that the funding provided was insufficient to cover the costs of fielding positions we intended to add. Exactly; how much does it cost to recruit, train; equip; and pay a Border Patrol Agent?*

All Border Patrol Agents are initially hired at the GS-5 level. After two years these agents will have advanced to the journeyman grade of GS-9. Based on this grade, costs for Border Patrol Agents are as follows:

Base salary (full year)	$17,035
Administrative uncontrollable overtime	4,259
Uniform allowance	125
Health benefits	796
Group Life Insurance	68
Retirement	1,597
Total personnel costs	$23,880
Other related costs	
Equipment	$300
Supplies	360
Ammunition	70
Payroll costs	85
Full-field investigations	950
Communications	230
Space allocation (SLUC)	710
Travel	290
Training	2,460
Total	$5,455
Total all of above	$29,335

BORDER PATROL

Castillo Report on Violence at the Southwest Border

I. E. I would like to discuss with you certain findings of the study done for Mr. Castillo on violence at the Southwest Border and their implications for IANS operations. (The report is entitled "Border Relations Task Force Report", dated June 8, 1979).

E. 1. The study found that one of the factors conducive to border violence was the inexperience of the officers assigned there. Yet IANS has and continues to plan to assign new officers to the Southwest Border.

(a) Why has IANS chosen to disregard the findings of its own internal study in allocating its personnel?

It may be true that inexperienced officers are more likely to make errors in judgement. While the report indicates that one of the reasons for violence might be the assignment of recruit officers to the border area, this is highly unlikely. However, we feel that adequate training is provided at the Academy to enable each trainee to respond well to any given situation. In addition, the trainee is assigned to work with experienced partners and learns rapidly from them. The Southern Border not only provides the most cost effective training, but is the only location where we are capable of providing for all facets of the Border Patrol occupation. The training there has consistently produced excellent career officers.

(b) What will IANS do to bring more experienced officers to the border?

Although vacancies in the border area are predominantly filled by trainees, the Service announces a portion of these vacancies at the journeyman level.

(c) What is IANS doing about it; i.e., is it changing its recruitment and selection procedures?

We have recently mandated that recruiting panels for prospective Border Patrol Agents be comprised of at least two Supervisory Border Patrol Agents. This was done to insure that the applicant is apprised of all aspects of Border Patrol operations. Our training division is exploring the possibility of pyschological testing for Border Patrol applicants.

(d) Is it revising its training program?

The Service is constantly reviewing its training program for areas in need of improvement. We are holding a training assessment and operational conference at the Border Academy in July, which will be attended by all Chief Patrol Agents. The entire curriculum of the Academy will be reviewed and adjusted, based on current operational needs.

The Castillo study also found that a factor in violence was that "journeyman officers transfer out of these stations as soon as possible, leaving the more inexperienced officers to train probationary officers."

(1) What is the turnover rate at the border of line officers, journeymen, and supervisors?

The Border Patrol experiences an attrition rate of approximately 13 percent per year.

(2) What incentives can INS establish to encourage good officers to stay and go to the border?

The following are possible solutions to this problem:

(a) Adequate staffing to improve safety and working conditions.

(b) Cost of living adjustments for high cost area.

(c) Reclassification of Border Patrol positions to a higher journeyman grade, which would create greater potential for promotion.

BORDER PATROL

Testing of Law Enforcement Personnel

I. F. *The Border Relations Task Force Report (p. 28) indicated ... "that all applicants for law enforcement positions be psychologically tested as to their suitability for such positions." Has this recommendation been implemented? If not, why not?*

There are no plans for subjecting applicants to a formal battery of psychological tests to determine suitability for employment.

However, indirectly, applicants are psychologically tested to a degree by virtue of having to pass the psychological fitness criteria in the Full Field Investigation administered by the Office of Personnel Management. Additionally, each applicant must pass one oral interview conducted by a Border Patrol Agent interview panel consisting of three Border Patrol Agents. The panel membership must be one Agent, GS-12 or above, one GS-12, and another officer, GS-11 or above. At least one member of the panel must be a minority or female.

BORDER PATROL

Drugs

I. Q. The drug abuse problem in America is very serious. Much of the abuse results from easy access to illicit drugs smuggled over our national borders. What involvement does I&NS have with the agencies, especially DEA; charged with enforcing our drug laws? Are there ways in which the I&NS could better assist with the drug enforcement effort?

Currently, I&NS has on-going liaison with all agencies charged with enforcement of drug laws. The I&NS is a member of the National Narcotics Intelligence Consumers Committee, which is composed of agencies with enforcement, policy, treatment, and research and intelligence responsibilities. The present members of NNICC are as follows: U.S. Coast Guard, U.S. Customs Service, Drug Enforcement Administration, Federal Bureau of Investigation, Immigration and Naturalization Service, Internal Revenue Service, National Institute on Drug Abuse, Department of State, Department of Treasury, and the White House.

The U.S. Immigration and Naturalization Service, with DEA, is maintaining the El Paso Intelligence Center. The center operates on a 24-hour basis to collect, correlate and disseminate tactical and strategic intelligence in drug enforcement matters and other border related crimes. Other participating agencies are the Customs Service, Bureau of Alcohol, Tobacco and Firearms, Coast Guards and the Federal Aviation Administration.

During calendar year 1979, the I&NS detected and seized illegal drugs valued at $84,276,386. So far this year, we have seized over $310,000,000 in illegal drugs. We feel that our working relations with the other agencies have been beneficial to each and feel they should continue as they currently exist.

I&NS traffic checkpoints near the border and ports of entry are an excellent medium for drug interdiction, including 426 pounds of cocaine seized at a traffic checkpoint in Florida on Monday, May 20, 1980.

BORDER PATROL

I. Q. 8. *I have been advised that a couple of years ago an on-duty Border Patrol Agent who was not in uniform shot an illegal alien in the back resulting in a subsequent criminal and civil suit. We have been advised that Border Patrol Agents received a $125 clothing allowance for a uniform which is required yet costs more than $125; and that Border Patrol Agents frequently wear jeans in the desert while on duty. What is the clothing allowance for Border Patrol Agents now? Are Border Patrol Agents frequently on duty yet out of uniform? What can we do to avoid situations like this in the future?*

The incident which you refer to appears to relate to a shooting incident which occurred in our Tucson Sector in March of 1976. In this case, the officer was assigned to plainclothes (civilian clothing) duty. In addition, after an extensive investigation, the officer was dismissed from this Service.

Border Patrol Agents normally are assigned to work in uniform and the uniform must be worn in its entirety. The Chief Patrol Agent may require officers assigned to duties where the uniform would tend to frustrate the effort, such as city patrol and anti-smuggling operations, to wear civilian clothing appropriate to locale and type of duty to be performed. In addition, the Chief Patrol Agent may authorize the wearing of non-uniform clothing, i.e., red jackets, in hunting areas or insulated boots in severe cold, when he deems such action to be advisable or appropriate. There are very few instances where Border Patrol Agents fail to comply with uniform policy.

The uniform allowance for Border Patrol Agents is $125 per annum and uniform costs over $125 per annum are borne by individual agents. A bill (HR 1263) to raise the uniform allowance to $300 the first year and $200 per annum thereafter is pending in the Compensation Subcommittee of the House Post Office Committee.

Inspections

In testimony before the House Judiciary Subcommittee on Immigration, Citizenship, and International Law on September 10, 1976, former I&NS Commissioner Leonard Chapman indicated that I&NS would welcome an expansion of the preinspection process but had been unsuccessful in gaining approval for such. What personnel increases have you requested for preinspection for FY 1981 and FY 1982?

There were no personnel increases requested for preinspection in FY 1981. In FY 1982, eight authorized positions were requested. Four positions will be authorized for the Northern Region and four in the Eastern Region.

INSPECTIONS

I. E. 1. The Castillo Report on Violence at the Southwest Border recommended that "the policy of wearing sidearms at ports of entry be reassessed." It also stated "that if it is determined to continue the present policy, I&NS should establish stricter controls over types of weapons, qualifications and where weapons may be worn." Earlier in the study, I&NS recommended that I&NS "make more use of non-lethal weapons such as night sticks and mace."

(a) Am I correct in assuming that these recommendations, when taken together, suggest that the need of I&NS officers to be issued weapons routinely may be questioned? (aliens aren't criminals)

Immigration Inspectors are not issued weapons routinely. Inspectors are not permitted to carry sidearms until they receive the required training, qualify initially, and continue to qualify quarterly on the appropriate course.

Immigration Inspectors are permitted to wear sidearms, at their discretion, at land border ports and seaports, locations where there is a great potential for assaults.

The potential is not confined to alien applicants, although one of the findings of the report states a larger percentage of non-Mexican aliens are of the criminal type. The most recent and tragic example of the danger inherent in inspectional activity was the slaying of a U.S. Customs Inspector at a Canadian border port last year. The killer was a U.S. citizen and an escaped felon who shot the officer during the conduct of an inspection.

(b) Am I also correct in assuming that the report suggests that officers currently are misusing deadly force?

Regulations provide for the use of deadly force only under three conditions: self-defense, in defense of a fellow officer, and in defense of an innocent third party. There is no evidence of misuse of deadly force by Service Inspectors.

(c) Is training in this area sufficient?

Yes. An officer is required to be trained, proficient, and to qualify on a Service range with the firearm he will carry before he is permitted to carry same.

Within 30 days of entering on duty with the Service, Immigration Inspector trainees are required to begin a fourteen week Immigration Officer Basic Training Course of the Federal Law Enforcement Training Center located at Glynco, Georgia. Twenty-eight hours of this course are devoted to all aspects of firearms training and firing for qualification.

- *(d) Can the rules be strengthened? Can enforcement of the rules be improved?*

We believe the present training, policies, and regulations on firearms meet the current needs of the Service. Since this is a sensitive area, we are prepared to make changes if circumstance should so dictate in the future.

INSPECTIONS

In addition to formal training, field officers have regional and Central Office Intelligence personnel at their disposal to review suspected fraudulent documents. The Fraudulent Document Center at El Paso, Texas, is open 24 hours a day to assist officers in determining false claims made by Mexican aliens. All fraudulent documents used by Mexican aliens are submitted to the Center, as set forth in the Immigration Inspector's Handbook.

In addition to the El Paso Information Center, field officers may have suspected documents reviewed by two highly-trained document analysts assigned to the Intelligence Division in our Central Office. Should further review of documents be necessary, our agency has access to the forensic laboratories of other governmental agencies in Washington, D.C. The services of the Fraud and Malfeasance Branch, Department of State, are also available in reviewing suspected fraudulent visas.

Suspected fraudulent nonimmigrant visas initially are checked under blacklights supplied to all ports of entry. The ports also receive weekly intelligence bulletins which keep field officers up-to-date on trends relating to use of fraudulent documents. Each port is also provided with passport studies and fraudulent document studies. Each officer has identification checkpoints for I&NS documents as part of his lookout book. These latter aides are restricted use material and copies, therefore, are not attached.

The damaging or destruction of suspect documentation is not a condoned practice. Specific instructions concerning this matter are being prepared for issuance to all inspectional personnel.

Is there a profile of a type of person likely to use a false document to enter; in other words, do I&NS officers look for a certain type of person in examining documents?

Experience has shown that the use of false documents appears most frequently as part of a trend. As trends are identified, lookouts are posted identifying possible bearers and describing documents being presented. These lookouts are also posted when it is suspected or known that an organized counterfeit ring is in operation.

In the instance mentioned in the news accounts, was disciplinary action instituted against the agents who destroyed the documents?

A review of the New York Times articles since the first of this year revealed only one case involving a suspected false claim to United States citizenship. That was the case of Norberto Gautier. However, the newsclippings relating to this incident do not indicate that I&NS personnel destroyed his evidence of citizenship.

The allegations made in the case of Mr. Gautier (Case 131 SGA-80) were preliminarily investigated by the Office of Professional Responsibility, Immigration and Naturalization Service. Jurisdiction of this matter has been transferred to the Civil Rights Division, Department of Justice, and it is presently under active investigation.

II. A. What percentage of your increased workload will computerization absorb?

Computerization of Inspections Program activities were not scheduled in the FY 1981 budget. All workload increases will be absorbed by the additional funding of 86 workyears and the 15 new inspector positions for Miami.

Essentially, none of the increased workloads in Adjudications were absorbed by computerization in FY's 1979 and to date in FY 1980 because the Automatic Data Processing (ADP) effort was small. An amount equivalent to about 1 percent of the Adjudications budget was or will be expended during these two years for ADP.

In FY 1981, the budget calls for an effort that approximates an expenditure of about 4 percent of the Adjudications budget. The effect of this increase won't be realized until FY 1982.

What percentage will require additional personnel?

In FY 1981, 100 percent of our workloads will require additional personnel.

INSPECTIONS

II. B. When will the new management techniques, both computerization and additional personnel, need to come on line to serve your needs?

The Immigration and Naturalization Service recognizes that new management techniques must be applied if I&NS is to accomplish its commitments and that automation will play a key role. Toward this I&NS is developing a comprehensive, servicewide plan of automation. The plan will take approximately sixteen months to complete. The development process will include the completion of a mission plan, consisting of general assumptions about the Service's workloads and resources in the 1980's, and the Service's goals and strategies for achieving these goals. This will lead to the development of specific ADP goals, systems design concept, and systems acquisition strategy for obtaining and developing the systems required.

Currently, the Immigration Service is developing machine readable documents for aliens. This system, when implemented, will consist of a telecommunications network with terminals located at all ports of entry that will be interfaced with computerized immigration and law enforcement data bases. This program is being coordinated with the U.S. Passport Office and the Visa Office at the Department of State. Both U.S. Passports and U.S. Visas in foreign passports will be machine readable. It is expected that the entire system will be operational within five years. Until the new machine readable documentation systems comes on line, the Inspections Program must rely upon available personnel to meet workload increases.

II. C. What are your feelings in regard to work permits or other documentation to assist your Service in the performance of your duties on behalf of our citizens and immigrants; and yet protect the rights of all of our people?

immigrants entering the United States are subject to the provisions of Section 212(a)(14) of the Immigration and Nationality Act. This section provides that an alien seeking entry to work in the United States must receive a certification of the United States Department of Labir that such employment will not displace an American citizen or permanent resident alien and that the alien's entry into a job category or geographic location will not adversely affect the working conditions.

These provisions are applicable to those aliens seeking to enter the United States as members of the professions under the preferences described in Section 203(a)(3), of the Act. Skilled and unskilled workers under Section 203 (a)(6), and principal immigrants who quality for non-preference visa numbers under Section 203(a)(8).

This Service authorizes employment to aliens who can demonstrate an economic need and have applications pending before the Service for permanent resident or asylum; we also authorize employment where extended voluntary departure has been granted to an alien prior to or after a deportation hearing and an economic need is established.

IV. A. What are preinspection stations and where are they located?

Preinspection stations are offices located outside the continental United States, where U.S. Immigration and Customs inspection is performed. Thus, where preinspected aircraft or ships arrive in the United States, no Customs/I&NS inspection is necessary.

Preinspection stations are located in the following cities:

Edmonton, Alberta, Canada
Victoria, B.C., Canada
Vancouver, B.C., Canada
Calgary, Alberta, Canada
Winnipeg, Manitoba, Canada
Toronto, Ontario, Canada
Montreal, Quebec, Canada
Hamilton, Bermuda
Nassau, Bahamas
Freeport, Bahamas

INSPECTIONS

IV. B. *How many requests for steamship preinspection does the Immigration and Naturalization Service receive per year in Vancouver and Victoria?*

The Service received four requests at Vancouver during FY 1979 and eleven during FY 1980. Victoria received two during FY 1979 and none during FY 1980.

What percentage of these requests are filled? How does this compare with requests for steamship preinspection at other stations such as Montreal, Bermuda and the Bahamas?

All requests were granted at Vancouver and Victoria during FY 1979. Seven of the eleven requests at Vancouver during FY 1980 were granted.

These locations advise that there have been no requests for vessel preinspection during FY 1979 and FY 1980.

IV. C. How many airline preinspections does the Immigration and Naturalization Service perform at each of the preinspection stations?

FY 1979	Passengers Inspected
Bermuda	490,796
Montreal	1,158,801
Toronto	2,294,983
Nassau	589,934
Freeport	248,317
Winnipeg	184,599
Calgary	419,280
Vancouver	699,233
Total	6,085,943

INSPECTIONS

IV. D. *Requests for preclearance are filed by transportation lines before their passengers may be preinspected by immigration officers. Such requests, however, do not guarantee that preinspection will be performed for steamship lines. A 1974 bilateral agreement between the U.S. and Canada (25 UST 768) specifies airline preinspection procedures and guarantees of performance. This agreement provides airlines with assurances that preinspection will be performed under given conditions. Have any steps been taken to amend this agreement to include steamship preinspection?*

No steps have been taken to amend the bilateral agreement which pertains solely to air transport matters. Any bilateral agreement covering maritime matters would be negotiated between the Department of State and the Canadian Department of External Affairs.

INSPECTIONS

IV. 8. *What, if any, is the cost to steamship companies for preinspection? For example, are these companies charged overtime fees for the service and, if so, are overtime fees also charged to airlines requesting preinspection? What is the disposition of fees collected for provision of preinspection?*

The cost for preinspection of vessels is assessed under the same regulations which apply to the preinspection of aircraft. If the departure occurs between the hours of 8:00 am and 5:00 p.m., there is no charge to the operators of aircraft or vessels. Inspection costs outside of these hours are charged to the carriers pursuant to the Inspectional Overtime Act of 1931. All overtime money collected from the carriers for inspections performed is returned to the general treasury fund.

IV. C. What amount of money does I&NS currently allocate for its preinspection program and how is it divided between the various preinspection stations? What percentage of the money is devoted to airport preinspection as opposed to steamship preinspection? Does I&NS have an overall plan by which it makes these budget determinations; including criteria for choosing the steamship that will be preinspected?

For FY 1980, I&NS allocated $2.6 million for preinspection. This amount was distributed to the various preinspection stations according to staffing requirements. Victoria is the only preinspection station devoted to steamship inspection. About 4 percent of the FY 1980 preinspection budget was allocated to Victoria with the remaining 96 percent allocated to locations devoted to airport preinspection.

Budget determinations are made on the basis of anticipated workloads. At locations other than Victoria, steamship inspections can only be accommodated when they do not conflict with the departure of aircraft.

INSPECTIONS

IV. H. *On March 10, 1980, David Crosland, Acting Commissioner of I&NS, indicated in a letter to the Honorable Mike Gravel of Alaska that the following four cruise vessels would not be preinspected at Vancouver:. Prinsendam, Cunard Princess, Veendam, and Fairsea. What cruise ships bound for Alaska are preinspected in Vancouver, and how are the determinations made as to which ships are preinspected?*

The following vessels have been approved for preclearance at Vancouver during the 1980 cruise season:

Vessel	Number of Cruises
Princess Patricia	18
Pacific Princess	12
Sun Princess	18
Calypso	17
Island Princess	11
Odessa	12
Royal Viking Star	6

Preinspection was established in Vancouver primarily for the purpose of clearing aircraft passengers. All inspectors are stationed at the airport and vessel inspection can only be conducted when it does not conflict with the departure of aircraft. The above vessels were approved because they could be accommodated by the existing staff.

INSPECTIONS

IV. I. Some steamships serving Alaska are not granted preinspection by I&NS in Canada and therefore must go through immigration at Alaskan ports of entry. What has I&NS done to increase the number of Immigration Inspectors available at Alaskan ports, such as Ketchikan, to facilitate entry of passengers on those ships?

There are no current plans to augment the immigration staff at any Alaskan ports.

INSPECTIONS

IV. J. In some instances, Customs Officers are assigned the authority to act as Immigration Officers and perform functions that include examining arriving aliens. Immigration Officers, likewise, can in some circumstances act as Customs Officers. Such dual assignment would be useful in some Alaskan ports such as Valdez where no Immigration Officer is assigned. What is the procedure used for assigning dual duties to Customs Officers in such instances?

In such instances, Customs Inspectors may be designated as Immigration Inspectors. Currently, our Northern Regional Office is working with Customs on the possibility of so cross-designating the Customs Officer at Valdez.

INVESTIGATIONS

Iranian Students

I. P. *Mr. Crosland, in your statement you mentioned the successful completion of the first phase of the Iranian student project. With all due respect, I was not aware that the effort was successful. Please fill me in on the details of the project. I am especially interested in any difficulties you had in locating and identifying Iranian students; in short, did your system work, and how?*

On November 10, 1979, in response to the crisis created by the detention of American citizens in the American Embassy in Iran, the President ordered the Attorney General to identify Iranian students in the United States who were not maintaining status and to take immediate steps to commence deportation proceedings against such persons. The Attorney General directed the Immigration and Naturalization Service to issue regulations requiring all nonimmigrant Iranian students to report their present location and status promptly to the nearest I&NS office to take additional actions to identify and locate all Iranian students to determine their immigration status. In compliance with the President's directive, the regulations governing maintenance of status of nonimmigrant students were amended to require Iranian students in the United States to report within 30 days to the nearest I&NS office or to an I&NS representative on campus and to present certain informaton verifying location and status as a student. Failure to report as required or furnishing false information to the I&NS would subject a student to deportation proceedings for failure to comply with conditions of nonimmigrant status. Conviction of a crime punishable by imprisonment for more than one year would also constitute failure to maintain status. These regulations were issued under the authority vested in the Attorney General by Section 214(a) of the Immigration and Nationality Act, 8 USC 1184(a) and were to be effective on November 13, 1979.

This revised regulation made immediate effective, as to Iranian students, the provisions of the law which defines as conditions of status obedience to laws of all jurisdictions of the United States and the provision of truthful information to the I&NS. This program resulted in 56,694 Iranian students reporting to I&NS. Of this number 6,996 were found to be deportable. To implement the program, it was necessary to add a new section to the regulations concerning the maintenance of student status.

Accordingly, Part 214 of Chapter I of Title 8, Code of Federal Regulations, was amended by adding a new Section, 214.5.

On December 11, 1979, the United States District Court for the District of Columbia held that regulations regarding the deportation of Iranian students were unconstitutional and a permanent injunction was issued against the government enjoining this Service from the registration of Iranian students.

On December 14, 1979, the United States Circuit Court of Appeals for the District of Columbia stayed this decision, once again permitting the registration of Iranian students.

This was the only major difficulty encountered in the registration process, which was concluded on December 31, 1979.

INVESTIGATIONS

Use of Government Vehicles by I&NS Employees

I. K. In Mr. Harpold's prepared statement, he states that a recent nationwide directive was issued that stated:

> *"Effective immediately, because of severe budgetary constraints, please take whatever steps necessary to implement the following: No government vehicles may be driven to and from work by any I&NS employees."*

For the records, could you explain this directive? Could you supply the Committee with the reasons why any I&NS employee should be driving a government vehicle to and from work?

Mr. Harpold continues in his statement that "...[it] will cost the government more in the long run due to increased private vehicle mileage costs..."

Correct me if I am wrong, but does this mean I&NS employees will be reimbursed for their mileage when they drive their own vehicles to and from work?

Isn't this both a misuse of travel funds and a "hidden" fringe benefit?

On April 29, 1980, Acting Commissioner David Crosland issued a directive based on the Attorney General's memo of March 27, 1980 that "1. Effective immediately FY 1980 travel and transportation limitations imposed by referenced memo are to be implemented as follows: ....

d. Prohibit the use of government vehicles for travel to and from an employee's place of residence.

The directive means that under no circumstance would government vehicles be taken to an employee's place of residence.

Previous Service policy allowed the use of a government vehicle by an I&NS employee when it was particularly advantageous to the United States Government to authorize an employee on stand-by-duty to use a government-owned automobile in traveling between home and place of duty. In addition, authorization may have been granted to an employee to drive a government-owned automobile to his residence when it is in the interest of the Government that he start on official travel from that point, rathern than from his place of business. Likewise, if he returns from official travel after office hours he may drive the automobile to his home and return it to the office or official garage on the following morning. Determination as to whether a government-owned automobile was to be used in this manner must have been based upon advantage to the Government, viz., savings in travel time, per diem, and/or taxi fare from home to garage.

I&NS employees must pay the cost of travel to their official duty station and will not be reimbursed for their mileage when they drive their own vehicles to and from work.

DETENTION AND DEPORTATION

I. Q. 1. *For the Record, could you provide the Committee with a full explanation of the I&NS procedure regarding illegal aliens who are taken into custody and are either injured while taken into custody or prior to being taken into custody?*

If an undocumented alien becomes ill or injured while in the custody of the I&NS, appropriate medical treatment is furnished by this Service.

If an undocumented alien is either seriously ill or injured he/she comes to the attention of I&NS, the alien is not taken into custody and would not be processed as a deportable alien at that time.

DETENTION AND DEPORTATION

III. D. *Your statement given before the Judiciary Committee on April 2 cited Border Patrol FY 1979 statistics of apprehended undocumented aliens. It is my understanding that the Border Patrol often apprehends illegal aliens who must be released due to insufficient funds for physical deportation? (i.e., is it occurring in all regions throughout each fiscal year, in specific regions only at the end of given fiscal years, etc.) Do the statistics which you cited, however, apply to the number of apprehended undocumented aliens only, or to the number apprehended and actually deported? If these statistics are those reflecting apprehended aliens only, would you please give statistics on how many of those aliens were actually deported? How many were granted "voluntary departure"?*

In those instances where sufficient travel funds are not available, I&NS does curtail apprehending activities since the apprehending functions are paced by the availability of Alien Travel funds. In FY 1979, 25,888 apprehended undocumented aliens were deported and 966,137 were granted voluntary departure.

DETENTION AND DEPORTATION

III. E. *In the instance where undocumented aliens are apprehended and detained, but where sufficient funds preclude their deportation, it is my understanding that the Service has also no alternative but to release them. Can you provide statistics as to how many illegal aliens have been apprehended and released? Can you identify the total cost to I&NS of such persons including situations where they are apprehended, released and apprehended again (during the past fiscal year)?*

There have been occasions where, because of a lack of sufficient Alien Travel and Detention funds, aliens were not detained for deportation hearings but were expeditiously removed under the voluntary departure procedure to save further detention costs. In some cases, it has been necessary to curtail apprehending details because of the lack of Alien Travel and Detention funds. However, statistical data on the number of these cases is not available.

OPERATIONS SUPPORT

Automation

I. N. *Each year we in the Senate look at the I&NS with the hope that more money, more creativity, and more effort will result in a better operation of I&NS. In general, what we see is delay after delay after delay. The responses to the series of questions prepared by the Committee demonstrate a lack of computer capability by I&NS. What steps are being taken in the broad area of automation to improve the capability of I&NS?*

a. Extend the Master Index and Remote Access System to additional Files Control Offices, Border Patrol Sector Headquarters, and Selected Ports of Entry. Master Index is a centralized system that contains personal identifying data, A-file location data, and selected status information. It aids investigations in finding files not located in their office, is used to answer inquiries, and to produce statistics.

b. Develop Field Automation. The initial effort was the Integrated Case Control System. The prototype was in Houston and extended to four interim systems in Boston, Newark, Washington, D.C., and Los Angeles. These systems are running application and petition tracking systems, inter-office A-file tracking system, deportation docket control (in Houston only) and Iranian Student Control System (in Houston and Washington, D.C.). The system in Los Angeles is used only for application and petition tracking in the Naturalization Section primarily because the equipment is too small for the office.

The next step in field automation was to procure equipment for all files control offices. This effort was placed on "hold" by the House Government Information and Individual Rights Subcommittee.

c. Develop a Long Range ADP Plan. The Long Range Plan, now being developed, will address the re-design and implementaton of all existing systems. It will establish a firm foundation upon which all ADP resources will be used, whether presently existing in individual form or planned to meet future requirements.

d. Expand the Financial Management Information Systems (FMIS). FMIS will be expanded to include fleet, property, and facility management. The Position Accounting and Control System (PACS) and Financial Accounting and Control System (FACS) modules of FMIS have been automated. These systems feature a central data base with remote access for inquiry and updating. The Property, Fleet, Facility, and Procurement modules remain to be developed and implemented. These modules must be completed in order to achieve total automation of I&NS resources management capability.

e. Improve the Nonimmigrant Document Control System (NIDC). The I&NS is currently undertaking a study on nonimmigrant control which lay the ground work for the design of a more responsive system to meet government's needs. The study will identify and rank information requirements regarding nonimmigrants and pose and evaluate alternative means of capturing and distributing information on this population. The alternatives posed in this should directly serve the needs of the I&NS and other government agencies concerned with nonimmigrants.

OPERATIONS SUPPORT

II. A. What percentage of your increased workload will computerization absorb? What percentage will require additional personnel?

Although IANS has operational equipment and software in field offices that are providing direct support to operational units, there has never been an adequate study to measure its effect on operating units. Part of the development of the Long Range ADP Plan will be to collect this information on existing and proposed systems. Personnel requirements and their interaction with automated support systems will also be addressed. Presently, no methodology exists to quantify the potential trade-off between machine vs. personnel resources.

OPERATIONS SUPPORT

III. B. When will the new management techniques; both computerization and additional personnel; need to come on line to serve your needs?

The Long Range ADP Plan will not be completed until late FY 1981. After this plan has been completed, implementation timetables will be developed.

OPERATIONS SUPPORT

IV. C. What plans do you have in mind to have greater accounting for all non-immigrants; foreign students; tourists; visitors; and businessmen? In other words; can we control the overstays and other illegals?

The I&NS is conducting a study on nonimmigrant control which will define the requirements for a new system. Because it will be at least two years before a new system can be implemented, we are currently investigating interim improvements which can be made to the existing system to improve its accounting for nonimmigrants.

MANAGEMENT

Nogales Fence

I. C. *As you know, I have been following the Nogales fence project with some interest. In your testimony before the Appropriations Committee you stated that the Bureau of Standards was conducting tests to determine if the materials used met specifications and that the results would be known within a day or so.*

Have the tests been completed?

What are the findings?

Yes, the tests are completed.

The following summarizes the findings of the Bureau of Standards Report on the expanded metal portion of fences being installed at El Paso, TX; San Ysidro, CA; Nogales, AZ and San Luis, AZ.

The report analyzed various factors concering the material against the specifications for the expanded metal used at the various sites along the border. These tests were run on samples obtained from each site. It was found that material at three of the four sites did not meet the specifications from two standpoints. One, it does not meet the weight requirement of three pounds per square foot. Samples indicated that in three cases the material did not meet specifications with the galvanized coating on. Two, the primary rolling direction fo the material was not in accordance with the shearing direction. These two specification deficiencies were evident in the fence projects at El Paso, TX, San Luis, AZ and Nogales, AZ. All other test criteria were according to the specification, i.e., MIL-M-17194C.

On April 21, 1980, the National Bureau of Standards report was sent to the Alcorn Fence Company of Sun Valley, CA and the Anchor Post Products, Inc. of Texas with the request that they advise I&NS of what action the firm proposed to effect corrections of the deficiency(s) noted in the report. To date, no response has been received.

Equal Employment Opportunity

How many Hispanic Border Patrol Agents are there?

As of March 22, 1980, I&NS had 421 Hispanic Border Patrol Agents. This represents 20.3 percent of a total number of 2,075 Border Patrol Agents.

Of these, how many are assigned to the southwest border?

1,674 Border Patrol Agents are assigned to the Southwest Border. Four hundred and six of these Border Patrol Agents (24.3 percent) are Hispanic. (See attached for a sector by sector breakdown.)

Of these, how many are Mexican-American?

Data is not available.

OFFICE OF PROFESSIONAL RESPONSIBILITY

Brutality Charges

I. J. *In a recent case in San Diego, two Border Patrol Agents (Bruce Brown and Jeffrey Otherson) were convicted on charges involving violations of the civil rights of illegal aliens. The convictions came as a result of the discovery of an organized brutality ring. While not wanting to discuss the particular instances of brutality, it suffices to say that they represent extremely brutal conduct. The sentences on the two cases were $1,000 fines and three years of probation, with a requirement that the agents do 750 hours of community service work.*

I am interested in your views on this case. Are you satisfied that this was only an isolated incident? If not, do you believe the sentences in the case are adequate as a deterrent to others whose activities are less than professional? Given the various statements issued by the Attorney General and the President, what more can be done to deter this illegal conduct?

We are not satisfied that this was an isolated incident and we do not believe that this one case will serve as an adequate deterrent to others whose activities are less than professional.

We have plans to deal with this situation.

1. Substantial increase in the Office of Professional Responsibility staffing (from 17 to 76).
2. Regionalization
   Establishment of offices in San Diego, Texas, Miami and New York.
3. Proactive - (self-initiated) investigations.
4. Utilization of under cover operations.

Regionalization is designed to deal with two key problems. Corruption and unlawful use of force.

It is essential in unlawful use of force cases to be able to respond quickly. Regionalization will accomplish this.

OFFICE OF PROFESSIONAL RESPONSIBILITY

Corruption

I. L. *The I&NS has recently been criticized for what many believe is both an ineffective and inhumane policy toward illegal aliens. I have also been aware of the fact that there is evidence of corruption within I&NS. An example of the corruption involves stories of visa-selling in foreign countries, so that foreign nationals can gain admittance to the United States.*

What is your office doing with regard to problems within I&NS? Where do you plan to focus most of your efforts in the next year? How can this Committee, and the Senate as a whole, help your office in making I&NS a better organization?

Anti corruption efforts will be given initial primary emphasis in the Eastern Region and Miami.

Criminal Civil Rights efforts (unlawful use of force, etc.) will be focused on the U.S./Mexican Border areas.

How can the Committee and the Senate as a whole, help your office in making I&NS a better organization?

When regional staff is in place (approximately 3 months) we will be seeking cojoint jurisdiction with the FBI to full investigate I&NS bribery and Criminal Civil Rights Violations.

It is essential that we develop professional cases "against our own" without exclusively relying on non-I&NS personnel (FBI).

I&NS is reprogramming 59 positions to provide OPR with adequate manpower resources. We may wish to ask you for a supplemental for electronic equipment, confidential funds, etc.

OFFICE OF PROFESSIONAL RESPONSIBILITY

Office of the Special Investigator

I. B. *With regard to the Office of the Special Investigator, it is my understanding that a special investigator has not yet been appointed. When will someone be named to fill this position?*

The Special Investigator will probably be appointed after the appointment of the new Commissioner.

What areas will this office be overseeing? What will be its duties? How will it relate to the Office of Professional Responsibility?

The Office of Special Investigator will oversee our function and that of Internal Audit. The exact guidelines have not been worked out as of yet.

PMIC

Management Study

I. M. One area of major concern to me is the management problem at the I&NS. It seems to me that once the management problems at the I&NS are solved, many other problems will fall into line.

Describe to me the scope of the management study you are overseeing. Why was there so lengthy a delay in setting up the study? When do you expect the study to be completed? How can this Committee; and the Senate as a whole; help you in improving the I&NS?

The response to these questions were provided directly by letter to the Chairman, Committee on the Judiciary. A copy of the letter is attached.

PUBLIC INFORMATION

Contact with Local Press

I. H. The Task Force recommends that each district and sector have one officer responsible for maintaining continuing active liaison with local U.S. and Mexican news media; and for furnishing them information, as appropriate. What is I&NS response to such a recommendation?

The I&NS public information policy directs that regional commissioners, district directors and chief patrol agents are authorized to make news releases, and they or a designated officer are responsible for answering inquiries from news media. Only questions of a local nature are to be answered by field offices. Questions concerning I&NS policy, resources, budget and manpower must be referred to the Central Office Public Information Office.

We believe it is necessary for I&NS field offices to provide information relating strictly to local events, but that sensitive questions of policy and use of resources should be answered in Washington. This is necessary to ensure consistency and accuracy in providing information to the media. It is perhaps even more important in providing information to news media in Mexico.

Planning, Evaluation and Budgeting

What impact will the Administration's new budget have on your Immigration and Naturalization Service? By way of service to the Nation? By way of new management procedures?

The Administration's new (revised) budget for FY 1981 was intended to be a balanced budget. The only change was a reduction of $2.2 million, which will have no significant impact on I&NS Service to the Nation or Management procedures. The reduction will require some minor adjustments to resource allocations throughout the Service. No specific program or function with sustain a significant decrease.

Planning, Evaluation and Budgeting

III. A. *Do you agree with the suggestion in the March 14, 1980 GAO report, "Illegal Aliens: Estimating their impact on the United States," that illegal aliens may pay more in taxes than they receive in social services? If not, upon what studies do you base your conclusion?*

Yes, many recent studies do suggest that illegal aliens pay more in taxes than they receive in social services. However, we should caution that most of these studies rely on samples of apprehended aliens: young, unaccompanied Mexican males who are in the United States for temporary periods. Thus, these results tend to show the short run effects.

Planning, Evaluation and Budgeting

III. B. *The same March 14, 1980 GAO report on illegal aliens states that: "available data indicates that illegal aliens are employed in low-skilled and unskilled jobs that most legal workers may be unwilling to take." Do you have any recent evidence which would refute this contention? Consequently, has the Immigration and Naturalization Service taken a position on whether illegal aliens displace or augment the American work force?*

We have no definitive studies that indicate a marked decrease in the tendency of illegal aliens to be employed in marginal jobs. However, we have found that many aliens apprehended at interior locations are earning wages well above minimum standards, and are developing skills not associated with marginal occupations. This information is subject to all the reservations raised about apprehended alien statistics. Thus, this evidence is not substantial enough for us to take a position on whether illegal aliens displace or augment the American work force. We should add that we are continuing to synthesize our available information and improve our methods for gathering statistics on aliens.

III. C. *Gilbert Cardenas; in a 1978 study on Mexican illegal aliens, found that illegal aliens are holding jobs that legal workers had chosen not to take due to the nature of the job and working conditions. Do you have any evidence which shows that illegal aliens from countries other than Mexico may be following the same trend?*

Again, our experience is that the majority of illegal aliens are employed in jobs associated with the secondary labor market: low wages, poor working conditions, and little prospects for advancement. This holds true for aliens from countries other than Mexico.

Planning, Evaluation and Budgeting

III. F. *It is my understanding that the Immigration and Naturalization Service has a study underway on the labor displacement and estimate of Mexican illegal aliens in the United States. Who specifically is conducting this study, what issues are being focused upon, and when do you anticipate its completion?*

The study of labor displacement currently underway by the Planning, Evaluation and Budgeting Division at the Immigration and Naturalization Service will investigate the effects the presence of aliens and foreign born persons on employment and earnings in the U.S. labor force. It also will delve into factors involved in the adjustment of aliens and foreign born individuals into the U.S. labor force. This study will be based on data from the 1970 United States Census of Population. It does not deal specifically with Mexican illegal aliens. A draft of the report is expected by the end of the year.

Planning, Evaluation and Budgeting

III. G. Future U.S. population estimates and employment trends suggest that imported labor may be needed in this country. If such a labor shortage should occur, particularly among unskilled workers, what legislative or policy adjustments would you advocate?

We are aware of projections of many economists that this country will begin to experience labor shortages, particularly in the unskilled markets, beginning in the mid-1980s. It is our understanding that the Select Commission on Immigration and Refugee Policy is weighing various alternatives for addressing such circumstances. Two alternatives suggest themselves: 1) the creation of a new temporary worker program and 2) introducing more specific labor market considerations into our immigration preference system.

ADDITIONAL RESPONSES OF

United States Department of Justice

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

WASHINGTON, D.C. 20530

AUG 27 1980

Honorable Edward M. Kennedy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

During the fiscal year 1981 authorization process, the Committee asked the Immigration and Naturalization Service to respond to various questions. Our responses to these questions are attached. In working with the Committee, an agreement was reached that where information requested was not readily available, we would so state. If the Committee is interested in receiving responses to those questions, we will work out a time frame within which they may be addressed.

Sincerely,

Alan A. Parker

Alan A. Parker
Assistant Attorney General

Attachments

HUMAN RIGHTS

1.(a) On September 14, 1979, President Carter announced that "this Administration's policy on human rights can only be effective if we assure the rights of all persons in the United States, whether or not they are citizens of this country." He directed all agencies to review their policies and practices to ensure that they are clear, equitable and compassionately applied. How and when will this policy be incorporated into INS' internal rules and regulations?

The President's human rights policy is not new to INS. Statutes and rules of conduct pertinent to employees of the Immigration and Naturalization Service will be found in sections 201 through 209 of Title 18 of the United States Code; Executive Order No. 11222 of May 8, 1965; Title 5, Chapter I, Part 735 of the Code of Federal Regulations; Concurrent Resolution No. 175 of the 85th Congress (Appendix); Federal Personnel Manual Chapter 735; Department of Justice Orders No. 350-65 of December 28, 1965, No. 379-67 of June 20, 1967 and No. 383-67 of September 12, 1967; section 2234.01-.07 of the INS Administrative Manual; Officers' Handbook (Form M-68); INS Form M-141; and Border Patrol, Investigators and Immigration Inspector Handbooks. Form M-141 is distributed to all new employees upon entrance on duty. The Officers' Handbook is a guide to proper official conduct in dealing with aliens and the general public and is issued to every employee upon entrance on duty in any position requiring contact with aliens or the public, as a representative of the Service.

(b) Who will be responsible for the incorporation? for the enforcement of the new orders?

Under the directive of the Commissioner of INS, the Office of Professional Responsibility oversees the enforcement of the new order and investigates any allegations of misconduct. If the allegation is proved, the employee is punished.

(c) What sanctions will be imposed by INS on those employees who violate the orders?

In December 1979 the Acting Commissioner forwarded a memorandum from the President to the regional commissioners asking them to take whatever additional action they considered necessary. The memorandum also requested suggestions, if any, to improve existing Service directives concerning the fair and humane treatment of aliens.

(d) How will the new orders and their sanctions be publicized to INS employees?

All material relating to the new orders and sanctions will be circulated among the INS employees.

(e) Will the existing training program(s) be modified?

The Office of the Associate Commissioner, Management is reviewing all Service instructions and training courses related to the conduct with others and will issue further instructions as appropriate.

(f) Will INS make any effort to advise the people it serves of the new order and its intended effect on them?

Yes.

2. What are INS rules and regulations concerning advising a person of his rights on apprehension? on arrest? on detention during deportation proceedings?

Regulations relating to deportation and exclusion proceedings require that an alien who is served with a warrant of arrest or who is arrested without a warrant be advised of the reason for his arrest, of his right to be represented by counsel of his own choice at no expense to the U.S. Government, and that any statement he makes may be used against him in a subsequent proceeding. Although some courts have held that this is not required when the arrestee is being held only for deportation proceedings, it is Service policy also to give a person in custody the complete Miranda warning before taking any statement from him.

(a) How are these rules and regulations publicized?

Title 8, United States Codes 242.2(a) and 287.3 are the pertinent regulations.

(b) How are they enforced?

INS Forms I-214 (Warning As To Rights-Interview Log), I-215B (Record of Sworn Statement in Affidavit Form), or I-263A&B (Record of Sworn Statement) are executed by both the arrestee and/or the arresting or interviewing officers.

3. Are identification documents presented for INS review by aliens or U.S. citizens given a presumption of validity until they are proven invalid?

Identification documents are usually accepted as valid. However, INS documentation and other commonly encountered identification documents (e.g., "Texas birth certificates") that appear fraudulent are frequently detected by INS officers.

(a) If no, what would be the effect of this presumption on INS and the persons it processes?

In cases where documents are suspect, further examination and verification are necessary. Questioning of the presenter will often suffice; however, if verification is necessary from another source such as a foreign or other federal, state or local government agency, a delay of final action is necessary.

4. Has INS ever been asked by an American-born citizen to be issued an INS identification card?

Yes.

(a) If yes, how many requests have there been? in what parts of the nation? by what ethnicities?

The Service does not record ethnicities of these applicants, but the greater percentage of documents has been issued to persons of Hispanic origin. Listed below by regions are the total number of U.S. Citizen Identification Cards that were issued to American citizens from 1959 through 1979:

	Eastern	Southern	Northern	Western	Total
Totals	25,135	19,394	55,727	221,813	332,069

(b) Has INS ever analyzed the cause and effect of such requests?

Although no formal study has been made, the primary reason for document issuance is the convenience for these citizens entering the United States over land borders from foreign contiguous territory.

5. What impact will the recent court cases on employment searches (e.g., the Blackie's case) have on INS policies, procedures and operations?

The Blackie's House of Beef, Inc. v. Leonel J. Castillo, et. al. case is having an impact on the investigations activity by affecting INS searches at places of employment for undocumented aliens. The ruling, concerning authority for use of search warrants under Federal Criminal Rule 41, enjoins only the INS district office within the boundaries of the U.S. District Court for the District of Columbia, and is not Service policy. However, in some other judicial districts, U.S. Magistrates base denials for such warrants on the Blackie's decision. The Solicitor General has now appealed the District Court's decision.

6. What impact will the recent Department of Justice policy concerning residential searches have on INS operations?

Residential searches have ceased except in the following instances: casework - when information existing in an investigation establishes that inquiry in a neighborhood is necessary; clean-up details - when, after arresting a deportable alien it is necessary to obtain his personal belongings before he leaves the United States; anti-smuggling investigations - when leads indicate alien smuggling activity in residential areas, e.g., existence of drop or safe houses; and in special or emergency circumstances - when life threatening or other urgent conditions exist. In the latter case, all circumstances must be reviewed by an INS attorney who examines the legal merits, and by the district director who gives final approval.

PERFORMANCE MEASUREMENT

1. What criteria does INS use to measure the performance of its individual employees at both the line and supervisory levels?

Criteria for line employees are quantity of work, quality of work, cooperativeness, and dependability.

Supervisory criteria include the four cited above as well as development of subordinates, and affirmative action for EEO.

Attorneys are rated under a separate system (Form DOJ 477). There are ten criteria used to rate non-supervisors; twelve criteria to evaluate supervisors.

2. Do these criteria differ by function, e.g., enforcement, service, administration, and by major job-type within function, e.g., immediate border patrol, non-border patrol?

Criteria do not differ by function or major job-type within function.

3. When were these criteria last assessed to ensure they are job-related?

These criteria have never been asessed to ensure they are job-related.

(a) What were the findings of that assessment?

Not applicable.

(b) How were those findings incorporated into the criteria by INS?

Not applicable.

4. What standardized psychological testing is required of INS enforcement personnel?

None.

(a) Are border patrol agent applicants given psychological tests as part of the hiring process?

No.

(b) Is psychological testing of applicants legal?

It is legal; however, OPM generally prohibits agencies from using personality tests as a method of appraising personal characteristics for placement purposes.

(c) Is the GS-5 entry level for Border Patrol Agents imposed by OPM or was the Service responsible for this?

OPM imposed the restructuring of the border patrol occupational career ladder as the result of a governmentwide review of law enforcement positions conducted several years ago. OPM had discovered that INS was the only agency with a career pattern which differed from the traditional GS-5, 7, 9 line of progression. Therefore, OPM wanted to bring the Service in line with other agencies.

5. How are INS employees, both line and supervisory personnel, made aware of these criteria?

The regulations are available in each personnel office. Personnel staff is available in person or by telephone to answer questions. New employees are informed at orientation and supervisors receive guidance on regulations through training.

6. Has INS evaluated its training programs to ascertain whether they give employees the tools required to perform according to criteria?

The Service provides seven basic training programs for the major occupations as border patrol agent, immigration inspector, immigration examiner, criminal investigator. It also provides journeyman, supervisory and management training. Training evaluations are routine for each training session. Analyses of evaluations result in modifications of subjects and hours.

The Training Division is conducting a systematic job analysis of seven INS occupations to identify new training curricula. This analysis and validation project propose to provide job related training programs; to provide each employee selected for training the opportunity to acquire the needed skills; and to provide management with job data to increase productivity, improve job opportunities and job enrichment.

7. Are the performance criteria incorporated into INS' promotion and disciplinary procedures, e.g., what steps does INS take when employees do not perform as required by the criteria?

Annual rating criteria are not a part of the promotion procedures. There is a separate promotion evaluation system which includes performance criteria measurement.

8. Does INS have a career development program?

Yes.

(a) What does this program include?

In the past, formal career ladder development has been opened only to the enforcement officer corps personnel. Training included basic, journeyman and supervisory courses for officers.

(b) Are there separate programs for the enforcement function? The service function? The administrative function?

Formal career ladder programs are only available to the enforcement and examinations functions. Training for career development in service and administrative functions occurs on an informal basis as funds are available.

(c) Does the program(s) include provisions for mobility between functions? For training people who change functions?

Mobility within the officer corps from one function to another is possible.

(d) Are there separate career development programs for professional and support staff?

The Civil Service Reform Act (CSRA) has required the use of Individual Development Plans (IDP) for all employees. Currently addressing this requirement, INS will be implementing IDP by the end of FY 1981.

(e) Does the program(s) include provisions for upward mobility?

An INS/OPM Upward Mobility training agreement has been approved, and is being implemented.

DISCIPLINE

1. Does INS have general orders for each of the three functions which detail basic operating procedures?

General orders are contained in the Officers Handbook (M-68), a guide for proper conduct and relationship with aliens and the general public, and issued to officers upon entrance on duty.

2. Do these general orders detail precisely standards of conduct and the conduct which will lead to administrative discipline?

Yes. The Officers Handbook contains guidance in the following areas:

Part I - Laws and Regulations - General Statement; Use of Intoxicating Beverages; Disclosure of Confidential Information; Acceptance of Gratuities; Conflict of Interest; Outside Employment; Acting as an Attorney or Agent in Claims against the United States; False Claims against the United States; False Statement of an Officer Concerning Oath Taken Before Him; Conspiracy; Code of Ethics for Government Service.

Part II - Service Standards - General Statement; Proper Identification; Needless Display of Official Means of Identification; Loss of Official Badges or Credentials; Proper Use of Government Property and Government Time; Proper Use of Firearms; Relationship with Aliens; Humanizing Immigration and Naturalization Laws; Prejudicial Influence in Administering the Immigration and Naturalization Laws; Premature Decision; Solicitation of Services; Discussion of Personal Matters with Aliens; Approved Techniques for Questioning Aliens; Use of Physical Force and "Third Degree Methods"; Escape of an Alien; Relationships with the Public; Administration of Oaths; Poise and Dignity in Performance of Official Duties; Courtesy; Be Patient; Be Firm; Be Frank; Acknowledge Appreciation for Assistance Given; Cooperative Spirit and Loyalty to the Service; Abuse of Authority; Use of Official Position for Personal Gain; Personal Conduct On and Off Duty; Indebtedness; Associations of a Questionable Nature; Devotion to Duty; Punctuality; Personal Appearance.

3. How are these orders enforced?

Supervisors have general responsibility to enforce standards of conduct. Recommendations for discipline are considered by higher levels of authority.

4. What disciplinary sanctions are available to INS?

The DOJ Standard Schedule of Disciplinary Offenses and Penalties (DOJ 373, attached) is used as a guide for administrative sanctions.

5. How are the orders and sanctions publicized within the Service, e.g., at pre-Service training?

The DOJ Standard Schedule of Disciplinary Offenses and Penalties (DOJ 373, attached) is issued to all employees.

6. When were these orders first written?

The Officers Handbook originated in 1944.

(a) How often are they revised?

The Officers Handbook is revised as required.

(b) When was the last time they were overhauled?

The latest revision was in 1972.

7.(a) Please describe in detail the procedural steps by which an internal investigation of alleged misconduct by border patrol agents is currently initiated, investigated, and resolved?

Alleged misconduct by border patrol agents (and of all employees) is handled in two phases, preliminary inquiry and investigation.

A preliminary inquiry is conducted to obtain very specific facts concerning the alleged misconduct. During this phase, the complainant or victim and witnesses, usually civilian, are interviewed to obtain these facts. The purpose of the preliminary inquiry is to gain specifics, to identify the person alleged to have acted improperly, and to ascertain if that person is an INS employee.

If the inquiry indicates that an investigation is not warranted, the case is closed. If warranted, a full investigation will be initiated. If the person alleged to have acted improperly is employed by another U.S. Government agency, the matter will be closed and referred to the employing agency for action.

If a civil rights violation is alleged, a preliminary inquiry will be initiated and the facts forwarded to the DOJ Civil Rights Division except when there has been a fatality or aggravated assault with a deadly weapon. The latter is also immediately reported to the Civil Rights Division and directly to the Federal Bureau of Investigation. Actions by INS employees which result in wounds or fatalities are most often investigated by local police having jurisdiction over the area where the incident occurred.

The responsibility to conduct an investigation following a preliminary inquiry is divided into two areas. Alleged criminal or administrative misconduct by supervisors and managers is investigated by the INS Office of Professional Responsibility. The investigation of purely administrative misconduct by journeymen officers or non-supervisory support personnel is the responsibility of the regional commissioners. The latter investigations are overviewed by the Office of Professional Responsibility.

Allegations of administrative misconduct sustained by investigation are forwarded to the appropriate associate regional comissioner for management to consider administrative sanctions. If the alleged misconduct is a criminal violation the incident, if not clearly within the investigative jurisdiction of another federal agency, is referred to the U.S. Attorney having jurisdiction over the area in which the event occurred. This referral is generally made following the completion of a preliminary inquiry. Further investigation will be at the direction of the U.S. Attorney either by the Office of Professional Responsibility or another agency at the discretion of the U.S. Attorney.

(b) How does INS management insure itself that these steps are followed?

INS management is assured these steps are followed by complying with Operations Instruction 287.10 which states the responsiblities and procedures to be followed with respect to allegations received.

8. Are any of these orders publicized to persons under INS jurisdiction? If yes, how? If not, why not?

DOJ Standard Schedule of Disciplinary Offenses and Penalties (DOJ 373) used as a guide for administrative sanctions is distributed to INS employees.

9. Is there a formal complaint system in INS through which persons under INS jurisdiction can forward their complaints?

All employees are responsible for reporting immediately when learning of allegations of misconduct by other employees. District directors and chief border patrol agents have the responsibility to receive and report allegations to either the regional commissioner or the Office of Professional Responsiblity. Individual employees may report alleged misconduct directly to the Office of Professional Responsibility or to regional commissioners. The Office of Professional Responsiblity maintains a telephone answering device to receive such calls following the close of regular business hours.

(a) How does it work in theory? in practice?

In theory, this system works well. In practice, employees make reports directly to the Office of Professional Responsibility and are automatically granted complete confidentiality through the assignment of a source symbol. Thereafter their names will never openly appear in any report, correspondence, or investigative file.

(b) Is it well publicized?

This system of reporting is well publicized to employees in the professional and management sectors of the Service.

(c) When has it last been evaluated?

This system is under constant evaluation. Tests of the system are being designed, i.e., test letters, complaints, etc., to determine its effectiveness.

(d) When has it last been revised?

The system was revised March 15, 1978.

(e) Are all complaints investigated?

All allegations received are reviewed to ascertain that it pertains to a Service employee, and it is a complaint of misconduct. If so, the allegation will be investigated.

10.(a) What are the numbers, qualifications, and training of the personnel charged with investigating alleged violations of these orders?

Fourteen criminal investigator positions are established to perform investigations of alleged violations Servicewide.

The qualifications established by the Office of Personnel Management include: ability to work effectively with people, skill in collecting and assembling facts, ability to prepare clear and concise reports, ability to accept responsiblity, and progressively responsible investigative experience (criminal investigative experience).

Training activities for investigators focus upon the individual training plans assuring technical training is available for the types of investigations performed; i.e., white collar crime, electronic surveillance, etc.

(b) In what percentage of investigations opened in the last year were preliminary investigations performed by agents from the same district as the accused, or of a contiguous district?

Such statistics are not available.

(c) Of those investigations closed after preliminary investigation, how many of the preliminary investigations were conducted by agents of the same district as the accused, or of a contiguous district?

Such statistics are not available.

11. Since FY 1975, by fiscal year, what is the number of persons against whom allegations of misconduct were placed?

The allegations of employee misconduct received were 368 in FY 1978 and 349 in FY 1979.

Comprehensive statistical data are not available prior to FY 1978.

(a) What percent of these people have been determined to be innocent of wrongdoing? After a preliminary investigation? After a full investigation.

The percentage determined innocent of wrongdoing was 82 in FY 1978 and 83 in FY 1979. These figures are for full investigations.

(b) What percent of those determined innocent have been transferred for management need? At their own request? What percent have resigned?

Unknown.

(c) What percent of those people have been determined "guilty" of wrongdoing?

The percentage determined "guilty" of wrongdoing was 18 in FY 1978 and 17 in FY 1979.

(d) What percent of those people have been dismissed for cause? Transferred for management need? Transferred at their own request? What percent have resigned?

During FY 1979, of those employees against whom charges were made following investigation of alleged misconduct, eight have been terminated and eleven have resigned.

12.(a) Is an INS employee who does not report an infraction of INS regulations or a violation of criminal law penalized? If not, why not?

Operations Instruction 287.10(g) states "failing to report or delay in reporting allegations in compliance with this Operations Instruction may result in disciplinary action against employees."

(b) Is an INS supervisor who conceals an infraction of INS regulations or a violation of criminal law penalized? If not, why not?

Disciplinary action against employees would include not only nonprofessional and journeymen employees but supervisors and managers as well.

(c) Please provide a summary or list of any actions described in (a) or (b) above to include the action taken on each?

To date there are only two instances of a failure to make a timely report of alleged misconduct. The appropriate personnel/management officials took no action in one completed investigation. The second occurrence is now under investigation.

(d) Please provide a summary or list of all specific allegations raised in the recent New York Times series on INS and any corrective action taken.

Fifty-one INS employees were identified from the series of articles published recently by the New York Times. All allegations against these employees made over a period of 15 years were investigated, of which 14 employees were cleared of misconduct. The remainder received disciplinary actions ranging from letters of reprimand and suspension to terminations. Three of five who were indicted for criminal violations have been convicted. Five have their cases pending with the Civil Rights Division of the Department of Justice.

13. There are two incidents on the Southwestern Border which received much notice in the press last summer. In both incidents, emergency medical assistance was needed by children being taken across the border. In both incidents, INS allegedly delayed entry until completion of processing. In both cases, the children died.

(a) Did INS investigate these incidents?

Yes. An inquiry began the day following the deaths.

(b) Who did the investigation?

The inquiry was conducted at the instruction of the district director by three criminal investigators stationed at the San Diego, California District Office. The Office of Professional Responsibility received the findings and concurred in them.

(c) Who was interviewed by the investigators?

A total of eight people were interviewed in connection with the Canedo case and seven in the Alberto case. Among these were both U.S. Customs Service and Immigration officers involved in the cases, civilians who were with the Alberto child, the mother of the Canedo child, and medical experts.

(d) What did the investigation find?

The Mario Canedo case was concluded by the statement of the examining physician that the death of the child occurred prior to his arrival at the port of entry. Although the lengthy wait in traffic lanes may have been a contributing factor, the death would not have been avoided by any act by an inspector. A San Diego, California coroner's report indicates the child died of an overdose of medication administered by a relative and that death occurred prior to the child's arrival at the port of entry.

In the Manolo Alberto case, Service officers directed that the child, who was suffering from acute malnutrition, be taken to the hospital nearest the port which was in Mexico. It was concluded that Service officers acted properly. The Tijuana General Hospital is about five miles from the port of entry at San Ysidro as compared to 20 miles to University Hospital in San Diego and 150 miles to Van Nuys, California, the claimed destination of the aliens. The child was admitted into the Tijuana General Hospital within 35 minutes after leaving the port of entry. The action taken by the Service officer permitted the child to have immediate medical attention and at the same time was consistent with immigration law and policy.

(e) Was anyone formally disciplined, e.g., demoted, separated from the Service?

No. It was concluded that Service officers acted properly.

(f) Was anyone informally disciplined, e.g., transferred for management need?

No.

(g) Was the general order on emergency medical asistance revised as a result of these incidents?

Yes. More new streamlined guidelines have been formulated and implemented at the port of San Ysidro. In addition, INS and the Customs Service are developing standard guidelines for handling similar situations at all ports of entry.

14. How do INS' general orders on the use of deadly and non-deadly force compare with those governing other DOJ law enforcement agencies? How and how effectively are the INS orders enforced?

It is Service policy that deadly force may not be used except in self-defense, in defense of another officer, or in the defense of an innocent third party. The use of physical force or violence in handling detained aliens or other persons with whom official business is being conducted is permissible only in self-defense, in defense of another person, or to such an extent as is absolutely necessary in making an arrest or preventing an escape.

Incidents involving the use of firearms, including the mere unholstering of the weapon, the use of unnecessary (as determined by the arrestee or a third party) non-deadly force, and the assault upon INS officers is reported to superior officials and/or directly to the Service's Office of Professional Responsibility. Reports by INS officers include the circumstances of the events and justifications for the use of force. In cases where force is deemed unwarranted, appropriate disciplinary actions are taken.

15. Does INS have a general order governing physical searches of persons of the opposite sex? What is it? How does it compare to those governing other DOJ agencies? How and how effectively is it enforced?

An INS officer may frisk, i.e., pat down the outer clothing of a a person stopped for questioning, if the officer believes that the individual (without distinction as to sex) may be armed and dangerous to the officer's own safety and that of others. If the officer feels something which may be a weapon, he may reach inside the person's outer clothing to remove it.

16. If there are no such orders;

(a) How do INS employees currently handle a possible undocumented alien of the female sex when there is no female INS employee available to assit?

In situations when a search, after arrest, is necessary to protect the officers and others and to insure that the prisoner retains no means of escape, or is made to prevent the destruction of evidence of the offense for which the subject was arrested, prisoners are searched by officers of the same sex. In the event such an employee of the Service is not available to perform the search, all other means are sought including the use of employees of other agencies to assure that the civil rights of the prisoners are not violated. However, in exigent circumstances, it sometimes may be necessary to search a prisoner of the opposite sex.

(b) How does INS control employee conduct in sensitive situations?

All situations in which there are allegations of misconduct by Service officers are reported to superior officers and/or the Service's Office of Professional Responsibility. In cases of substantiated charges, appropriate disciplinary actions are taken.

PERSONNEL

1. Since FY 1975, by fiscal year, please provide the following information for the enforcement function: the absolute number and percent of officers on the immediate border; the absolute number and percent of officers on the immediate border who are:

(a) Women, men, total;

This data are not available.

(b) Spanish-speaking, French-speaking, English speaking, and other language-speaking, total;

One hundred percent are Spanish-speaking and English-speaking.

(c) Hispanic, black, white, other, total;

This information is not available.

(d) High school educated, some college, college educated, some graduate education, total; and

This information is not accessible.

(e) Former military, former military police, former state and local police, social science background, other, total.

This information is not available.

2. Please provide the same information by fiscal year for persons working in the service function and in the administrative function.

For FY 1980, the numbers of employees in the administrative and service functions are 917 and 6,587, respectively. The other requested information is not available.

3. Again by fiscal year, please provide by central office and by field function, i.e., delineate service, enforcement and administration, the absolute number and percent of male employees and female employees at each general schedule and executive service level.

The information is not available.

4. Again by fiscal year, please provide the absolute number and percent of persons who enter the Service as enforcement personnel, as service personnel, as administrative personnel.

This information in not available.

(a) What is the most frequent entry grade, by fiscal year, for each of the above functions?

The entry levels are GS-7 in FY 1975-77 and GS-5 in FY 1978-80 for enforcement agents; GS-5 for service personnel; GS-3 for adminstrative/clerical and GS-5 for administrative/non-clerical.

(b) What is the most frequent separation grade, by fiscal year, for each of the above functions?

(c) What is the attrition rate for each fiscal year by function?

(d) What is the average length of service by function for each fiscal year?

(e) On the average, for each fiscal year, how many persons switched functions annually?

(f) What change(s) in function are the most frequent, e.g., enforcement to service, service to administration, etc.

Data for Items b-f are not available.

5. Since fiscal year 1975, by fiscal year, what is the number of persons who transfer or are transferred from the field to headquarters? From headquarters to field?

(a) What percent of these total transfers, by type, is accompanied by a promotion? by no promotion? by a demotion?

(b) What percent of these total transfers, by type, are effected as a result of management need? as a result of the employee's request?

(Percentages in parenthesis)

Information Category	FY 1976	FY 1977	FY 1978	FY 1979	FY 1980
Number of employee transfers from central office to field	8	14	16	12	2
Promotion	3(38)	1(7)	3(19)	6(50)	-
No promotion	4(50)	4(29)	6(38)	4(33)	2(100)
Demotion	-	3(21)	-	-	-
Management need	1(12)	6(43)	5(31)	2(17)	-
Employee request	-	-	2(12)	-	-
Number of employee transfers from field to central office	35	48	63	35	8
Promotion	25(71)	18(37)	49(78)	28(80)	3(38)
No promotion	3(9)	6(13)	9(14)	6(17)	5(62)
Demotion	1(3)	1(2)	1(2)	-	-
Management need	5(14)	23(48)	4(6)	1(3)	-
Employee request	1(3)	-	-	-	-

6. Since 1975, by fiscal year, what is the absolute number and percent of persons who entered the Service as enforcement officers and who have since become:

(a) inspectors;
(b) examiners;
(c) investigators;
(d) adjudicators; or
(e) other management positions.

Occupational Change Data
Enforcement Officer (Border Patrol Agent)

Information Category	FY 1975	FY 1976	FY 1977	FY 1978	FY 1979
Number of border patrol agents entering Service	389	393	312	527	163
Changed status to:					
Inspectors					
Absolute number	32	27	19	16	6
Percentage	8.2	6.9	6	3	3.7
Examiners/Adjudicators					
Absolute number	4	-	-	-	-
Percentage	1	-	-	-	-
Investigators					
Absolute number	30	26	11	1	-
Percentage	7.7	6.6	3.5	.2	-
Other management positions					
Absolute number	1	-	3	-	-
Percentage	.3	-	1	-	-

7. Since 1975, by fiscal year, what is the absolute number and percent of persons who entered the Service as service officers and who have become:

(a) inspectors;
(b) examiners;
(c) investigators;
(d) adjudicators; or
(e) other management positions.

This information is not available.

8. What is the absolute number and percent of persons in management ranks who entered the Service from management positions outside of the Service? Where have these people been placed by function (enforcement, service, administration) and by office?

Based on employment during July 1979, the number and percentage of persons of management ranks who entered INS from management positions outside of INS are 12 and 8 percent respectively. These persons were placed in the administrative function in the central office (Washington, D.C.), Eastern Regional Office (Burlington, VT), Southern Regional Office (Dallas, TX), Western Regional Office (San Pedro, CA), and Seattle District Office (Seattle, WA).

9. For each fiscal year since 1975, please provide, by office, and by function and position classification, the absolute number of position announcements and the percent of those announcements which were advertised Servicewide, Departmentwide, and nationwide, both career status and non-status.

(a) By fiscal year, function, office and position classification, what percent of these announcements were advertised as "having no potential for promotion?" as having career ladder potential?"

(b) During this same time period, how many and what percent of these positions were filled by persons already employed by the Service? by the Department? by the Federal Government? by private industry?

(c) During this same time period, how many and what percent of these positions were filled by persons holding or eligible to hold the position in an acting capacity?

(d) During this same time period, how many and what percent of empty positions were filled without announcement?

These data are not available.

10. By function, for fiscal years 1977 and 1978, what is the average length of time between: position vacancy, position announcement, applicant contact, applicant selection, and applicant starting date?

Average Recruitment Time Frames
(Days)

Average length of time between:	FY 1978	FY 1979
Position vacancy and position announcement	20	20
Position announcement and applicant contact	10	14
Position contact and applicant selection	80	48
Applicant selection to applicant starting date		
a. Change in geographical location is not required	77	39
b. Change in geographical location is required	106	65

11. What impact, if any, would result to INS management if INS could obtain the same flexibility that DEA and FBI have in selecting persons for management positions of GS-15 and above levels?

To obtain same flexibility as DEA/FBI, INS must convert all GS-15 managerial positions to excepted service. This may initially cause high turnover of senior managers and loss of service expertise. It may result in the lack of promotional opportunity for junior service managers who do not want to relinquish competitive status while increasing the flexibility to hire women and minorities.

TRAINING

1. What is the duration and curriculum of pre-Service training offered at the Federal Law Enforcement Training Center (FLETC)?

INS maintains two academies. The Border Patrol Academy is 81 days; the Immigration Officer Academy for criminal investigators, deportation officers, immigration inspectors, and immigration examiner trainees is 70 days.

Each curriculum is divided into six major areas: Law; Language; Operations and Procedures; Physical Training; Firearms Training; and Selected Policy Training.

(a) What is the relevance of this training to initial assignment?

After graduation from either academy, a trainee has acquired skills to function at the GS-5 level under the general supervision of a journeyman officer.

(b) What is the relevance to a person assigned to patrol the Canadian Border? to a person assigned to the enforcement function, but not at the immediate border? to a person not assigned to the enforcement function?

On the Canadian Border there are fewer officers to cover an equivalent area of international boundary. Under these circumstances, an officer with prior experience can perform his assigned duties with less direct supervision. All new border patrol agents are assigned to the Southern Border.

All agents of the officer corps are charged with the enforcement function of INS. While there may be more variation or concentration of duties and activities in a station removed from the immediate border, the same principles, knowledge and skills learned at the academy remain for all officers, regardless of their assigned areas.

2. To what extent does the pre-Service training cover the following topics?

(a) Rights of undocumented aliens?

The rights of all persons is of major concern at the Officer Development Training Facility (ODTF). Eight courses deal with human rights: Immigration Law; Officers Handbook; Statutory Authority; Criminal Law; Constitutional Law and Civil Liberties; Detention and Arrest; Nationality Law; Patrol Agents' Handbook; and Human Relations.

(b) Human relations?

Twenty-four hours of each academy's curriculum are devoted to "Human Relations." The course introduces trainees with individual, group, social and cultural motivators effecting on human behavior. Emphasis is placed on interpersonal contacts and the responsibility and legal authority in circumstances involving the public and law violators. The officers become aware of the sources of human relation problems and examine alternatives to prevent and resolve conflicts. Role perception for law enforcement officers is stressed. Crisis intervention techniques are also taught.

(c) Use of deadly and non-deadly force?

The use of deadly and non-deadly force is explored in varying degrees during the following course presentations: Officers Handbook; Statutory Authority; Physical Training; and Firearms Training.

(d) Crisis intervention?

Crises intervention techniques are also included in each academy's curriculum.

(e) Medical emergencies - recognition and handling?

Trainees receive instruction in trauma medicine (First Aid) and cardio-pulmonary resuscitation. Standard American Red Cross procedures are used to develop skills to deal with shock, control of bleeding, fractures, burns, poisoning and gunshot wounds.

(f) Crowd control?

Crowd control is not part of the curriculum.

(g) Diplomatic immunities?

Instruction concerning diplomatic immunity of alien diplomats is covered in two courses: Immigration Law; and Statutory Authority.

(h) INS general orders?

Service policies are introduced to trainees at the academy in varying degrees during the following course presentations: Equal Employment Opportunity; Employee's Services; Organization and Functions of INS; Officers Handbook; Role of the Office of Professional Responsibility; Forms and Correspondence; and Travel Regulations.

(i) Interagency coordination, e.g., Customs, Agriculture, DEA?

Trainees receive basic training in "Organizations and Functions of Law Enforcement Agencies." Border patrol trainees receive a 16-hour and immigration officers a 24-hour cross-training program by the U.S. Customs Service. In addition, Labor, APHIS and USPHS contribute a two-hour block of instruction to IOA trainees.

(j) Use of computers?

While receiving no "hands on" training in computer programs, the trainees learn about systems available for their professional inquiry while performing daily duties.

3. Has INS evaluated its pre-Service training program? When?

Pre-Service training is provided to all newly appointed officer corps personnel. This group includes the seven major occupations in the Service, i.e., border patrol agent, immigration inspector, immigration examiner, criminal investigator, deportation and detention officers.

Evaluation of the INS pre-Service training program is a continuous on-going process. Curricula are evaluated and up-dated by a cadre of subject matter specialists and training specialists at the Officer Development Training Facility in Glynco, Georgia. This approach is necessary to insure that trainees receive the latest changes in laws, regulations and operational procedures.

The Service is also pursuing a long range analysis and evaluation for the major occupational groups to further insure the validity of the pre-Service training program.

4. What is the maximum number of INS employees that FLETC can and will train annually?

FLETC can accommodate 1,220 students at any one time.

5. How many people on the average go through FLETC pre-Service training annually? How many people do not complete training successfully?

Since moving the operations to FLETC in 1977, the following INS trainees have gone through pre-Service training:

Basic Training

	FY 1978	FY 1979	Estimated FY 1980
Border Patrol Academy	280	491	236
Immigration Officer Academy	191	336	336

The average failure/withdrawal rate for basic training is negligible. Failure/withdrawl rate at the journeyman level is nil.

Actual Failures

	FY 1977	FY 1978	FY 1979
Border Patrol Academy	10	13	3
Immigration Officer Academy	6	7	9

6. Are persons who enter INS to perform the INS service functions also trained at FLETC?

Inasmuch as law enforcement officers are trained at FLETC, not all INS support personnel are trained at the location. The Center has authorized support personnel training on a space available basis and under the provision of the Economy Act. Specific exceptions have been granted for contact representatives, docket clerks, and detention officers.

(a) If yes, describe the training provided them and explain how it differs from the training provided enforcement personnel.

Contact representatives receive 88 hours of instruction in Security; Immigration Law; Nationality Law; Records Processing and Administration; Freedom of Information/Privacy Acts; Effective Writing and Reporting; and Human Relations.

Docket clerks receive 24 hours of training in the technical management of the docket and bonds.

Detention officers receive 144 hours of training that constitutes an abbreviated Immigration Officer Basic Training Course without Immigration Law.

(b) If not, describe the pre-Service training they receive.

Not applicable.

7. Describe the background and qualifications of the instructors who provide INS employees FLETC training?

Background and qualifications of FLETC instructors are geared directly to the area for which they would be selected.

(a) Who selects the instructors?

Selection of instructors is done by the FLETC staff.

(b) To whom do they report?

Instructors are accountable to FLETC management through the Branch Chief, Division Chief, and Assistant Director for Faculty Management.

(c) Are they specialists for the most part?

They are specialists requiring six years of experience in their technical field; three years general and three years specialized experience.

8. What formal training courses does INS provide its employees, other than pre-Service training?

The Border Patrol Academy provides two in-Service schools for its agents, Supervisory Border Patrol Course (11 days or 87 hours of instruction) and Journeyman Border Patrol Course (12 days or 96 hours of instruction). The Immigration Officer Academy conducts Advanced In-Service Training for all other activities.

(a) What do these courses cover?

All courses cover the functional aspects of each activity: personal skill development, operational studies, human relations, court decisions, court testimony, constitutional law, search and seizure, and statutory authority.

(b) How often are they given?

Courses are scheduled by ODTF within given budgetary and operational constraints.

(c) For each fiscal year since 1975, identify how many have attended these courses, by course?

Since January 1977, the following Advanced In-Service Refresher Specialized courses (AIRS) have been conducted (attendees in parenthesis):

	1977	1978	1979	1980*
Supervisory Border Patrol	1 (20)	1 (28)	2 (59)	1 (24)
Journeyman Border Patrol	-	-	7 (168)	7 (168)
Supervisory Investigator	1 (20)	-	2 (60)	-
Journeyman Investigator	2 (96)	-	4 (192)	1 (48)
Supervisory Insp./Examiner	3 (64)	1 (30)	2 (54)	1 (24)
Journeyman Imm. Inspector	3 (72)	1 (24)	6 (144)	3 (72)
Journeyman Imm. Examiner	2 (46)	1 (24)	6 (144)	2 (48)
Supervisory Deportation Off.	1 (20)	-	1 (24)	-
Journeyman Deportation Off.	3 (64)	-	2 (48)	1 (24)
Journeyman Detention Officer	-	-	2 (48)	-
Detention Officer	2 (48)	5 (120)	4 (95)	2 (48)
Instructor Training	4 (81)	-	-	-
Naturalization Examiners	1 (17)	-	2 (40)	1 (20)
Intelligence Officers	-	1 (20)	-	-
Anti-Smuggling Unit	-	-	2 (60)	1 (24)
Off. of Professional Integrity	-	-	2 (54)	-
Misc. Operational Conferences	1 (24)	-	6 (142)	7 (107)
Nigerian Imm. Off'r Training	-	-	-	4 (93)

*Includes projections.

9. Does INS provide any management training courses?

INS does not conduct in-Service management training courses. The Service participates in the Department of Justice Executive/Management Program and sends its employees to the Federal Executive Institute and the Executive Seminar Centers. These formal programs are augmented by both government and non-government seminars, attended on an individual basis, to meet specific development needs.

(a) How many INS employees have attended these courses since 1975?

Since 1975, approximately 345 employees have attended training courses in these formal programs. These figures do not include seminars attended on an individual basis. During FY 1980, the Service has 41 spaces scheduled in the forementioned formal training programs.

(b) What percent of INS' existing management cadre does this number represent?

As of July 1979, the Service had 393 encumbered supervisory/managerial positions. This is equivalent to .88 formal training opportunities per position.

(c) Are management training courses a pre-requisite for promotion? on being promoted?

No.

ENFORCEMENT

1. How does INS deploy existing enforcement resources?

(a) Are persons assigned to border locations based on "intelligence" analyses performed by INS?

With the approval of the INS Central Office, regional offices are allowed to reassign the authorized force to those locations which have increased illegal activity. These shifts of personnel are based on the amount of illegal activity in a given area and intelligence analysis.

(b) Are persons then assigned to shifts according to "workload"?

Shiftwork is assigned as necessary.

(c) Should INS expand its "one-stop" processing effort, currently in effect primarily at airports, to all points of entry?

"One-stop" inspection has been in effect for many years at land border ports. It has been an operational and economic success for the federal agencies involved. A pilot program for "one-stop" inspections at airports has been implemented at the Philadelphia Airport. Based on the success of this experiment, and others to be conducted, both the Immigration and Naturalization Service and the U.S. Customs Service plan to expand the one-stop procedure to all major airports as facilities become available, either through new construction or modification.

2. Is INS' immediate border-enforcement mission vis-a-vis persons seeking to enter illegally achievable?

The objective of the border patrol is to maintain the integrity of the national boundaries by preventing the entry of undocumented aliens. As the vast majority of deportable aliens are returned to the border within 24 hours of their apprehension many continue to attempt illegal entries until they are successful. Illegal entry can be prevented only when economic incentives are removed or a legal option is available to the potential entrant.

(a) If yes, how many employees and how much equipment would be required to achieve it?

INS cannot define the level of resources and manpower which would achieve this objective.

(b) What would be the financial cost of these estimates?

Unknown.

(c) Would changes in law or INS policies and procedures also be required? If yes, what changes?

Most illegal migration to the United States results from aliens seeking jobs. In the past, the Department has supported sanctions against employers who hire aliens not authorized to work as a means to remove the economic incentive to enter the U.S. illegally. We also support financial assistance to develop the economy and labor markets of the countries from which illegal migration occurs.

3. Under the current budget request, what are INS' plans for the deployment of requested personnel along the border?

FY 1981 Allocation of Personnel
Immediate Border + Other Than Border

Sector	Authorized Force		On Duty	
	Officer	Support	Officer	Support
Chula Vista	520	59	434	33
El Paso	368	41	335	30
Del Rio	200	23	182	17
McAllen	181	22	167	16
Yuma	160	17	152	22
El Centro	156	35	129	26
Tucson	148	23	129	18
Laredo	130	20	131	16
Marfa	108	16	90	11
Livermore	65	9	60	8
New Orleans	38	8	33	8
Miami	26	8	26	8
Swanton	41	11	37	10
Grand Forks	28	8	27	8
Houlton	24	10	23	10
Blaine	25	7	25	7
Havre	23	6	22	7
Ogdensburg	21	8	20	7
Buffalo	20	9	20	10
Detroit	22	6	21	6
Spokane	21	7	21	7
Regional Office	13	7	10	5
Central Office	10	7	7	4
	2,348*	367*	2,101*	294

*The authorized force in FY 1980 has been reduced by the 160 positions deleted in FY 1981 in the Immediate Border Program. In addition, the 24 positions which the Other Than Border Program was to have received in FY 1980 have not been included because of an anticipated reduction of 39 positions in this program in FY 1981.

4. What steps should be taken to improve morale of border patrol agents? Which of these will be taken during FY 1981?

Timely purchase of replacement vehicles and other equipment, together with adequate facilities manned by sufficient number of personnel, would resolve most of the morale issues. Any act perceived by border patrol agents as a firm commitment to accept the current influx of undocumented aliens as a serious problem would have significant impact.

INS will continue to make its needs known through the appropriate budget process. An addition of 206 additional trucks, 154 replacement trucks, and 130 replacement sedans will be purchased this fiscal year for delivery in FY 1981.

5. Please provide a copy of Commissioner Castillo's study of border violence to find out its recommendations and what INS did to implement them.

A copy of Commissioner Castillo's study of June 1979 is attached.

SERVICE TO THE PUBLIC

1. Has INS analyzed the steps (and forms) each person must go through (and complete) to become a citizen in order to ascertain whether there is unnecessary delay, inconvenience and/or redundancy built into the naturalization process?

Naturalization procedures have been streamlined, forms revised to eliminate repetitive and archaic items, and individual production standards have been raised considerably. These methods have resulted in an increase in production of 58 percent over the past years utilizing the same resources.

2. Has INS done similar analyses for other processes, such as "extension of stay", "adjustment of status" and the like?

INS conducted extensive analyses of the visa petition and adjustment of status processes as well as doing work to reduce adjudication time and expedite the delivery of immigration benefits to qualified applicants by means of our remote adjudications program. It has also established a program whereby every form is reviewed every six months to determine, among other things, if the forms can be simplified, shortened, or in any other way made easier for the public to use.

3. Has INS determined time standards for each process?

With very few exceptions, INS has determined time standards for each process.

4. Does INS know, for each stage and each office, the number of persons awaiting processing? The number who have awaited processing for periods longer than those dictated by the time standards?

Through a comprehensive work measurement system, the G-23 monthly report, the number of different types of applications pending at each office and the stage of process can be readily determined by INS. Using this same reporting system, one can determine the number of cases pending an inordinate time.

5. Does INS know (or have a means to find out), for each stage, the reasons for lag time and/or backlog, e.g., level or type of resources, quality of information, management problems, etc.

Field offices provide a narrative analysis along with their statistical reports which explains to regional and central office managers the reasons for workload growth, processing delays and other anomolies.

6. Does INS have a policy on what level(s) of backlog is untenable? Does INS have a procedure to identify when an office is approaching the level(s)?

INS does not have such a policy; however, it does have a work measurement system which identifies current levels of backlogs for each Service office.

7. Does INS allocate its service personnel according to documented alien population location and requests for service?

INS allocates its service personnel in accordance to the workloads within the areas of jurisdiction of the various offices. The workload is determined by both the number and complexity of requests for benefits received at a given location. Inspectors are assigned to ports based on workloads.

8. Does INS redeploy resources from office to office or from staffs within offices or take corrective actions when backlogs reach certain levels?

Yes, where possible. However, workloads are increasing in all offices simultaneously and few redeployments are feasible.

9. What personnel incentives (or sanctions) can be developed at the line level to improve the service function? at the supervisory level?

INS has an extensive incentive awards system which rewards its employees both at the line and supervisory levels who have performed in an exemplary manner or made significant contributions to efficiency and effectiveness of the operations. Existing sanctions include oral admonishments, withholding of within-grade increases, official reprimands, suspensions, demotions, and removals. Rating of line and supervisory employees is a valuable management tool for improving the service function. The ratings of supervisors are based on the performance of the employees under their supervision.

10. Are any changes in the training program necessary to improve the service function?

Training programs are continually monitored for new ways to enhance employees' usefulness to the Service, to improve the quality of work-life, to reduce stress, etc.

Team-building courses are being given in the field and will soon be expanded Servicewide to foster teamwork between and among executives, managers, supervisors and subordinates.

11. Are any changes in the planning process or its focus required to improve the service function?

No changes are foreseen for the planning process which is now underway.

(a) For example, when Vietnam fell, did INS project the five-year impact on its operations of the refugee influx and plan accordingly for that influx?

Resources were requested through the budget process to accommodate the expected increase in adjustment applications and naturalizations.

(b) Is INS reviewing the worldwide refugee situation now to determine what programs and resources it will require two years hence? five years hence?

Yes, although the changing political and economic climate makes long-range identification of problem areas difficult. INS relies heavily on the Department of State for input relating to international affairs.

12. Does INS collate and analyze complaints, and even Congressional requests for action, to determine what system improvements should be effected in the service functions?

Complaints and Congressional requests for action are given full consideration. Those which identify needed system improvements form the basis for prompt remedial action if resources for that action are available.

AUTOMATION

1. Please compare Commissioner Castillo's actual testing program with last fiscal year's plan.

Commissioner Castillo's program developed in May 1979 was to extend the "Houston-type" automation to 23 INS offices in FY 1980 (including replacement of prototype systems in Houston, Boston, Newark, Washington, DC and Los Angeles) and 26 other offices in FY 1981. This program has not been implemented due to concerns raised by the House Subcommittee on Government Information and the GAO on INS' long-range planning for automation, evaluation of the "Houston" prototype, and the agency's ADP procurement practices. A concensus has not been reached between INS, DOJ and the Congress on whether Castillo's automation program should be implemented.

2. How long will it take to complete the testing program and what will be the additional cost factor?

At the Attorney General's request, the President's Management Improvement Council (PMIC) is beginning a management study of INS. The first task of PMIC is to resolve the impasse on automation. A schedule or cost information for either interim automation or long term automation has not yet been developed.

IMMIGRATION BAR

1. What relationship exists, if any, between INS and the immigration bar?

There is no formal relationship between INS and the immigration bar although the General Counsel has been designated by the Commissioner to serve as INS liaison with the immigration bar. Senior program managers in the INS Central Office meet several times a year with the liaison committee of the Association of Immigration and Nationality Lawyers. These meetings give the lawyers an opportunity to discuss important issues of policy and procedures which have arisen across the country, while giving the Central Office an opportunity to be informed of problems of which it may have been unaware and to provide clarification of policies and procedures where appropriate. Such meetings are beneficial to both the INS and the private bar and in many instances provide a mechanism which avoids needless litigation. Many of the larger INS district offices also have periodic meetings with the immigration bar to discuss local problems of mutual concern.

2. What, if anything, does INS do when there has been an allegation of an impropriety involving the immigration bar?

Allegations of impropriety against an attorney or representative practicing before the INS are investigated by the Investigations Section of the INS district office where the allegation arose. If the investigation establishes misconduct within the scope of 8 C.F.R. 292.3 (relating to suspension or disbarment of attorneys and representatives practicing before the Board of Immigration Appeals) the report is forwarded to the regional commissioner who has the authority to initiate disciplinary proceedings. The attorney or representative has a right to a hearing, and the decision is made by the Board of Immigration Appeals. If the Board's decision is to suspend or disbar the attorney or representative, the decision is automatically referred to the Attorney General for his review. The Service will also cooperate with the appropriate State agencies investigating attorney misconduct.

BUDGET AND FINANCIAL MANAGEMENT

1. What steps is INS taking to improve its accounting and budgeting system so that it will be able to trace its expenditure of money along program lines?

The Financial Management Information System (FMIS) which provides an automated capability of tracing the Service's expenditures at their most detailed level of occurrence (program element) became fully operational in FY 1979. Financial reports are produced on a monthly basis that present the status of expenditures by individual program elements as well as by programs. Additionally, an on-line inquiry capability exists for responding to ad hoc user requests for financial information.

PROCUREMENT

1. It has been stated that INS has a history of disregard of required government regulations during the procurement process. Further, it has been stated that the Department of Justice has periodically taken the procurement powers from INS. What, if anything, is INS doing to insure that INS procurement complies with the spirit and intent of government requirements?

The General Accounting Office and Department of Justice are currently reviewing the INS procurement process. Deficiencies verbally brought to the attention of INS officials are being acted upon to prevent recurrence in future procurements. Formal reports from GAO and the Department of Justice are not anticipated until such reviews are complete.

The Department of Justice has never taken procurement powers from INS. However, the Department is conducted a detailed review of all proposed INS contracts exceeding $10,000.

ADDITIONAL QUESTIONS FROM SENATOR DeCONCINI

1. Attach a copy of the August 27, 1979 reprogramming notification to the Department.

Reprogramming No. 3, dated July 23, 1979, is attached. There was no reprogramming request of August 27, 1979 submitted to the Department.

2. What is the distribution of the 86 workyears by land ports and air ports?

The Inspection Program was authorized a funding increase of $2.2 million which equates to 86 workyears. The effect of the additional money will be to reduce the vacancy rate for existing positions. The additional funds will be used to fill vacancies which exist at the beginning of FY 1981. The precise vacancy pattern which might exist at that time cannot be predicted now. Therefore, a detailed distribution of the additional funds on a port by port basis cannot be made.

3. What is the impact of the visa waiver and one-stop inspection process on both foreign and domestic travelers?

Due to the fact that beneficiaries of the proposed visa waiver will not be screened by consular officers prior to arrival in the United States, they will require a thorough inspection at the ports of entry. The waiver of visa would have no effect on domestic passengers since they don't require inspection by the federal inspection services.

One-stop inspection is now in use at Philadelphia, Pennsylvania; Edmonton, Alberta, Canada; and Los Angeles, California. The systems in use at Philadelphia and Edmonton, because of individual attributes, do not provide an adequate basis for estimates of the overall benefits of one-stop inspections. Philadelphia has only one inspection module operating on a one-stop basis and excessive amounts of productive inspection time are lost due to delays in baggage delivery by the airlines. Edmonton, as a pre-clearance station, services arriving passengers and is free from the pressures of passengers leaving airplanes in a compact group. With the opening of Los Angeles in June 1980, a full evaluation of effectiveness, passenger facilitation and cost of the one-stop system will be made. If its anticipated benefits are verified, the system will be extended to other locations.

4. Why is '31 Act overtime going up in the Service?

The increase is attributable to the presence of several factors: the seven percent pay raise of October 1979; the progression of trainee inspectors at GS-5 and GS-7 levels to the journeyman inspector at the GS-9 level; an overall traffic increase of nine percent during the first quarter of FY 1980 and with airport arrivals increasing by 17 percent.

5. Get copy of report of mileage and repair cost of vehicle fleet that is submitted to Congress quarterly.

Subject report is attached.

6. What is the impact of the cuts in investigations?

The Service has taken actions which have reduced the reported staffing level of the specific budget program area for investigations without reducing the availability of investigative resources. Cases from the Status Verification Program were subjected to much tighter controls to assure that only those cases appropriate for investigative action are referred to the Investigations Program. To effect this new procedure and to adjust for its effect on investigative case loads, a number of positions were shifted to Status Verification. In February 1978 the Service established a separate organization for anti-smuggling enforcement. This function, the linchpin in the Service's effort against professional criminal involvement in the traffic and exploitation of aliens entering without inspection, now employs 229 criminal investigators. Administrative, detention and deportation positions formerly reported under the Investigations Program are now reported in other programs.

7. Status report on Iranian students.

The Service has interviewed 56,694 Iranian students since the President ordered the Attorney General, on November 10, 1979, to identify all Iranian students in the United States who were not maintaining lawful student status. This was accomplished by the order of the Attorney General to have Iranian students report to INS within 30 days to prove that they were enrolled as full-time students, in compliance with their visas. Of those, 29,556 Iranian students were interviewed at Service offices, while 27,138 were interviewed at the 1,023 schools that were visited by INS employees.

Of the total number interviewed, 49,366 were found to be in status; 7,680 were found to be deportable, and 970 students are waiting pending adjudication of status. Voluntary departure was granted to 1,194 students, 6,086 Orders to Show Cause were issued and 960 Warrants of Arrest were issued.

At the present time, Nonimmigrant Student Eligibility Forms (I-20's and I-538's) are being sent to the district offices. These forms are being used to seek out Iranian students who have failed to register under 8 CFR 214.5, or students whose departure has not been verified. Thus far, over 18,000 forms have been sent to the field.

8. What is the impact of the Southeast Refugee Program in both the Adjudications and Naturalization functions?

The impact for the Adjudications Division began with the passage of Public Law 94-145, effective October 28, 1977. On that date, the Indochinese became eligible for adjustment of status. In order to process these cases effectively, the Service asked for and received a $1.7 million supplemental budget increase for FY 1978, enabling the near completion of all the cases received during that fiscal year, i.e., of the 117,000 cases received, 105,000 were completed. The hours per unit to adjudicate these cases were substantially lower than normal because of the positive contribution of voluntary agencies. The 1979 INS receipts dropped to 19,000 and completions were 26,000. Only 2,700 cases were pending at the end of January 1980. The adjustment of status completions since the beginning of the program have been 133,000. INS also completed about 33,000 visa petitions for Indochinese who filed immediately after adjustment and other related work such as Refugee Travel Documents and replacement Alien Registration Receipt Cards.

"Regular" receipts of naturalization applications are expected to remain at, or exceed, the 250,000 level in FY 1980. Beginning in May 1980, thousands of additional applications are expected to be submitted by Southeast Asian persons who will be eligible for naturalization. The bulk of these will be from those in the age group 18-50 years. This added workload implies greater backlogs, especially in those areas with heavy concentration of Indochinese - California, Texas, Louisiana and Virginia/District of Columbia. Prior budget requests to deal with this problem have been without success.

The best hope for the program rests in the passage of the "efficiency legislation" package now pending before Congress (H.R. 5087 and S. 1763, almost identical in content). Enactment will allow a 30 percent increase in productivity with no additional resources.

9. What is the cost of all details to Southeast Asia?

The FY 1979 cost was $230,000 which was fully reimbursed by the Department of State.

10. What happened to 40 positions that were authorized by Congress in FY 1979 and how are these positions being used; have they been filled?

Of the 40 new positions that were approved for the Overseas Program in the initial FY 1980 Budget Amendment for Refugee Processing, 18 have been filled: 11 overseas positions of which 7 are foreign service local hires and 7 positions in the Central Office. The remaining 22 positions which are now vacant are expected to be filled.

11. What is the status of the meeting the Commissioner had with the Preyer Committee?

The "hold" remains in effect. Its terms require INS to reevaluate current automation efforts and place these efforts in the perspective of total INS automation requirements. Field automation for the Integrated Case Control System (ICCS) has been deferred pending the results of these evaluations and plans.

A major Servicewide planning effort with primary emphasis on automation is now underway. It will provide for an orderly and comprehensive approach for the Service's acquisition, implementation and use of automation technology on both a near-term and long-range basis. Its initial tasks include the development of a mission plan, an information requirements study and a systems design study.

The Government Operations Committee is aware of this effort and expected to review its progress in September 1980. The Service will make no proposal concerning the "hold" before that time.

12. Give us assessment of all automation programs for the Service.

Extend the Master Index and Remote Access System to additional files control offices, border patrol sector headquarters, and selected ports of entry. Master Index is a centralized system that contains personal identifying data, A-file location data, and selected status information. It aids investigations in finding files not located in their office, is used to answer inquiries and to produce statistics.

Develop field automation. The initial effort was the Integrated Case Control System. The prototype was in Houston and extended to four interim systems in Boston, Newark, Washington, DC and Los Angeles. These systems are running application and petition tracking systems, inter-office A-file tracking system, deportation docket control (in Houston only) and Iranian Student Control System (in Houston and Washington, DC). The system in Los Angeles is used only for application and petition tracking in the Naturalization Section primarily because the equipment is too small for the office.

The next step in field automation was to procure equipment for all files control offices. This effort was placed on "hold" by the House Government Information and Individual Rights Subcommittee.

Develop a long range ADP plan. The long range plan, now being developed, will address the re-design and implementation of all existing systems. It will establish a firm foundation upon which all ADP resources will be used, whether presently existing in individual form or planned to meet future requirements.

Expand the Financial Management Information Systems (FMIS). FMIS will be expanded to include fleet, property and facility management. The Position Accounting and Control System (PACS) and Financial Accounting and Control System (FACS) modules of FMIS have been automated. These systems feature a central data base with remote access for inquiry and updating. The property, fleet, facility and procurement modules remain to be developed and implemented. These modules must be completed in order to achieve total automation of INS resources management capability.

Improve the Nonimmigrant Docket Control System (NIDC). The INS is currently undertaking a study on nonimmigrant control which will lay the groundwork for the design of a more responsive system to meet government's needs. The study will identify and rank information requirements regarding nonimmigrants and pose an evaluate alternative means of capturing and distributing information on this population. The alternatives posed in this should directly serve the needs of the INS and other government agencies concerned with nonimmigrants.

(a) How is the $2.8 million to be spent for the remainder of the year on automation?

Due to the procurement freeze by the House Subcommittee on Government Information and Individual Rights $3,366,000 was is proposed for reprogramming to purchase vehicles in FY 1980. This is included in Reprogramming Request No. 1 submitted to the Department of Justice on August 1, 1980.

13. What protection, rights, etc., do employees who are "whistle blowers" have in the agency?

Employees of this Service have the same rights and protections under the law as employees in other federal agencies. These rights/protections preclude this Service from taking or failing to take a personnel action with respect to any "whistle blower" because of disclosure of information relating to:

- violation of any law;
- violation of any rule;
- violation of any regulation;
- mismanagement of the Service;
- gross waste of Service funds;
- abuse of authority by Service officials; and
- Service policy or directive which is substantially dangerous to public health or safety.

14. Discuss the impact of the lapse rate on the 495 positions.

In FY 1980, 495 additional border patrol positions were appropriated, all for the immediate border. A 20 percent lapse rate was initially planned. However, due to a program reduction of 160 positions in the FY 1981 Budget Estimate (pending in Congress), it was necessary to revise plans for the current 1980 fiscal year. The revised plan called for the hiring of 291 additional border patrol positions at a 40 percent lapse rate in FY 1980 and full funding in FY 1981. The impact of the combined lapse rate and position reduction is reflected in the apprehension table below:

Deportable Aliens Apprehended

	Initial Plan	Revised Plan	Reduction (proposed)
FY 1980:			
Immediate border	924,000	852,000	72,000
Other Than Border	100,000	93,000	7,000
Total	1,024,000	945,000	79,000
FY 1981:			
Immediate border	1,049,000	963,000	86,000
Other Than Border	108,000	91,000	17,000
Total	1,157,000	1,054,000	103,000

Any lapse rate will directly affect workload accomplishments. The two-fold effect of reducing positons (from 468 to 291) increasing lapse (from 20% to 40%) has caused a decline in projected apprehensions of 79,000 in FY 1980. This effect on apprehensions, however, is significantly understated in FY 1980 because of the 4-month training period required of all new border patrol agents. The full effect of this reduction in manpower can better be seen by noting the difference in apprehensions in FY 1981 (103,000). This analysis assumes that illegal alien activity along our border will continue at the FY 1979 rate.

15. In FY 1980 is there a budget line item for fencing at San Ysidro and El Paso?

No.

(a) How much money is involved and how has that money been used this year?

There is no money appropriated to INS for fencing at San Ysirdo and El Paso.

16. The INS owns Building 300 in New York City and leases two of the six floors.

(a) Where does the lease money go and who pays for the utilities for the building?

The lease monies of $107,920 annually are returned to the U.S. Treasury for inclusion in the general fund. Utilities are split between INS and the lessee on a 50-50 basis and INS pays its own share.

(b) Who is the contractor leasing the building?

Coastal Dry Dock and Repair Corporation, Building 131, Brooklyn Navy Yard, Brooklyn, NY 11205, is leasing the building.

DEPARTMENT OF JUSTICE
STANDARD SCHEDULE OF DISCIPLINARY OFFENSES AND PENALTIES

INSTRUCTIONS

1. This table is intended as a guide to be used in determining appropriate discipline to impose by type of offense committed. The offenses listed are not inclusive of all offenses. Also, the table does not cover discipline required by law. For instance, conviction for violation of 18 U.S.C. 1913, Lobbying with Appropriated Funds, requires removal of the employee so convicted. Chapter 735, Federal Personnel Manual, contains additional statutory and nonstatutory provisions relating to conduct of Federal Government employees. The Department of Justice Standards of Conduct contain further prohibitions.
2. Normally, penalties imposed should be within the range of penalties provided for an offense. In aggravated cases, a penalty outside the range of penalties may be imposed. For example, supervisors, because of their responsibility to demonstrate exemplary behavior, may be subject to a greater penalty than is provided in the range of penalties. When a more severe penalty than provided for in the range of penalties is proposed, the notice of proposed action must provide a reason for proposing a penalty beyond the range of penalties for an offense.
3. Many of the items listed in this schedule combine several offenses in one statement. When constructing a charge, use only those portions of the listed offense that specifically apply.
4. Depending upon the gravity of the offenses, removal proceedings may be instituted against an employee for any four, not necessarily related, infractions in any 24-month period.
5. Where appropriate, consideration may be given to change to lower grade in lieu of removal.
6. Suspension penalties on this schedule refer to calendar days. If the total period of the suspension exceeds 30 calendar days, procedures in FPM Chapter 752.2 (Part 752, Subpart B) apply.
7. Reckoning periods start with the date of the offense.
8. Chapter 3 of order DOJ 1752.1 provides specific requirements for taking disciplinary and adverse actions.
9. Information concerning other offenses for which employees may be disciplined may be found in FPM Chapter 735.
10. Copies of this table must be provided to all employees presently on duty and to those who enter-on-duty and copies MUST be PERMANENTLY posted on bulletin boards, and other appropriate areas, in all Department of Justice installations covered by order DOJ 1752.1.

OFFENSE		DISCIPLINE			
NATURE	EXPLANATION	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE	RECKONING PERIOD
1. Unexcused or unauthorized absence of 8 hours or less.	Unauthorized absence of 8 hours or less; tardiness; leaving the job without permission.	Official reprimand to 1-day suspension.	Official reprimand to 5-day suspension.	Official reprimand to removal.	6 Months
2. Unexcused or unauthorized absence of between 1 and 5 consecutive workdays.	Unauthorized absence of 8 to 40 hours.	Official reprimand to 5-day suspension.	5-day suspension to 15-day suspension.	15-day suspension to removal.	6 Months
3. Excessive unauthorized absence.	Unauthorized absence of more than 5 consecutive workdays.	5-day suspension to removal.	5-day suspension to removal.	15-day suspension to removal.	1 Year
4. Loafing, wasting time, sleeping on the job, or inattention to duty.	Potential danger to safety of persons and/or actual damage to property is a primary consideration in determining severity of the penalty.	Official reprimand to removal.	5-day suspension to removal.	15-day suspension to removal.	1 Year
5. Careless workmanship or negligence resulting in spoilage or waste of materials or delay in work production.		Official reprimand to 5-day suspension.	5-day suspension to 10-day suspension.	10-day suspension to removal.	1 Year
6. Failure or delay in carrying out orders, work assignments, or instructions of superiors.		Official reprimand to 5-day suspension.	5-day suspension to 10-day suspension.	10-day suspension to removal.	1 Year
7. Disobedience to constituted authorities, or refusal to carry out a proper order from any supervisor or other official having responsibility for the work of the employee; insubordination.		Official reprimand to removal.	15-day suspension to removal.	Removal.	2 Years
8. Failure to observe: (1) precautions for personal safety; (2) posted rules; (3) signs; (4) written or oral safety instructions, or failure to use protective clothing and equipment.		Official reprimand to 5-day suspension.	5-day suspension to 10-day suspension.	10-day suspension to removal.	1 Year
9. Unauthorized possession of, use of, loss of, or damage to Government property or the property of others.	(NOTE: 31 U.S.C. Section 638a(c)(2) provides a minimum of 30-day suspension for employee who willfully uses or authorizes the use of any Government-owned or leased motor vehicle or aircraft for other than official purposes.)	Official reprimand to removal.	5-day suspension to removal.	15-day suspension to removal.	1 Year
10. Failure to honor just debts without good cause.	A just financial obligation is one acknowledged by the employee to be valid, reduced to judgement by a court, or imposed by law.	Official reprimand.	Official reprimand.	Official reprimand to removal.	1 Year
11. Gambling or unlawful betting on Government premises.		Official reprimand to 10-day suspension.	10-day suspension to removal.	15-day suspension to removal.	1 Year
12. Promotion of gambling on Government premises.		Official reprimand to removal.	15-day suspension to removal.	Removal.	2 Years

(CONTINUED ON REVERSE)

OFFENSE		DISCIPLINE			
NATURE	EXPLANATION	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE	RECKONING PERIOD
13. Malicious damage to government property or the property of others.		Official reprimand to removal.	15-day suspension to removal.	Removal.	2 Years
14. Endangering the safety of or causing injury to personnel through carelessness or failure to follow instructions.		Official reprimand to removal.	15-day suspension to removal.	Removal.	2 Years
15. Theft of Government property or the property of others.		Official reprimand to removal.	15-day suspension to removal.	Removal.	2 Years
16. Conversion of Government funds to personal use.	Includes travel advances, imprest funds, or amounts received as collections.	Official reprimand to removal.	15-day suspension to removal.	Removal.	2 Years
17. Disorderly conduct, fighting, threatening, or attempting to inflict bodily injury to another; engaging in dangerous horseplay.		Official reprimand to removal.	15-day suspension to removal.	Removal.	2 Years
18. Disrespectful conduct; use of insulting, abusive or obscene language to or about others.		Official reprimand to removal.	15-day suspension to removal.	Removal.	2 Years
19. Refusal to cooperate in an official Government inquiry.		Official reprimand to removal.	15-day suspension to removal.	Removal.	2 Years
20. Reporting for duty or being on duty under the influence of intoxicants or other drugs; unauthorized possession of intoxicants or drugs on Government premises.		Official reprimand to removal.	15-day suspension to removal.	15-day suspension to removal.	2 Years
21. Criminal, dishonest, infamous, or notoriously disgraceful conduct.		Official reprimand to removal.	15-day suspension to removal.	Removal.	2 Years
22. Falsification, misstatement, exaggeration or concealment of material fact in connection with employment, promotion, travel voucher, any record, investigation or other proper proceeding.		Official reprimand to removal.	15-day suspension to removal.	Removal.	2 Years
23. Discrimination in official action against an employee or applicant because of race, age, color, religion, sex or national origin, or any reprisal action taken against an employee for filing a discrimination complaint.		Official reprimand to removal.	15-day suspension to removal.	Removal.	2 Years
24. Use of Department of Justice identification to coerce, intimidate or deceive. (Includes credentials, ID card, badges, various letters [illegible].)		Official reprimand to removal.	15-day suspension to removal.	Removal.	2 Years

CO 1433

Charles C. Sava
Associate Commissioner, Enforcement

Richard R. Thut, Acting
Assistant Commissioner, Border Patrol

Border Relations Task Force Report

COBOR review of the recommendations contained on pages 24-29 of the aforementioned report prompts the following observations:

A. Public Relations

1. Currently being done
2. Currently encouraged
3. Any effort of this magnitude should be coordinated thru the Public Information Office and local items of interest, i.e., outstanding monthly accomplishments and unusual apprehensions are presently dessimated by CPA.
4. N/A
5. Current practice at all Border Patrol Sectors.
6. Currently done, however; the truth at a later date generally lacks the sensationalism desired by the media.
7. Currently done on an as-needed basis.

B. Prosecutions

1. Strongly encouraged by this office.
2. Concur. Presently this practice is in effect in Western Region.
3. Currently done.
4. Logical, should be practice if not currently done. Close contact with local U.S. Attorneys insures this is being done.

C. Communications

1. Currently done to the extent possible.
2. COBOR feels this approach impractical and disruptive to operations. Suggest instead that this be accomplished via procedures outlined in C-1.

D. Recruitment and Training

1. Currently being done, project CORE is an example.
2. Currently under study by COPER.

3. COBOR considers the Human Relations training currently offered to be practical and up-to-date.
4. Same as #2
5. Same as #2.
6&7. No serious objection from COBOR, legalities involved should be answered by Management.
8. Currently done.

E. General

Items 1 thru 4 are considered by COBOR to be worthwhile. All are either currently being implemented or explored by both I&NS and the Department of Justice.

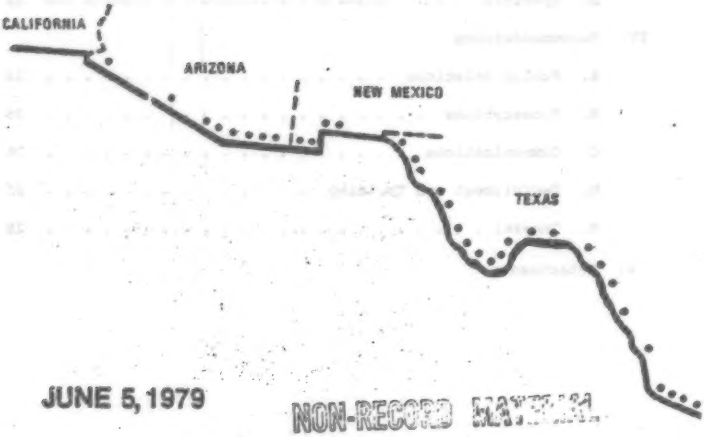
5. N/A

cc:
CO 1433
CO 659-C
Master Log
Commissioner's Reading File

COBOR:LLRichardson:avj 7/9/79

IMMIGRATION AND NATURALIZATION SERVICE

BORDER RELATIONS TASK FORCE REPORT


CALIFORNIA
ARIZONA
NEW MEXICO
TEXAS

JUNE 5, 1979

NON-RECORD MATERIAL

BORDER RELATIONS TASK FORCE REPORT

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ATTACHMENTS

1) Number of Interviews Conducted
2) Typical News Stories on Immigration and Alien Topics
3) News Story Reporting Discovery of Group of Smugglers Responsible for Death of Potential Entrants
4) Questions Posed by Mexican Consul
5) Forms Designed by Mexican Consul and Furnished Apprehended Aliens in Tucson, Arizona
6) Sign Posted at Pedestrian and Vehicular Lanes at El Paso, Texas Port of Entry
7) News Article from Hermosillo, Sonora Reporting Presentation of Award to Mexican Official by United States Officials
8) San Diego Union News Story on Border Patrol Wives
9) Juarez, Chihuahua News Story on Torture of Two Theft Suspects
10) Excerpt from 1978 Annual Report of the United States Attorney, Southern District of California
11) Photograph - Border Fence and Flood Control Levees West of San Ysidro, California Port of Entry

best copy available

BORDER RELATIONS TASK FORCE REPORT

I. Introduction

In response to reports of poor border relations between the United States and Mexico, the Attorney General requested the Commissioner of Immigration and Naturalization to make a survey of relations along the United States-Mexico border. Commissioner Castillo appointed a task force of four members to interview persons to get their opinions on the current state of border relations.

Included in the 353 persons interviewed were elected officials at the state and local level, local law enforcement officers, federal officials (U.S. Attorneys, U.S. Magistrates, and representatives of the FBI, DEA, and Customs), Mexican Consuls, Mexican officials in adjacent border areas, and Immigration and Naturalization Service employees. Attachment - 1

All major Ports of Entry, Border Patrol Sector offices, and District Director's offices, commencing at Brownsville, Texas and terminating at San Diego, California together with offices of other named persons, both in Mexico and the United States were visited.

To facilitate discussion and to coordinate responses, a set of broad open-ended questions was developed for use during the interviews.

II. Summary of Findings

A. General

- A large majority of the persons interviewed felt relations with the general public, U.S. and Mexican officials are as good or better than they were two years ago. However, at El Paso, Texas San Luis, Arizona, Calexico and Chula Vista, California there are problems which need attention by both the Mexican and United States Governments.

- A growing sense of pride and nationalism by Mexican nationals was noted along the entire border. Service officers need to be aware of this growing feeling and be prepared to react to it properly.
- Persons contacted outside the Service were unanimous in their opinion that Service employees are overwhelmed by number of aliens causing frustrations that contribute to incidents. Most stated that they are amazed that a far greater number of incidents do not occur.
- General feeling by Service supervisors and journeymen and many elected officials that the United States Government as a whole does not want to control the border. They feel it is for that reason sufficient resources have not been made available to provide control.
- Young border residents in the United States and Mexico are much more militant, aggressive, and defiant that they were two to three years ago. This group precipitates or is involved in almost all incidents.

pages tightly bound

- Border residents who have violated the immigration laws and been apprehended frequently know procedures and the limitations on actions which can be taken. They therefore become more aggressive.

- There is a need for more effective action by police departments in Tijuana, Mexicali, and Juarez to eliminate gangs of hoodlums who rob illegals and harass Border Patrol Agents by rock throwing. These mostly juveniles, are not true illegal entrants themselves, but residents of Mexican border areas. This problem will increase when construction of fence starts. Improved means of communication between Border Patrol dispatchers and adjacent police departments needed.

- A need exists for a more effective coordinated joint program to control the increased influx of other than Mexican aliens. Our statistics show a larger percentage of these aliens are of the criminal type.

- A more effective coordinated effort to control smuggling of all aliens, with emphasis on apprehension and prosecution of smugglers, both in United States and Mexico is needed. Ambassador at Large, Benjamin Arredondo Perez, who completed a survey of the problem along the border in April is particularly concerned and anxious to take action.

- Local officials and chambers of commerce in both United States and Mexico are critical of the time required to obtain local crossing card (Form I-186).

- INS matters and incidents now receive more attention and publicity by news media and organized groups on both sides of borders. Attachment - 2

- More district directors and chief patrol agents need to be personally acquainted with local Mexican officials and Mexican consuls.

- There is a general feeling that the Service should respond to untrue allegations in news media by special interest groups.

- Many field officers feel that when an incident occurs they do not receive backing from the Service or the Department of Justice, particularly when, under regulations, the accused officer must obtain counsel at his expense where there is a question of whether the officer may have exceeded his authority.

- A large number of officers feel there is a lack of prosecution of smugglers and other immigration law violators. A great deal of frustration was expressed over having to process smuggling cases only to have prosecution declined.

- United States officials a d Mexican consular officers recognize the problem of holding material witnesses in alien smuggling cases. Both are particularly concerned over this problem. The greatest problem exists in California and Arizona where a decision by Ninth Circuit Court of Appeals requires holding of all aliens involved in each case as material witnesses. The United States Attorney, San Diego, is preparing plan to cope with the problem there. Parole of witnesses with concurrence of concerned Mexican consul, in selected cases is being considered.

- There is a need for interior repatriation of apprehended aliens. Local voluntary return increases problems of Mexican border cities and makes illegal reentry almost certain.

- Local law enforcement officers all along the border were concerned over the problem of organized automobile theft rings which specialize in Ford trucks which are taken to Mexico. They are of the opinion this adversely impacts on border relations.

- Inquiry into news reports alleging large number of drownings on the border showed the following statistics relating to the number of drownings of unidentified persons in 1978 and the first four months of 1979:

LOCATION	1978	1979
Cameron County Texas	26	17
Hidalgo County Texas	20	7
Webb County Texas	13*	6*
Maverick & Valverde Counties Texas	47	7
El Paso County Texas	3	-
Imperial County California	50**	-
Yuma County Arizona	5	3

*Total includes unknown number at recreation lake.

**Estimated number per year and includes United States citizens and legal resident aliens.

A news story appeared in the Cd. Reynosa, Tamps., Mexico newspaper, La Tarde, dated May 18, 1979 which indicates organized groups kill potential illegal entrants and throw them in the Rio Grande.

Attachment - 3

- Local law enforcement officials feel that the policy statement issued by the Attorney General regarding the arrest of illegal aliens by police officers fails to take into consideration the problems created by the large numbers of aliens in the border area and the necessity for extremely close relationships required of all law enforcement agencies on the border.

- A majority of the persons interviewed outside INS expressed the opinion that illegal entrants are mistreated by smugglers and border gangs rather than by Service personnel.

- Concern expressed by supervisors and many younger non-supervisory officers about the quality, dedication, and maturity of new appointees, both in the Border Patrol and Inspections.

- Ports of Entry,at El Paso and San Ysidro have a large number of inexperienced inspectors which impacts on inspections.

- El Paso, Chula Vista, and Calexico Border Patrol Stations have the most serious problems and also have the least experienced cadre of officers to cope with the problems.

B. Specifics

1. Positive Actions Which Affirmatively Affect Border Relations

- Mexican consular officers almost unanimous in opinion of no mistreatment of their nationals by INS personnel. A few complaints were heard of discourtesy at ports of entry and problems with state and local officials. At Nogales, Arizona, Lic. Alberto Becerra-Sierra, Consul General of Mexico brought up a number of questions which he feels sure will be agenda items for discussion in future talks between the United States and Mexico. See attachment 4

- A Supervisory Border Patrol Officer uses his own plane to ferry medical supplies, doctors, or nurses to church missions in Mexico and Central America at no cost to the sponsoring group except for gas, oil, and lodging.
- Apprehended aliens are advised by Border Patrol of their right to see a consular officer.
- A Border Patrol Agent on his own time, accompanies burned children to the Shrine Burn Center in Galveston, Texas.
- In Tucson, Arizona Sector, aliens in custody are given a form, furnished by Mexican Consul, which they can use to request the Mexican Consul's assistance in collecting wages due or filing claim for refund of taxes withheld from their salary. Attachment - 5
- Thirty-three (33) illegals, who would have overwise perished, rescued in Yuma desert area by Patrol Agents in 1978.
- At El Paso, Texas signs are posted in Spanish and English stating "Welcome, your declarations concerning citizenship

and customs are taken seriously. Please no jokes. Thank you." Attachment - 6.

- At San Ysidro, California when an infant needing incubator care is to be admitted, the United States hospital's incubator is "charged" in the Immigration office while waiting the arrival of the child.
- At Nogales, Arizona, United States officials awarded a plaque to the Chief of Mexican Immigration at Nogales, Sonora in recognition of his invaluable contribution to the good working relations.now existing in that area between the two countries. Attachment - 7
- At El Paso, Texas an elderly man was pushed into the river after being robbed by a border bandit gang, was rescued from drowning by a Border Patrol Agent.
- At El Centro, California a female alien from Central America was apprehended after being smuggled, reported she had become separated from her small son while still in Mexico. United States and Mexican officers working together helped her locate the child in Mexicali.
- It is the policy of the Immigration and Naturalization Service to avoid separating families.
- A Border Patrol Sector pilot located a vehicle in desert and directed a patrol car to it. Officers found a four-month old infant in front seat who would have not survived but a few more hours. Parents of the child were found murdered in the trunk of car.

- At McAllen, Texas a shipment of garbage trucks which had been purchased by the City of Tampico were denied entry into Mexico by Mexican Customs regulations - McAllen Mayor, Othal Brand, suggested sale to City of McAllen for one dollar and donation by McAllen to Tampico thereby making them eligible for entry.

- At Calexico, California when a female Immigration Inspector called an applicant for a Form I-186 to ask why the applicant had not returned to pick up her card, she learned the applicant's small son had been severely burned. The Inspector and her supervisors arranged for the child's admission and transportation to a hospital for treatment.

3. Negative Incidents Which Adversely Affect Border Relations

- Some Immigration Inspectors feel that Customs Inspectors on primary are not as courteous as they should be and as a result, persons sent to Immigration secondary are already upset and agitated and ready to cause an incident.

- The carrying of weapons by Inspectors on primary and secondary at Ports of Entry.

- Death of a woman after she was questioned at the Port of Entry at Progreso, Texas in 1978 and the subsequent demonstrations at that Port.

- Allegations of rape by a Border Patrol Agent at Laredo, Texas.

- Delays in inspection at Ports of Entry and the issuance of Forms I-186.

- Long hours of duty by Immigration Detention Officer bus drivers, particularly at El Centro, create potential for accidents.

- Frequent rock attacks on officers at El Paso, Calexico, and Chula Vista by border gangs.

- The Mexican Consul at Calexico, California mentioned the problem caused by failure of INS to conduct deportation hearings while aliens are serving prison sentences in federal penitentiaries. He said on occasion, aliens must remain at El Centro ten (10) days or two weeks waiting for a hearing because their files are not available. This was reported to happen more frequently with aliens who are incarcerated in Arizona.

- There were numerous comments that early and widespread publicity on the proposed amnesty program caused more aliens to enter and resulted in a more belligerent attitude by many aliens already in the country illegally.

- In the Port of San Luis, Arizona, three problems exist which contribute to poor border relations. As a result of these problems, Border Patrol Anti-Smuggling Agents are not making contacts in Mexico at this time.

- The building which houses the inspection station is totally inadequate, poorly arranged, lacking in space, and was the poorest facility seen on the entire border. Immigration has no space for a public waiting room, no space for interviewing applicants in private, and fingerprinting is done in a hallway barely wide enough for two people to pass. The crowded, makeshift condition not only causes low morale among INS employees, but reflects adversely on our country's public image.

- The Ministerio Publico Federal Lic. Carlos Landeros Buentiempo, San Luis, Sonora (the office which corresponds to our United States Attorney) was intercepted at the Port of Entry with two aliens hidden in the trunk of his automobile. While the case was the result of a drunken spree, and had no commercial smuggling implications, his local crossing privileges were terminated, and have not been restored. Local DEA officers insist that he is of great value to them, and are urging such action. No knowledge of any Mexican Government action is available.

- At San Luis, Sonora, the Officer in Charge, Assistant Officer in Charge, and a former Officer in Charge of Mexican Immigration are involved in taking payoffs from smugglers of aliens to allow them to continue operation. The Officer in Charge is reported to have been arrested by Mexican authorities, and the Assistant Officer in

Charge is being sought. The case was originated by Border Patrol Anti-Smuggling Agents and Investigators of the District Director's office.

- The crowded unclean conditions at Substation 831 of the Chula Vista Station contibute to the anger and frustration of agents working out of that office. The Chief Patrol Agent is negotiating for additional space which, if secured, will replace this Substation.

- The Police Departments in Mexicali and Tijuana do not respond promptly when called to deal with local hoodlum rock throwers who harass Patrol Agnets and create diversions for smugglers.

- At Nogales, Arizona, there is considerable criticism of a Supervisory Immigration Inspector for perceived unreasonableness in dealing with the general public.

- Many Service personnel are critical of newspaper acticles which are not factual. However, an article in the San Diego Union dated May 12, 1979 features statements attributed to Border Patrol wives which are not factual. For example, the husbands of two of the wives have been promoted since January 1, 1979 and there are fallacious statements about policy. Attachment - 8

- Sensational stories about incidents are not limited to United States publications. Attachment - 9

C. Questions and Responses

In addition to the summary of findings in paragraphs II A and B, other information provided by interviewees to the questions developed for the study are summarized below. Other significant individual statements made in connection with each question are included under the heading "comments".

1. Has there been any change in border relations? To what do you attribute the change?

The local Mexican-American communities are becoming more concerned about the alien problem and in some areas are reporting illegals more frequently.

More stolen vehicles are being recovered in Mexico.

Inspections personnel are demonstrating a more patient professional attitude.

Relations have improved as a result of person-to-person contacts with counterparts in United States and Mexico.

Relations between border cities are better than in previous years and there is a freer flow of information.

Many expressed the opinion that relations on the border merely reflect the change in attitude in the United States and Mexico of showing increased disrespect for law.

Comments:

- Service relations are better in the United States because it presents a better image.

- Young aliens vent their frustrations when they are prevented from entering.
- Transient aliens from Juarez or Tijuana traveling across Arizona are more belligerent than those who enter through the desert.
- Handbills are found in possession of aliens advising them of their rights and telling them resist arrest or attempt to escape.
- The rapid growth of Mexican cities puts more pressure on the border.
- The publicity given some incidents seem to sprawn others.

2. In your opinion, has there been a change in the number of incidents/complaints on the border?

It was the concensus of both INS employees and others interviewed that there has been an increase in the number of incidents or complaints due to the dramatic increase in the number of persons contacted or arrested by Service personnel. The greatest majority were of the opinion that percentage-wise the ratio of incidents to the number of contacts is much lower today than in previous years.

3. Where do most incidents or complaints occur?

In Border Patrol Sectors where the Rio Grande forms a physical barrier, interviewees indicated most incidents occur most frequently on highway traffic inspection with transportation check and city patrol next in order. However, in those Sectors where there is no barrier except a fence, practically all incidents occur on the immediate border and consist of rock attacks during many of which the assailants remain in Mexico.

At Ports of Entry most incidents occur on primary inspection. In Investigations activities most occur on area control.

4. Why do incidents or complaints occur?

Many opinions were expressed as to the cause of incidents but there was total agreement on the role played by young, unemployed, gangs of local border residents in practically all incidents. Everyone felt this group is responsible for 80% - 85% of all incidents on the border.

Although a great deal of overtime is worked at ports, there was not a feeling this contributes to incidents.

Comments:

- Slow movement of traffic through Ports of Entry.

- Criminals and other undesirables gravitate to both sides of the border.

- Frustrations of officers due to lack of action against persons who attack officers.

- Lack of immediate on-the-spot supervision of new officers.

- Younger officers, both Patrol and Inspections, are more aggressive.

- Younger officers don't have the training or experience to cope with sensitive situations.

- Quality of new officers doesn't seem as high as previously.

- Border residents, United States and Mexico, are more sensitive to being questioned than interior residents and are more prone to challenge officers' actions and authority.

- Quick escape to Mexico makes hit and run tactics possible.

5. What can be done to minimize incidents or complaints?

There was considerable comment and several recommendations that all applicants for law enforcement positions be psychologically tested as to their suitability for such positions.

Government personnel (both United States and Mexican) and private sector stressed participation by Service personnel in community activities to promote friendship and understanding. Also that the key to effective relations in Mexican areas as well as United States official circles is regular person to person contacts by district and sector supervisors. District Directors and Chief Patrol Agents are so short handed and overburdened with administrative matters that they often cannot devote enough time to these important fields. Some do not realize importance of such personal contacts. One Patrol Agent suggested a series of short interviews or taped television programs highlighting work and problems of journeymen officers - similar to some commercials such as "Mr. Goodwrench", and one used by the United States Department of Agriculture regarding food and fruit which cannot be imported into the United States from Mexico.

Comments:

- Strengthen supervision at all levels.
- Conduct training for supervisors on handling adverse incidents.
- Publicize good work of employees and positive actions.

✓ - Continue stressing cooperation and liaison with Mexican officials.

- Maintain good communications with employees and the public.

✓ - More manpower to stop frustrations now being experienced.

- Make Service personnel aware that not all persons entering the United States want to stay here.

- Devise a plan to combat the problem of the frequent entrant.

- Adopt a procedure to shift applications for admission to another inspector or supervisor when an impasse is reached or it becomes obvious the tension level is becoming unacceptable.

- Make more use of non-lethal weapons such as night stick and mace as a deterrent to physical attacks.

- Provide a more practical Human Relations course in basic, journeymen, and supervisory training programs.

- Encourage Mexico to take action to break up border gangs.

- Exercise care in recognizing spokesmen for community groups.

- Keep on enforcing the law humanely.

6. Would a local bi-national group of consultants be helpful in maintaining good border relations?

General response was negative. Most objections cited possible conflicts of interest by those interested in serving and a lack of understanding of the problems faced in border enforcement programs.

Those who favored such a group did so on the conditions that it be completely objective, a police review board concept be avoided and that it should operate quietly.

Comments:

Such a group would be looked upon as "hatchet men. The team or task force approach such as the present effort could be more positive.

Would be helpful to explain and/or publicize that most incidents are not as serious as reported.

Would be helpful if it were mult-tiered with highest tier representing the four border states and local bi-city groups working on local situations.

7. Would any type of temporary worker program help minimize border incidents?

Most INS personnel favor some type of temporary labor program.

Many border city officials had doubts about the program due to high unemployment in their areas, with the exception that all favored such a program for domestic help such as maids and yard men.

Mexican Consuls were reluctant to express opinions, one stating flatly that he could not due to the question being under discussion by our Governments.

Almost all persons interviewed agreed that such a program would help alleviate the present illegal entry problem.

In the Del Rio and Marfa areas most people were doubtful that ranchers would participate as they do not wish to pay minimum wages. In the irrigated areas, including the Presidio Valley of the Marfa Sector all were highly in favor of the program.

All who favored the program were unanimous in recommending stricter controls, together with recruiting only in interior parts of Mexico and that aliens presently in United States illegally be ineligible while in the United States.

III. Conclusions

A. General

1. Relations between the United States and Mexico along our common border generally are very good with a few areas having specific problems that can be resolved.

2. Many affirmative actions which have a potential effect on border relations receive little publicity.

3. Gangs of young unemployed border residents instigate or are involved in most border incidents. These incidents receive publicity out of proportion to their number.

4. Numerous widespread violations precludes prosecution of most smugglers of aliens and other immigration law violators. See Attachment 10.

5. Most incidents occur where adjacent metropolitan areas in the United States and Mexico are separated by only a fence or an easily crossed river.

6. Institution of a temporary worker program, with stringent controls, to bring alien laborers into United States areas where domestic labor is not available is needed as an integral part of a broad action package which will be required to gain control of the illegal entry problem.

7. Rock attacks on United States officers can be drastically reduced by a stronger and more effective Mexican police patrol on the Mexican side of the border.

8. The number of border incidents will increase until a stronger program to control smuggling and illegal entry is formulated, adopted, and implemented.

9. There is no information to indicate that unidentified persons found in the Rio Grande and All American Canals met death by

other than accidental drowning or possibly as a result of foul play by border gangs who prey on prospective illegal entrants.

B. Specific

1. Relaxed recruiting practices and procedures imposed by the Office of Personnel Management (formerly United States Civil Service Commission) have an adverse effect on the quality of new law enforcement employees.

2. The three locations where a majority of the incidents involving Patrol Agents are at El Paso, Calexico, and Chula Vista. Factors which contribute to incidents at these locations are:

   - The three largest cities on the Mexican side of the border are adjacent to these locations.
   - The largest numbers of smugglers, hoodlums and gangs who prey on illegal entrants are concentrated in these cities.
   - Large numbers of illegal entrants cross the border repeatedly at these locations.
   - These stations have high percentages of inexperienced officers, with the length of service for nonsupervisory officers averaging less than three years at each station.
   - Journeymen officers transfer out of these stations as soon as possible leaving the more inexperienced officers to train probationary officers.

— Morale at these stations is lower than it should be as a result of frustrations caused by the large numbers of apprehensions made daily frequently while being attacked by rocks.

3. The large numbers of smuggling violations and aliens apprehended coupled with publicity about the fence, budget cuts and similar subjects cause many persons to believe the Government does not really want to control the border.

4. There is a demonstrated lack of knowledge, understanding, and acceptance of policies and procedures particularly with respect to the deportation and/or prosecution of smugglers, flagrant violators, and persons who physically attacked officers. This may be due to a lack of communication caused by the overwhelming workload at all offices.

5. All Ports of Entry either have contingency plans to cope with civil disorder or are in the process of developing and writing them.

6. The large numbers of persons contacted and the volume of business conducted daily at Ports of Entry and along the border will inevitably result in a certain amount of friction and disagreement. Those who perform the difficult tasks under trying conditions on a daily basis are to be congratulated for the job they are doing.

7. West of the Port of Entry at San Ysidro, California the international fence is within 30 to 100 feet of the new flood control levee and cannot be seen from the United States side of the border except from the top of the levees nearest the border or the area between the levee and the fence. This encourages cutting of the fence and attacks against United States officers either from Mexico or the top of the levee. Ten trails from the fence to the levee are clearly visible in the photograph of the area which is attached as attachment 11.

IV. Recommendations

A. Public Relations

1. All District Directors and Chief Patrol Agents having offices on or near the border should make sure they are personally acquainted with and, where appropriate, jointly meet frequently with the heads of Mexican federal, state, and local offices.

   Officers in Charge and Patrol Agents in Charge should be personally acquainted with and meet frequently with their Mexican counterparts.

2. Heads of INS offices, including Officers in Charge and Patrol Agents in Charge, where appropriate, should personally participate in local civic clubs (Rotary, Kiwanis, Lions,

etc.), chambers of commerce especially where they have a group which meets regularly with its Mexican counterpart such as is done in El Paso and other community organizations.

3. Prepare a series of short radio and TV programs or announcements of interest for local broadcast presenting local Service actions and problems as appropriate. The Officer in Charge at San Luis, Arizona made a series of such tapes in English and Spanish which were broadcast locally and were well received by the public.

4. Reassess the policy of wearing sidearms at Ports of Entry. If it is determined to continue the present policy, establish stricter controls over types of weapons and holsters, qualifications, and where weapons may be worn.

5. Assure that each district and sector has one officer responsible for maintaining continuing active liaison with all local United States and Mexican news media, and for furnishing them information, as appropriate.

6. When derogatory allegations against the Service or an employee are printed or broadcast and the investigation proves the allegation to be unfounded every effort should be made to have the true facts publicized in the same media.

7. Establish a policy where District Directors and Chief Patrol Agents arrange quarterly meetings with leaders in the various

communities in their area of jurisdiction to provide for better communications and exchange of ideas.

B. Prosecutions

1. Request the Attorney General to include as a priority item training for United States Attorneys on prosecution of immigration law violators.

2. Reestablish the practice of rotating Patrol Agents through the prosecution office to give them training and experience in the total enforcement effort.

3. Conduct frequent briefings to discuss criteria for prosecutions and to explain changes as they occur.

4. Make an early determination whether a particular case will be prosecuted and reduce the processing procedure to a minimum.

C. Communications

1. At all district and sector offices require supervisors to conduct regular and frequent briefings for all employees to present factual information about policy and such matters as personnel, budget, court decisions, news stories, and other matters of interest.

2. Representatives of each Central Office Division, accompanied by a Regional representative, should meet annually with all

employees of that program at each office to discuss items of interest. It is recognized that at large offices it will be necessary to hold several small meetings to avoid disrupting operations and to enable all employees to attend.

D. Recruitment and Training

1. Review all entry level training at Glynco to assure that it is practical and meets Service needs.

2. Conduct a training program for officers who interview applicants for positions in Border Patrol, Investigations, and Inspections.

3. Conduct special review of Human Relations training at Glynco to make it less theoretical and more practical for Service purposes.

4. Explore again the possibility of psychological testing for law enforcement applicants prior to initial interview or during the first year of employment.

5. Show the Office of Personnel Management the problems caused by current standards and recruitment procedures and request raising of standards.

6. Designate the Chula Vista, El Paso, and Calexico Border Patrol Stations and the El Paso and San Ysidro Ports of Entry as special training stations.

7. Establish exceptions to the merit promotion and reassignment plan at these special training stations to provide a realistic ratio of journeymen to trainee officers and improved training of newer officers such as:

   - Reassign or isolate from trainees the present journeyman officers who do not demonstrate the desired ability to provide on-the-job training for new officers.
   - Fill journeymen vacancies with selected specially qualified officers.
   - Provide inducement to qualified journeymen by offering a limited tour of duty, choice of stations after completing their initial tour of duty, and additional points on promotion scores for having performed special training duties.

8. Conduct monthly orientations on current policy, procedures, and practices explaining recent changes.

E. General

1. Enter into agreement with the Government of Mexico to take affirmative continuing police action in Mexico to stop attacks on United States officers from Mexico and to arrest those who engage in hit and run tactics in the United States then return to Mexico.

2. Request the Government fo Mexico to participate in developing a viable material witness program.

3. Urge the Attorney General to move quikcly in developing the criteria needed in order to prepare a case to test the material witness rule established by the Ninth Circuit Court of Appeals in the case of the United States v. Mendez-Rodriquez.

4. Devote all resources necessary to assist the United States Attorneys in Arizona and California to develop a strong case to test the material witness rule.

5. Adopt a policy of posting signs at all Ports of Entry similar to the ones now posted at El Paso, Texas. See attachment 6. Consideration should be given to adding the phrase, "you are now entering the United States" after the word "Welcome".

ATTACHMENT 1

BORDER RELATIONS TASK FORCE INTERVIEWS

BROWNSVILLE TO SAN YSIDRO

BORDER PATROL SECTORS	
Sector Chief and Staff	37
ASU and Intelligence	17
Supervisors	38
Non-Supervisors	48
DISTRICTS	
District Director and Staff	11
Service Processing Center	4
OIC	16
Supervisors	19
Non-Supervisors	33
REGIONAL OFFICE PERSONNEL	21
FEDERAL	
American Consul	1
U.S. Attorney	5
DEA	5
FBI	7
District Director, Customs	3
Customs Port Director	8
Director, Customs Patrol	2
U.S. Magistrate	6
OTHER	
Mexican Consul	15
Mayor	3
Chief, Mexican Immigration	2
City Manager	2
City Council	1
Chamber of Commerce	21
Chief of Police	10
Sheriff	9
County Judge	1
County Attorney	1
Inter-City Group	1
California Attorney General's Narcotics Task Force	2
Private Citizen	3
Foreman, San Diego County Grand Jury	1
TOTAL	353

ATTACHMENT 2

Los "Greasers"

Oposición 8-14 Feb 79
Mexican Communist Party

Despreciados y superexplotados

Se calcula que son entre 6 y 8 millones los trabajadores mexicanos indocumentados que se encuentran en los Estados Unidos, indefensos frente a los abusos de los patrones y sometidos a una intensa superexplotación.

Sus condiciones de vida son lamentables. En la mayoría de los casos, familias enteras viven en galerones de madera carentes de los más elementales servicios. Se trata de verdaderos campos de concentración ubicados dentro de los ranchos agrícolas.

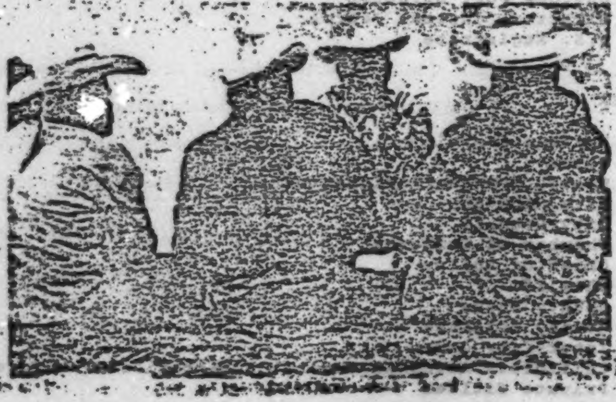
A los trabajadores no se les permite abandonar sus "moradas" y al final de la jornada el patrón descuenta la renta, la comida y todos los artículos de consumo de los cuales les provee haciendo funcionar así una verdadera tienda de raya.

Su jornada de trabajo es hasta de 12 y 14 horas y a cambio de ellas se pagan salarios que están muy por debajo del nivel mínimo de subsistencia. Tampoco cuentan los indocumentados con seguridad social ni con prestación social alguna. Estos trabajadores se encuentran indefensos frente a la amenaza de la "migra", que en cualquier momento puede detenerlos y deportarlos. Muchas veces es el mismo patrón quien, una vez terminada la época de la cosecha, entrega a los trabajadores a las autoridades para que sean deportados.

El problema de la emigración de los trabajadores mexicanos hacia los Estados Unidos se origina en la miseria y en la opresión que vive el pueblo mexicano, gracias a una estructura económica que sólo beneficia a una pequeña minoría del país y a los grandes consorcios monopolistas extranjeros.

La situación de los trabajadores indocumentados no ha sido comprendida a fondo en nuestro país. Muchas veces se ha considerado a estos trabajadores como extranjeros, sin reflexionar sobre lo difícil de su situación y sobre las razones de su emigración.

Hoy es necesario buscar el más amplio consenso para luchar por las reivindicaciones de los trabajadores indocumentados y por abolir la superexplotación y la discriminación social y laboral de la que son víctimas. Es necesario propugnar por su organización y por el establecimiento de un sólido vínculo entre ellos y los trabajadores que laboran dentro del país, pues ambos son víctimas de la misma explotación.



Oposición E.-14 Feb 79

Mexican Communist Party

El problema de la frontera, nudo de contradicciones

Por José Luis PEREZ CANCHOLA

Las maquiladoras empezaron a brotar como hongos. Al finalizar 1966 había en Baja California Norte 4 de estas empresas que ocupaban 266 trabajadores. Ocho años después había 200 plantas con un total de 26 mil 378 personas ocupadas.

Pero las maquiladoras no mantuvieron su auge inicial. Según cifras correspondientes a junio de 1978, estas empresas ocupaban en el estado un total de 16 mil 641 trabajadores, o sea, que de diciembre de 1974 a junio de 1978, fueron despedidos cerca de diez mil trabajadores de maquila.

¿A qué se debió este descenso en el número de obreros ocupados en maquiladoras? La historia se había repetido. El hecho es que para 1974 estas empresas contaban ya con 10 años de estar funcionando. Habían creado una concentración obrera con cierta estabilidad, que empezaba a buscar mejores condiciones de salario y de trabajo. La necesidad de la organización era evidente. Los movimientos de huelgas durante 1975 eran el pan de cada día y las demandas principales de los trabajadores eran el derecho a la sindicalización y el aumento general de salarios.

Y los inversionistas de la industria maquiladora reaccionaron de la misma manera que aquellos grandes rancheros de California en 1964: arrojaron a la calle a miles de trabajadores, en su mayoría mujeres con infinidad de padecimientos profesionales.

Para Baja California tanto el Programa de Braceros como las maquiladoras han sido potentes focos de atracción que han provocado fuertes corrientes migratorias. Esto, aunado a las grandes deportaciones que realizan las autoridades de migración de Estados Unidos, provoca como consecuencia una concentración insospechada de grandes masas marginadas. Solamente Tijuana recibe cada mes un promedio de 50 mil nuevos habitantes provenientes tanto del sur del país, como de las expulsiones del estado de California.

Baja California ya no es la ventana de México, sino la síntesis de las contradicciones del capitalismo: un 40 por ciento de su población es originaria de otros estados, ausencia total de desarrollo industrial y la reproducción de miseria social es ahí asombrosa.

Pero mientras esto sucede, el gobierno del estado mantiene una calma franciscana y un notorio desinterés en la búsqueda de posibles soluciones a la creciente concentración de población en el estado. Lo que ha hecho el actual gobernador es ofrecer tierras de cultivo a los agricultores de California, con el argumento de combatir el desempleo y abrir mercados para el estado. Pero en el fondo se les está ofreciendo a los rancheros yanquis un recurso para debilitar al movimiento sindical del destacado líder chicano César Chávez. Y más recientemente se ha hablado de la inversión de capitales cien por ciento extranjeros con el pretexto de atraer inversiones para dar el despegue de una nueva era de prosperidad para Baja California.

La crisis de desempleo que hay en el estado no se resolverá con maquiladoras ni con la explotación agrícola por parte de empresas extranjeras. La concentración de desempleados en esta frontera es un defecto de estructura que habrá de continuar por muchos años más, tomando la forma de migración y de deportaciones. La burguesía gobernante no tiene ni puede tener soluciones a este problema.

Otros dos Cadáveres de "Mojados" en Tijuana

Aumenta el Número de Muertes

Fueron Encontrados a 8 Kilómetros de la Línea Divisoria en EU

Por Francisco [illegible], Enviado de EXCELSIOR

TIJUANA, B.C.N., Marzo 25 (EXCELSIOR).—Los cadáveres de dos trabajadores mexicanos indocumentados fueron hallados anoche, a 8 kilómetros de la línea fronteriza, en territorio estadounidense, a escasos siete días de que otros dos mexicanos fueron baleados por agentes del Servicio de Inmigración y Naturalización.

Los trabajadores migratorios descubiertos anoche no presentaban huellas de violencia, según las investigaciones realizadas por la Policía del Condado de San Diego, pero hoy mismo se les practicarán las respectivas autopsias, para determinar las causas de su muerte.

Uno de los victimados, José Luis García, de 42 años, fue encontrado a las 21.40 horas, cerca de unos matorrales a escasos metros de la carretera número 5, a la altura del Dairymart Road.

El hallazgo lo hizo el mexicano-norteamericano Armando Gallego, residente de San Isidro, California, quien avisó a la Patrulla Fronteriza.

Pocos minutos después fue hallado el cadáver de Gilberto Castañeda Flores, sobre el cauce del río Tijuana, a corta distancia de donde fue localizado el cuerpo de José Luis García.

El oficial de la Policía de San Diego, [illegible], informó que el cuerpo de García [illegible] en una laguna que se formó en el río Tijuana a consecuencia de las recientes lluvias y del agua acumulada desde hace dos [illegible] de la presa Abelardo L. Rodríguez.

Este hecho ocurre una semana después de que un patrullero disparó contra Benito Rincón y Efrén Reyes, este último resultó muerto en el Condado de San Isidro, a unos metros de la línea internacional.

El agente policiaco dijo que disparó cuando Efrén Reyes y Benito Rincón intentaron escapar, no obstante estar esposados.

DIARIO DE JUAREZ

Registrado como Correspondencia de Segunda Clase en la Dirección General de Correos, con fecha [illegible] de Septiembre de 1976 bajo el número [illegible]

DIRECTOR GENERAL Osvaldo Rodríguez Borunda

AÑO IV CD. JUAREZ, CHIH., LUNES 26 DE MARZO DE 1979 No. 1,119

Page 6-B THE EL PASO TIMES, Sunday, April 22, 1979

Diplomat says illegal entry like 'cannon loose on deck'

By JESSICA WATSON
Times Staff Writer

A high-ranking career diplomat likens the problem of illegal entry into the United States by Mexicans to that of "a cannon loose on the deck."

"You just never know when it's going to explode, and the problem is going to get worse," said Herbert B. Thompson, who until last September served as the number two envoy assigned to the American Embassy in Mexico City.

Thompson described the illegal alien issue as one that can only be dealt with in a "piecemeal way" because the elements of negotiation "aren't there on either side."

He told a group of students and scholars gathered for a noon lecture Friday at the University of Texas at El Paso that Mexico does not recognize the numbers of its citizens working illegally in the United States as a problem.

But, he said, Mexico does not want its workers to have to leave their country to find work in the United States. "They're very sensitive about it."

At present, there is no consensus in the United States on how to resolve the undocumented worker issue. But trends indicate, the 30-year Foreign Service officer surmised, that Mexican immigration will continue to go "up, up, up" while the capacity of the U.S. economy to provide jobs for the aliens decreases.

"Then, you'll be subject to the mistaken political view that one more Mexican alien means one more job lost in the U.S. And that will lead to consensus. Who knows what will happen? Instead of thinking that it is a serious problem that needs to be thought through, we may slam on the brakes in a way that can be very damaging," Thompson said.

In response to a question from his audience, Thompson dismissed as "balderdash" the idea of a trade-off of illegal aliens for Mexican oil. "That's too simplistic. No American president would ever agree to forget the issue of undocumented workers," he said.

across
the river

Currently winding up a year as diplomat-in-residence at the University of Texas at Austin, Thompson is awaiting reassignment to another position with the Foreign Service.

He worked his way up in the diplomatic corps from his first job in 1949 as consular officer at the American Embassy in Madrid to his most recent post as deputy chief of mission in Mexico City. Along the way, he served as political consul, international relations officer, economics officer and in other positions in Argentina, Panama, Chile, Bolivia and Washington.

Discussing Mexico's oil bonanza and what it means for that nation's economy, Thompson said his guess is that Mexico will increase the government's already substantial role in business.

"The kind of cash flow that oil represents will mean Mexico will have enough capital for a development program. That money comes from the public sector (Pemex, Mexico's national oil company) and will probably mean Mexico will increase the state's participation in the economy," he said.

How Mexico manages its gas and oil resources, he stressed, remains to be seen. "How Mexico will make their own decisions about how to exploit these resources."

Negotiations for the U. S. purchase of Mexican gas broke down last year because of mistakes made by Mexico as well as by the United States, Thompson explained.

"Mexico made some very bad mistakes in connection with those (gas) negotiations. They did what no government does if it is going to be prudent. They announced the conditions of the sale before they got to the table," he said.

To him, Thompson said, it seemed that Mexico made a deal with American gas companies for the gas sale and "acted as if they had never heard of the regulatory powers of U.S. government agencies."

And Mexico bungled, he indicated, by announcing it would build a gas pipeline and sell gas to the United States at a price worked out with the gas companies. The problems began when the regulatory agencies refused approval.

"No government as close to the United States as Mexico is can say they don't know about that (regulatory) role. They just thought we needed the gas more than we apparently did...." the diplomat said.

United States interests are still being served, he added, even if Mexico is currently involved in a program to convert its mainly oil-consuming industrial centers to gas use. When the gas deal with the United States fell through, Mexico began to build an infrastructure of gas lines to pipe gas from its east coast producing areas to industrial centers in the interior of the country.

That conversion means there is more Mexican oil for sale, he suggested. "And, as long as Mexican oil flows into the international market, U.S. interests are served."

LOS ANGELES TIMES

'DEAD MAN' APPEARS AT RITES

5/5/79

ORANGE (AP) - The funeral of Francisco Cantu Robles was under way when he got there.

Robles, 31, was identified as the man killed when his sports car and a tanker truck collided April 24 near Desert Shores in Imperial County.

The victim actually was Juan Manuel Arias Sanchez, 28, a friend who assumed Robles' identity to avoid deportation as an illegal alien, authorities said. For four years, he carried a duplicate set of Robles' identification cards including a driver's license.

Robles' wife was told of his death. She told his employers. No friends or relatives viewed the body because of the massive face injuries.

As the closed casket with Sanchez' body sat in a funeral home, the grieving relatives and friends of Robles were startled to see him stride in last Friday.

The happy greetings gave way to confusion, though. Deputy Coroner Donald Coe said in El Centro that he will demand an investigation.

For one thing, he said that he has learned the woman in the mortuary mourning as Mrs. Robles was really Sanchez' common-law wife.

May 11, 1979

BASE STICKERS USED TO SKIRT CHECKPOINT

Navy Wives Linked To Alien Smuggling

43 aliens found in truck — B-3

By BILL OTT
Staff Writer, The San Diego Union

Navy wives used vehicles with military base stickers to smuggle illegal aliens through Camp Pendleton, skirting the San Clemente border patrol checkpoint, according to testimony in federal court here.

The four women, married to enlisted men, testified at the trial of Juventino Mendoza, who yesterday was convicted of conspiracy to smuggle and harbor illegal aliens.

The jury was told that from 100 to 200 aliens a week allegedly were lodged in the Flamingo Motel in San Ysidro, where Mendoza was manager, at times last summer while awaiting transportation to farm fields.

U.S. District Court Judge Howard B. Turrentine scheduled sentencing for June 18.

During the 3-day trial, Assistant U.S. Attorney David Doyle called the four wives as witnesses. Two of the women were granted immunity from prosecution and two others, their friends, came forward voluntarily to testify.

(Continued on B-4, Col. 1)

Aliens Smuggled Via Base

(Continued from B-1)

Doyle said the ringleader was Guadalupe Dominguez, a Tijuana woman who ran a restaurant just across the border. She pleaded guilty earlier to two felony counts of inducing entry of illegal aliens. Another defendant, Jesus Aguila, also of Tijuana, pleaded guilty to conspiracy to smuggle aliens.

Also involved were two Los Angeles residents. One of them, Dolores Castillo, pleaded guilty to harboring illegal aliens. The other, Fermin Carona, pleaded guilty to conspiracy to smuggle aliens. Dominguez, Aguila, Castillo and Carona are scheduled to be sentenced on Monday.

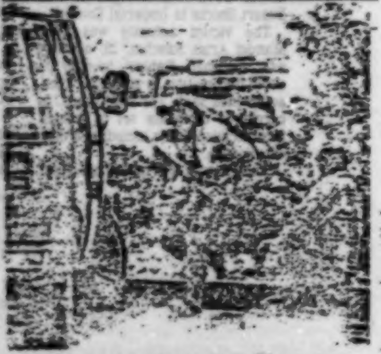
According to evidence, the women were getting $100 per alien transported, and trips usually involved 10 to a van.

Richard G. Sandoval, a criminal investigator with the INS, said in an affidavit for indictment that the women went to the Flamingo Motel, took aliens out of the rooms and placed them in a van.

After leaving the motel, they drove through Camp Pendleton to avoid the Border Patrol checkpoint. The aliens were taken to an apartment on George Street in Los Angeles, where a man named "Fernando" and a woman named "Lois" took charge of the aliens and paid the women.

One of the women stated that from September to November 1978 she transported at least 20 loads of illegal aliens from San Diego to the George Street apartment.

B-4 THE SAN DIEGO UNION (U)



Government surveillance photograph shows an undocumented alien running from a tunnel (behind bushes) toward a van parked in a supermarket lot in San Ysidro. After crossing the border, aliens reportedly were taken to the Flamingo Motel to await transportation to Los Angeles. The route reportedly wound through Camp Pendleton.

THE SAN DIEGO UNION B-3

MARINE DRIVER HELD

43 Aliens Found Jammed Into Truck

By RICHARD HEINLICH
Staff Writer, The San Diego Union

Forty-three undocumented aliens each said they paid $200 for the ride north from San Ysidro.

Piled in a one-ton enclosed rental truck bound for Los Angeles, they made it as far as the Border Patrol checkpoint at San Onofre.

Patrol agents were tipped that such a truck was being used for smuggling and ordered the driver to pull over when it showed up at 6:15 p.m. Wednesday.

Right away, they saw the dripping of human sweat from the rear of the truck, and the driver was asked to open the doors.

"The suspect said he lost the keys to the doors," said John Wesson, the Border Patrol agent in charge, adding that the truck was put on a weighing scale which showed the unventilated truck was not empty, but rather carrying 6,000 pounds.

At that point agents broke open the back door. "It was like a turkish steam bath inside," said Wesson. Inside the cargo area were the 43 aliens, many who were beginning to pass out from lack of oxygen, he added.

"Some of those people would not have made it to L.A.," said Wesson. Small children, women and men were jammed inside. All but two were from Mexico, with the remainder coming from El Salvador, he said. They ranged in age from 4 to 60 years old.

"After the people got some fresh air they recovered and none required hospitalization," said Wesson.

The driver, James Samuel Hamilton, 23, a Marine stationed at Camp Pendleton, was arraigned yesterday in federal court in San Diego on a charge of felony transportation of the aliens. U.S. Magistrate J. Edward Harris ordered Hamilton, who is attached to the 1st Marine Division, held at the downtown Metropolitan Correctional Center in lieu of $3,500 bond pending a trial date hearing next Thursday.

Wesson said Hamilton told authorities he was given $15 by a man in Oceanside to drive the van he thought was empty, to Los Angeles.

The victims are now in a Chula Vista U.S. Border Patrol holding facility waiting for deportation.

ILLEGAL ALIEN TREATMENT STUDIED

SAN DIEGO UNION
5-11-79

Key Mexican Official Visits Here

Mexican Foreign Minister Santiago Roel arrived here yesterday to wind up his tour of the U.S.-Mexico border.

Roel said he was ordered by President Jose Lopez Portillo to travel along the border to study first-hand the situation of undocumented Mexican workers living in the United States.

While here, Roel will be given a guided tour by U.S. Border Patrol officials of the detention center at San Ysidro.

The foreign minister said at a press conference that he will brief Lopez Portillo after he returns to Mexico City today.

The problem of undocumented Mexican workers will be one of the top topics of discussion when Lopez Portillo and President Jimmy Carter meet in Washington, D.C., September 25, said Roel.

During his tour, Roel visited Brownsville, Laredo, El Paso and Los Angeles. He has seen some of the detention camps and been inside federal courts to observe what happens to his countrymen after they are caught by U.S. authorities.

SANTIAGO ROEL
. . . tours border areas

Mexican aliens locked up in the U.S. detention centers are generally well treated, said Roel. "They have good places to sleep. They have medical attention. They have workshops. The kitchens are good," he said. But he added, "There is always room for improvement."

Roel said his government has made the protection of Mexicans living and working in the United States a top priority of the Mexican consulates.

The problem of undocumented workers is a "migration problem," said Roel. It is a "bilateral, economic, geographic, political and psychological problem," he said. "It is a star with a thousand points."

"Mexico is doing all it can to resolve the problem," said Roel. He cited the fact that he was ordered to make the border trip, which he undertook April 30, by Lopez Portillo.

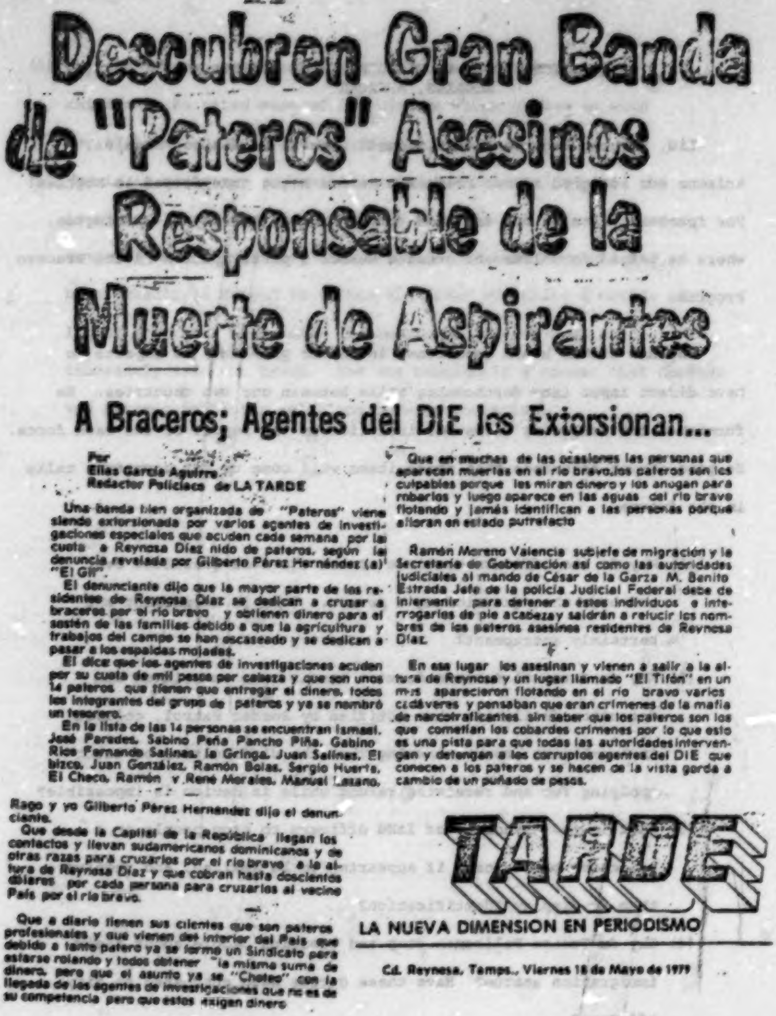
"We are reaching very important conclusions which we will present to President Lopez Portillo," said Roel.

Roel said the border, any border, is by its very nature a problem area. "This is where our skins touch," he said. Roel then named some of the other problems: Pollution and drug trafficking.

Mexican officials are now quickly returning stolen American cars and planes seized in Mexico, said Roel.

— By Alex Dreimier

ATTACHMENT 3



Descubren Gran Banda de "Pateros" Asesinos Responsable de la Muerte de Aspirantes

A Braceros; Agentes del DIE los Extorsionan...

Por
Elías García Aguirre
Redactor Policiaco de LA TARDE

Una banda bien organizada de "Pateros" viene siendo extorsionada por varios agentes de investigaciones especiales que acuden cada semana por la cuota a Reynosa Díaz nido de pateros, según la denuncia revelada por Gilberto Pérez Hernández (a) "El Gil".

El denunciante dijo que la mayor parte de los residentes de Reynosa Díaz se dedican a cruzar a braceros por el rio bravo y obtienen dinero para el sostén de las familias debido a que la agricultura y trabajos del campo se han escaseado y se dedican a pasar a los espaldas mojadas.

El dice que los agentes de investigaciones acuden por su cuota de mil pesos por cabeza y que son unos 14 pateros que tienen que entregar el dinero, todos los integrantes del grupo de pateros y ya se nombró un tesorero.

En la lista de las 14 personas se encuentran Ismael. José Paredes. Sabino Peña Pancho Piña. Gabino Ríos Fernando Salinas. la Gringa. Juan Salinas. El bizco. Juan González. Ramón Bolas. Sergio Huerta. El Checo. Ramón y René Morales. Manuel Lozano. Rago y yo Gilberto Pérez Hernández dijo el denunciante.

Que desde la Capital de la República llegan los contactos y llevan sudamericanos dominicanos y de otras razas para cruzarlos por el rio bravo a la altura de Reynosa Díaz y que cobran hasta doscientos dólares por cada persona para cruzarlos al vecino País por el rio bravo.

Que a diario tienen sus clientes que son pateros profesionales y que vienen del interior del País que debido a tanto patero ya se formo un Sindicato para estarse rolando y todos obtener la misma suma de dinero, pero que el asunto ya se "Choteo" con la llegada de los agentes de investigaciones que no es de su competencia pero que estos exigen dinero.

Que en muchas de las ocasiones las personas que aparecen muertas en el rio bravo,los pateros son los culpables porque les miran dinero y los anugan para robarlos y luego aparece en las aguas del rio bravo flotando y jamás identifican a las personas porque afloran en estado putrefacto

Ramón Moreno Valencia subjefe de migración y la Secretaría de Gobernación así como las autoridades judiciales al mando de César de la Garza M. Benito Estrada Jefe de la policía Judicial Federal debe de intervenir para detener a éstos individuos e interrogarlos de pie acabezay saldrán a relucir los nombres de los pateros asesinos residentes de Reynosa Díaz.

En esa lugar los asesinan y vienen a salir a la altura de Reynosa y un lugar llamado "El Tifón" en un mes aparecieron flotando en el rio bravo varios cadáveres y pensaban que eran crimenes de la mafia de narcotraficantes sin saber que los pateros son los que cometían los cobardes crimenes por lo que esto es una pista para que todas las autoridades intervengan y detengan a los corruptos agentes del DIE que conocen a los pateros y se hacen de la vista gorda a cambio de un puñado de pesos.

TARDE
LA NUEVA DIMENSION EN PERIODISMO

Cd. Reynosa, Tamps., Viernes 18 de Mayo de 1979

ATTACHMENT 4

QUESTIONS POSED BY MEXICAN CONSUL GENERAL, NOGALES, ARIZONA

Lic. Alberto Becerra-Sierra, Consul General of Mexico, Nogales, Arizona was assigned at San Francisco before being transferred to Nogales. For fourteen years he was assigned to the Mexican Embassy in Washington, where he helped formulate and oversee Mexico's participation in the Bracero Program.

Because of his broad experience in border problems, he expects to have direct input into forthcoming talks between our two countries. He furnished the following items for inclusion in the report of the task force. He gave strong assurance that these items will come up for committee talks in the future.

(1) Why do the officers continue to ask the same questions over and over when questioning a person. This is harassment and certainly entrapment?

(2) Why do Internal Revenue Service Agents come to bridges and detention facilities when notified by Border Patrol, collect an exorbitant amount, knowing that the difficulties of later applying for and receiving refund while in Mexico is impossible?

(3) What is the authority of I&NS officers to stop people on a selective basis, only if appearing to be Mexican, and require them to display identification?

(4) Why do Tucson Policemen stop and question people about their immigration status? Have these duties been entrusted to city officers?

(5) Why can't humane treatment be accorded to Mexican women and children? He cited case of Casa Grande woman picked up with her children and held for a long period of time.

(6) Why is it necessary to humilate a woman national of Mexico, who is obviously not a criminal? Cited was a recent case of a woman coming from the interior, well dressed, and a tourist who had been asked by a friend to do him the favor of taking a bottle of liquer for him. When asked if liquor was for her use, she innocently told the truth. She was handled in a manner that damages any attempt at better relations between countries.

ATTACHMENT 5 PAGE 1

CONSULADO DE MEXICO
137 Terrace Ave.
Nogales, Arizona, 85621.

FORMA # 1
SALARIOS

A fin de tramitar cualquier reclamación que tenga contra personas o autoridades en el lugar donde estuvo trabajando o residiendo, se le recomienda proporcionar los datos que siguen, bajo protesta, de decir verdad, utilizando espacio atrás de esta hoja si es necesario.

1.- Su nombre completo y el que usó en Estados Unidos:

____

2.- Lugar y fecha de nacimiento (ranchería, municipio, ciudad y Estado de la República) y papeles de identificación que tenga:

____

____

3.- Nombre, dirección y si es posible teléfono del rancho, compañía o patrón con el que trabajó:

____

4.- Fecha aproximada de entrada y tiempo que trabajó en Estados Unidos:

____

Clase de trabajo que desempeñaba y horas diarias:

____

Salario que le pagaban por hora o por pieza (destajo)__________

Qué trato le daba el patrón o mayordomo:______________

5.- Salario que le quedaron debiendo:______________

6.- Si el recolector de impuestos (Internal Revenue) le recogió dinero cuando estaba detenido por la Migración Americana llene la Forma # 2 y mándela por correo a este Consulado.

7.- Domicilio o dirección en México en donde pueda recibir la posible devolución de sus salarios pendientes:

____

8.- Otros datos que considere conveniente dar (como descuentos que se le hacían por renta de casa o alojamiento, comida, seguro social de Estados Unidos, etc.,)

____

____

____

____
FIRMA (si no sabe firmar ponga la huella de su pulgar derecho.

ATTACHMENT 5 PAGE 2

CONSULADO DE MEXICO
P. O. BOX [illegible]
NOGALES, ARIZ. [illegible]

CUESTIONARIO

FORMA # 2

DINERO REGOCIDO POR
IMPUESTOS

SI USTED NO CONTESTA EXACTAMENTE LAS PREGUNTAS QUE SIGUEN, SE DIFICULTAN LOS TRAMITES- FAVOR DE CONTESTARLAS TODAS CUIDADOSAMENTE, BAJO PROTESTA DE DECIR VERDAD.

NOMBRE COMPLETO________________________________

NOMBRE QUE USO EN LOS ESTADOS UNIDOS________________

DOMICILIO EN DONDE PUEDA RECIBIR LA POSIBLE DEVOLUCION DE SUS FONDOS
____

Si es casado anote el nombre de su esposa y su edad:
Si tiene hijos menores de 18 años anote el nombre y edad:

Esposa______________________________Edad__________

Hijos:______________________________Edad__________

______________________________Edad__________

______________________________Edad__________

______________________________Edad__________

______________________________Edad__________

______________________________Edad__________

Si es soltero y sostiene económicamente a sus padres, siempre que lo pueda comprobar, anote sus nombres y edades y tiempo que tienen radicando a su lado:

Padre__________________________Edad________Tiempo________

Madre__________________________Edad________Tiempo________

Si es soltero, pero sostiene a sus hermanos menores de 18 años de edad anote sus nombres y edades:

1.-__________________Edad____ 2.-__________________Edad__

3.-__________________Edad____ 4.-__________________Edad__

NOMBRE Y DIRECCION DEL RANCHO O COMPAÑIA DONDE TRABAJO:
____

Que clase de trabajo desempeñaba________________________

De que fecha a que fecha trabajó en los Estados Unidos____________
____

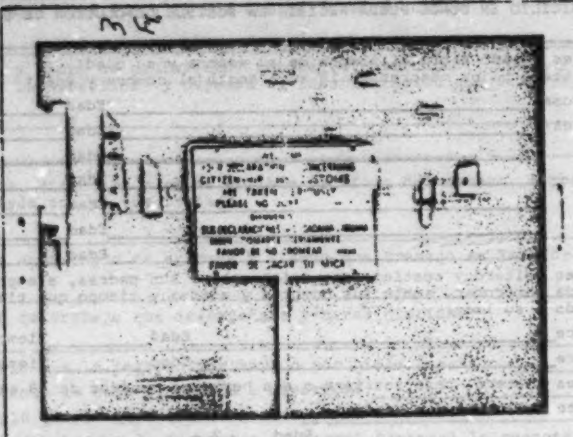
Fecha de salida__________________Sueldo Total Percibido__________

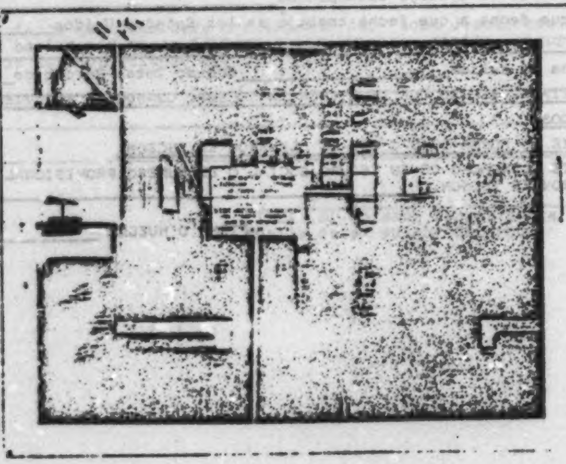
REMITA EL RECIBO QUE LE DIERON EN TUCSON, CUANDO LE RETUVIERON SUS — FONDOS.

ENVIE LA FORMA 1040 C QUE LE LLENARON EN TUCSON.

ANOTE EL NUMERO DE SU SEGURO SOCIAL O EL NUMERO PROVISIONAL QUE LE - DIERON EN TUCSON.______________________________

FIRMA O HUELLA ________________


3 K
CUSTOMS
PLEASE
FAVOR DE NO FUMAR
FAVOR DE SACAR SU MICA



ATTACHMENT 7 PAGE 1

EL IMPARCIAL
DIARIO INDEPENDIENTE DE SONORA
Fundado [illegible] Empresa [illegible]
[illegible]
Número 14,242, Hermosillo, Sonora. Lunes 20 de Noviembre de 1978 [illegible]

Reconocimiento al Delegado de Servicios Migratorios de Nogales

Por Luis Ordaño

NOGALES, Arizona. (PH).- El jefe de la Border Patrol en el Estado de Arizona, Herbert E. Walsh y el jefe del Departamento de Inmigración y Naturalización de Estados Unidos en Nogales Arizona, Charles Walter, hicieron entrega ayer de un testimonio de reconocimiento al delegado de los Servicios Migratorios de Nogales, Sonora, señor Conrado Batiz Cassani.

El reconocimiento entregado al señor Batiz Cassani, obedece a la excelente labor desarrollada en la detectación de ilegales centro y sudamericanos en la garita fito-sanitaria de Benjamín Hill, Sonora, a casi un año de iniciada la vigilancia, a través de la cual se han capturado más de 3 mil personas.

La ceremonia se desarrolló al mediodía de ayer en el hotel Americana de esta ciudad, estando presentes como invitados los alcaldes de ambos Nogales, mayor Arthur M. Dean y Héctor Monroy Rivera, el cónsul de México en Nogales, Arizona, German Sánchez Trujillo, el tesorero municipal de la vecina ciudad CP Carmelo Salazar Figueroa y otros elementos de la Border Patrol.

Completamente emocionado, el jefe de Migración en Nogales, Sonora, recibió el testimonio de parte del señor Walsh, agradeciendo a la Border Patrol la ceremonia en su honor, indicando que "no solamente es para mí, sino para todo el personal que está a mis órdenes"; agradeció también la ayuda prestada por el municipio de la vecina ciudad, que les facilita la internación de los detenidos en la cárcel municipal mientras son enviados a México.

Reconoció que la labor de vigilancia ha tenido excelentes resultados por las amplias relaciones que guardan los departamentos de Migración de ambos Nogales y el departamento de la Border Patrol.

Previamente a la ceremonia de entrega del testimonio, se sirvió un exquisito buffet entre los asistentes.

NOGALES (PSI).- En reconocimiento a su labor en la detección de ilegales centro y sudamericanos en los últimos meses en su calidad de jefe de la Oficina de Población de Nogales, Sonora, El Sr. Conrado Bátiz Cassel, recibió una placa de manos del jefe de la patrulla fronteriza en Arizona Sr. Herbert Walsh. La ceremonia especial, fue el pasado viernes en el hotel Americana de Nogales, Arizona. (Foto Salvador Martínez).

ATTACHMENT 8

B-2 THE SAN DIEGO UNION Saturday, May 12, 1979

BORDER PATROL WIVES SPEAK OUT

'Thin Green Line' Wavers

By DAVE POLIS
Staff Writer, The San Diego Union

OTAY MESA — "When my husband straps on his gun, he knows it is there for show. If he uses it — well, everything is on the line," the wife of a Border Patrol agent said yesterday.

Marsha DeSonia is one of a group of wives of patrol agents who said they will begin speaking out on the problems of the "thin green line," despite the likelihood of retaliation against their husbands.

"Our husbands cannot speak out, so we are going to," she said.

The prospect of their husbands being passed over for promotions, lost duty assignments and the like is real enough, said Olene O'Dowd.

Frieda Cole, whose husband, Daniel, finds his 30-year career on the line as a result of shooting two illegal aliens last March, said there is no clear policy on illegal aliens from President Carter on down.

Muriel Watson said the public sees the illegal alien in newspapers and on television as a helpless victim of international politics, the prey of smugglers and looting gangs. But Border Patrol agents face increasingly hostile and violent illegal aliens, Watson said.

"Twenty years ago, an attack on a patrol agent was unheard of," she said. "Even 10 years ago, there might be one or two a year. Now we are facing hardened people who have paid their money to get across the border, and by God they are going to do it."

She said the public still has the image of a docile, amiable illegal alien who smiles and shrugs his shoulders when he is discovered.

"The days of the cat-and-mouse game are over," she said. "Now we are having patrol agents attacked almost every night. We're dealing with vicious smugglers with a lot of money on the line, and they will stop at nothing."

The Border Patrol has covered the Jeeps it uses along the border with steel mesh, Cole said, because of frequent sniping attacks and rock and debris throwing.

"They're called war wagons," DeSonia said. "Let's face it, there's a war going on down there."

The patrolmen are "supposed to just stand there and take it," she said. "There is an unwritten rule not to use your gun."

DeSonia said the agents have to keep their shotguns locked in the trunk of their vehicles.

"They're damned if they do, and damned if they don't," said Joyce Chumbley.

Jane Cross said agents must deal with large numbers of illegal aliens without proper backup, with faulty equipment, and this in the face of uncertain support by their superiors whenever a complaint is issued.

Ginger Ward, another of the wives, said the Border Patrol diverted $10 million intended by Congress for enforcement operations for use in planning and other less critical areas.

"That money would have gone a long way toward meeting the needs of the men," she said.

Watson said about 200 patrol agents are assigned to the San Ysidro station, which represents about 3 percent of the border, and annually claims about 43 percent of the illegal aliens apprehended.

She said the Border Patrol "is a thin, green line" that increasingly finds itself the scapegoat in dealing with the illegal alien problem.

"We can accept the dangers, the exposure to disease, the lack of support," Watson said, "but we can't stand the apathy."

— Staff Photo by [illegible]

Wives of Border Patrol officers discuss plans to speak out on the problems their husband face in dealing with illegal aliens. Left to right are Olene O'Dowd, Muriel Watson and Ginger Ward.

Página 1, Cd. Juárez, Chih., Jueves 22 de Abril de [illegible] Sección "A"

Ladrones Fueron Torturados

Dos Oriundos de Parral se Quejan de Golpes

Dos sospechosos de robo, originarios de Parral, Chih., fueron brutalmente golpeados y "chicharroneados" por agentes de los Servicios Especiales de la Inspección de Policía, quienes los dejaron en condiciones lamentables y sin recibir atención médica.

Ellos son Maximino Rivera Morales, de 21 años, y Eduardo Villarreal Cervantes, de 27, quienes ayer se quejaban de agudos dolores en el abdomen, tórax y demás partes del cuerpo.

Al ser entrevistados, dijeron que fueron atormentados por agentes del Servicio Secreto, después de que los detuvo la tripulación de una unidad de radiopatrullas y posteriormente los "interrogaron científicamente".

Según el caso, Maximino y Villarreal, fueron interceptados por la policía a las 13.00 horas de antier, cuando transitaban por la calle Ramón Corona y Malecón.

Estos al ver la unidad policiaca, emprendieron la huida y arrojaron un veliz y una caja de cartón, por lo cual fueron perseguidos y detenidos cuadras adelante.

Cuando los patrulleros regresaron y recogieron el veliz y la caja, encontraron un radio de transistores, un tocadiscos, un par de audífonos, una grabadora, una bocina y un vestido de novia, sin comprobar su procedencia.

Ambos dijeron que acababan de llegar de Parral.

Después que los condujeron a la Cárcel Preventiva, fueron puestos en manos de los agentes del Servicio Secreto, cuyos agentes los atormentaron para que dijeran de dónde procedían los objetos que les decomisaron.

Los presuntos ladrones Eduardo Villarreal y Maximino Rivera, originarios de Parral, Chih., fueron brutalmente atormentados por agentes del Servicio Secreto, para hacerles "cantar". Ambos adolecen de dolores en el tórax y abdómen y apenas pueden sostenerse en pie. No son los primeros detenidos que se quejan del [illegible] de los agentes de la Inspección de

Immigration Violations: Policy Regarding Alien Smuggling

Special mention must be made of the prosecution policies in the Southern District of California relating to illegal alien and immigration violations. As noted above, approximately 400,000 illegal entrants were arrested by Border Patrol and Immigration officials during 1978 in the San Diego region alone. The number of such arrests has increased dramatically over the past several years, far outdistancing the ability of the present law enforcement and prosecutorial resources to cope with the major domestic and international issue. While the federal government continues to look for a workable long-range solution to this perplexing problem, officials along the Mexican border are confronted on a daily basis with the everyday realities of the issue, and must attempt somehow to deal with the many and serious problems presented to law enforcement as a result of widespread violations of federal law.

The sheer numbers of individual illegal aliens arrested obviously precludes prosecution in each and every case. Individual illegal entrants are not prosecuted unless they have an extensive prior record of criminal conduct, or unless they themselves are part of a commercial alien smuggling conspiracy. While such a policy is not without problems, it should be fairly obvious that neither the courts, the United States Attorney, the Border Patrol, nor the prison system could survive an attempt to prosecute each and every illegal entrant. Not only would a contrary policy be futile, but even worse, the effort itself would be so all-consuming that virtually all other federal prosecutorial efforts detailed in this report would be brought to a virtual standstill.

In an attempt to enforce the existing criminal laws relating to illegal immigration against this backdrop, the United States Attorney's Office has developed a prosecution policy that focuses on those who attempt to profit financially from the plight of illegal entrants. This policy emphasizes the prosecution of apparently professional or commercial alien smuggling activities, more specifically, large alien smuggling conspiracies.

Such conspiracies commonly include conspirators who act as arrangers or recruiters in Mexico or other Central American countries whose function it is to "contract" with those desirous of entering the United States illegally to arrange for their entry. Once recruited, and the arrangements for payment and delivery to their final destinations have been made, the aliens are turned over to conspirators whose function it is to guide them across the border illegally, usually in groups of between 10 and 30, or to otherwise attempt to smuggle them into this country. Once successfully across the border, the aliens are transported by other conspirators to "safe" or "drop" houses where the illegal entrants are harbored, frequently under deplorable conditions, by other conspirators until transportation can be arranged for delivery to their ultimate destinations. Cases are common where the aliens are ultimately delivered to Los Angeles, Chicago, New York City, and every major metropolitan and agricultural area of the United States.

Unfortunately, alien smuggling is not monopolized by a few sophisticated or powerful smugglers who can be identified, prosecuted, and jailed--thus eliminating the commercial exploitation of illegal aliens. Rather, it is characterized by an incredible proliferation of smuggling enterprises, some large and some small. It is so lucrative that many smaller operators can succeed alongside the larger, more sophisticated smuggling rings. Therefore, in order to provide something approaching a credible deterrent, this office attempts to prosecute as many smugglers as possible whose activities appear to be commercially motivated. Smaller, less sophisticated operators are frequently allowed to plead to misdemeanor-type violations because of the undue cost and time which felony prosecutions would involve.

One the major obstacles over the past decade preventing the effective prosecution of alien smuggling cases has been the lack of resources available at the investigative level. In the early 1970's, the Chula Vista sector of the Border Patrol created an anti-smuggling unit of 13 agents who specialized in smuggling cases. The various agents who were assigned to that office over the years have been among the best investigators that the U. S. Attorney's Office has had the privilege of working with. Their dedication has been most commendable, especially in view of the frequent lack of support personnel and equipment. Similar cooperation has always been forthcoming from agents assigned to the El Centro office.

But 13 investigators, no matter how dedicated or well-equipped, could not hope to cope with the torrent of cases referred to them for investigation. During the spring of 1978, the U. S. Attorney met with Commissioner Leonel Castillo of the Immigration and Naturalization Service to discuss the issue of how to more effectively investigate and prosecute commercial alien smuggling cases. As a result, eleven new anti-smuggling positions were added to the Chula Vista Border Patrol office and three to the El Centro office. (INS also added three positions to the anti-smuggling unit in the San Diego office.) Although these new positions have helped considerably, the volume of smuggling cases still far exceeds the ability of federal law enforcement officers to deal with effectively.

Death and High Speed Chase Cases

The utter disregard by alien smugglers for the health and safety of the illegal aliens they victimize was a recurrent theme throughout the last year, and led to the adoption of a new prosecution policy meant to deter such callousness. The number of incidents involving high speed chases of smugglers trying to avoid apprehension--some of which ended in accidents resulting in the death or injury of the illegal aliens being transported--and the obvious potential for death or injury to the pursuing officers or innocent third persons, mandated the adoption of a "get-tough" approach. Accordingly, any defendant involved in a high speed vehicular chase, regardless of whether an injury or death actually occurs, and any defendant involved in a case resulting in death or injury to an alien or a third party will be required to plead guilty to the entire indictment or go to trial. In other words, there will be no plea bargaining with such defendants.

Material Witness Problem

Aside from the lack of investigative and prosecutive resources, the most serious obstacle to the effective enforcement of our immigration laws is the decision in United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971). The practical effect of this decision is to require that every single illegal alien being smuggled, transported, or harbored by a defendant must be held in federal custody as a "material witness" until the defendant's attorney has had the opportunity to interview them (which usually takes several weeks), and sometimes until the defendant's trial, which might be two or three months after arrest. The U. S. Attorney's Office has in the past year prosecuted cases involving the use of tractor-trailers to transport 150 illegal aliens at a time; in such cases, all 150 aliens had to be held in custody as material witnesses. Such incarceration obviously results in severe hardships for the witnesses, and places severe restrictions on the ability of the prosecution to properly investigate and prosecute criminal violations. The beneficiary of the dilemma caused by Mendez-Rodriguez is the defendant, who knows that delay works to pressure the prosecution to dismiss, reduce, or compromise the charges brought against the defendant in the interests of incarcerated material witnesses (quite often while the defendant himself is free on bond).

One of the first problems the Criminal Division faced in 1978 was the logistical problem of housing the thousands of material witnesses arrested annually. During Fiscal Year 1978, 2,902 aliens were booked into custody as material witnesses. The Metropolitan Correctional Center located in San Diego, which serves primarily as a pretrial detention facility for federal prisoners, has encountered periodic overcrowding during the last several years, exacerbated by the material witness problem. Particular stresses occur when large single loads of from 50 to 100 aliens are apprehended, and when women and small children are included in a group.

In order to rectify the problem, this office turned to U. S. Marshal James R. Laffoon for his assistance. With his excellent cooperation and leadership, an agreement was reached with the Warden at the Metropolitan Correctional

Center, INS officials who operate an Immigration Service detention facility in El Centro, California (120 miles away), and local INS and Border Patrol officials, which allows for the incarceration of some material witnesses at the El Centro facility when overcrowding occurs at the Metropolitan Correctional Center. Various related aspects of the agreement have resulted in an enormous savings in money and manhours. The cooperation of the federal magistrates, district court judges, defense lawyers, and attorneys appointed to represent the material witnesses has reduced the inconvenience caused by the transfer of the witnesses to El Centro for pretrial detention. (During Fiscal Year 1978, the average number of days in custody per material witness was 20.12 days. This was down from 25.97 days in Fiscal Year 1977.)

Because of current Bureau of Prisons policies, the Metropolitan Correctional Center has had great difficulties dealing with the number of women and small children that are arrested as material witnesses. This office again turned to the U. S. Marshal for his assistance in solving this problem. Efforts are currently in progress to develop a program which will allow women and children to be released from custody to live in a "foster" home in the local community pending the resolution of criminal charges against the defendants.

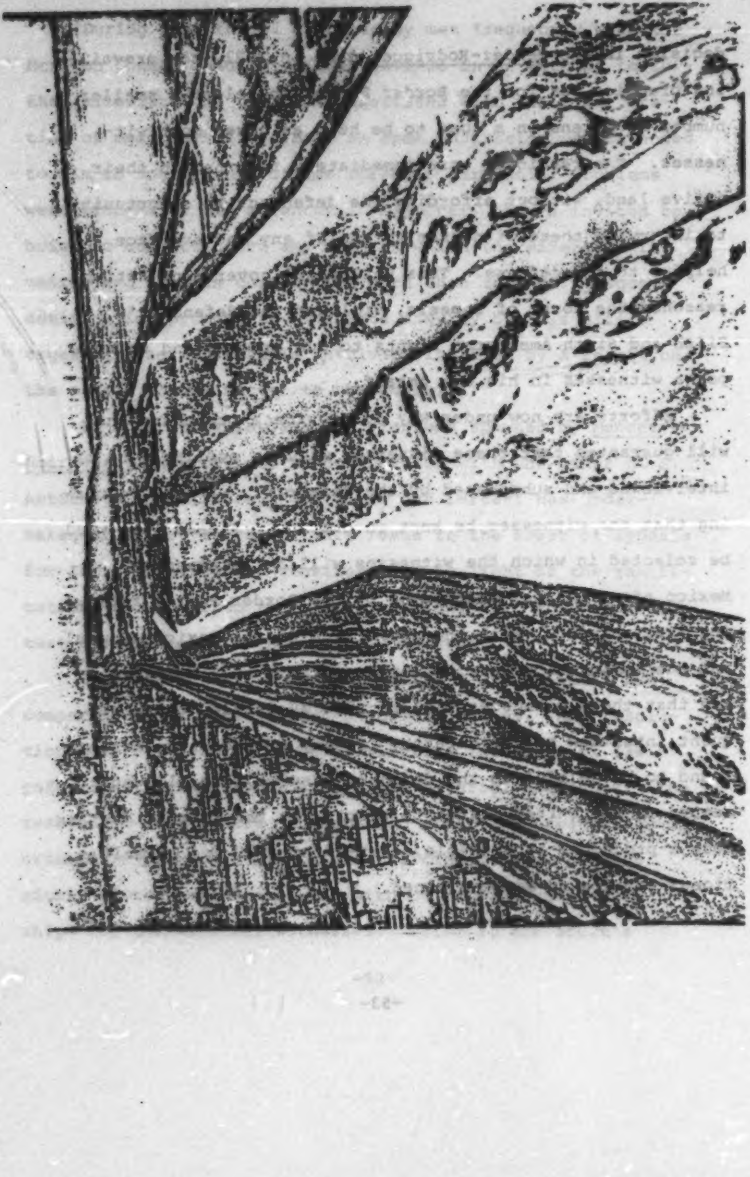
During 1978 the U. S. Attorney met frequently with the Mexican Consul Jesus Rodriguez Navarro in an attempt to further alleviate the problems associated with the incarceration of material witnesses. An open invitation was extended to him to notify this office whenever particular problems were brought to his attention. Moreover, he was invited to bring to our attention any case in which the material witnesses had been in custody for more than 30 days. (Such notification prompts an immediate inquiry by this office regarding the individuals involved, followed by a report on the status of the matter to the Consul.)

In order to alleviate the problems spawned by Mendez-Rodriguez, this office, in conjunction with the other U. S. Attorneys in California and along the border, has undertaken an effort to return this issue to the court of appeals for further review and consideration in light of the ramifications flowing from their decision in 1971. An appropriate test case or cases is now being selected.

Such a test case will necessarily raise critical and competing constitutional and practical issues. Any resolution must balance the often conflicting interests of law enforcement, the defendant, and the material witnesses. The resolution must permit vigorous and effective prosecution of criminal violations, without sacrificing the due process rights of the defendants, and without causing undue hardships for the material witnesses. Prior to the court's decision in the Mendez-Rodriquez case in 1971, the prevailing practice was for the Border Patrol to select a smaller number of aliens in a load to be held as government witnesses. The remainder were immediately returned to their native land, without affording the defendant an opportunity to interview these witnesses to see if any had evidence helpful to the defense. This unilateral government action, reasoned the court of appeals, violated the defendant's Fifth and Sixth Amendment rights to due process and to subpoena witnesses in his own behalf.

Efforts are now under way to provide a procedure that will guarantee that these witnesses will be available to be interviewed and subpoenaed by the defendant, without requiring that the witnesses be kept in custody. A test case will be selected in which the witnesses will be returned to Mexico after initial processing by the Border Patrol following their arrest. With the assistance of the Mexican Consul and the Immigration Service, every attempt will be made to see that these witnesses will be made available for subsequent interview by the defense. If any of the witnesses are found to be helpful to the defense, they will be allowed to return to the United States to testify at the trial. Whether such a procedure is workable, cost-effective, and constitutional remains to be determined.

ATTACHMENT 11



23 JUL 1979

Leonel J. Castillo
Commissioner

CO 1315.10

Reprogramming Request Number Three, Fiscal Year 1979

Kevin D. Rooney
Assistant Attorney General for Administration
Department of Justice

Attached is the I&NS Reprogramming Request Number Three for FY 1979. It requests funding for several specific items as well as some technical adjustments. I believe that these requested reprogrammings do not significantly alter the thrust of the FY 1979 Execution Plan as it was originally conceived. Rather, they identify the need for specific changes in funding for various items that have become apparent since the development of the original plan.

The availability of funds for this reprogramming is chiefly a result of two occurrences: (1) the change in the rate of ADIT card production due to delays in the automating of that procedure; and, (2) the changes in the Administration's policy regarding fencing on the southern border of the United States. In some cases, funds are requested to be reprogrammed into areas from which funds were reprogrammed in the development of the original FY 1979 Execution Plan. As stated conclusively in that request, these reprogrammings were necessary to meet uncontrollable or inflationary increases in funding requirements of ongoing operations. In fact, an analysis of actual expenditures to date confirms the validity of those needs. This issue was raised in the recent Departmental FY 1981 Budget Hearing for I&NS.

The fact that funds may have been moved out of a specific area in the beginning of the fiscal year, and now may be moved back into that area because of the unanticipated availability of funds is neither unusual, nor does it represent a lack of planning.

The effects of this reprogramming are reflected in the latest operating plan for I&NS, which was submitted to the Department this month.

Attachment

PEB:PS:HDM:HWH:jmb:7/19/79

cc: Mr. Andersen
Mr. Nahan
Mr. Kirby
Mr. Pulley
Mr. Furr
Mr. Yost
Mr. Roney
Mr. Diefenbeck
Mr. Murray
Mr. Adams

Honorable Edward M. Kennedy, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is to advise you of several reprogramming actions proposed by the Immigration and Naturalization Service (I&NS) for Fiscal Year 1979. The majority of these proposed actions represent either a realignment of positions and workyears in response to current operational needs, a realignment of positions due to previously approved changes in program structure, or the funding of pressing operational needs. There are no major changes in I&NS program requirements and the original justification remains essentially the same. Most of these reprogrammings are limited to Fiscal Year 1979 funds. A few are permanent and will affect Fiscal Year 1980 levels. These are specifically identified. The proposed actions involve the following:

- Reprogramming of nine positions and $253,000 into the Overseas program to establish an Office of Refugee and Parole, and to establish an I&NS office in Bangkok, Thailand, as approved by the Department of State on December 16, 1978 (wire no. 316812).
- Reprogramming of $296,000 into the Data Systems Program to provide the funds to carry out a portion of the keying of arrival and departure documents received into the Nonimmigrant Document Control (I-94) System as mandated by law.
- Reprogramming of four positions and $41,000 to the Statistics Program to eliminate the backlog in the coding of I-94 documents.
- Reprogramming of $100,000 into the Border Patrol Program to fund the operational costs of helicopters, which will be loaned to I&NS without charge by the U.S. Army; and to replace the Piper aircraft which recently crashed.
- Reprogramming of three positions and $53,000 into Executive Direction and Control to provide for an administrative assistant in each of three large District Offices.

- Reprogramming of fifteen positions into Administrative Services to meet the increasing workload in the personnel services function due to the increase in agency staff levels in the past several years; and to establish a Health and Safety Program.
- Reprogramming of thirteen positions to reflect corrections in coding errors, position reclassification, and to account for several minor adjustments between programs.
- Reprogramming of $390,000 into the Deportation Program for alien travel.
- Reprogramming of $130,000 into the Inspections Program to fund the hiring of Inspectors to meet the increased workload on the Southern Border.
- Reprogramming of $49,000 to the Inspections Program for expenses incurred in automating the Service Lookout Book at Washington, D.C., Nassau and Freeport, Bahamas, ports of entry.
- Reprogramming of $100,000 to the Border Patrol Program to fund increases in recurring GSA charges.
- Reprogramming of $167,000 to the Border Patrol Program to purchase replacement sedans.
- Reprogramming of $108,000 to the Communications Systems Program for enhancement of sensor systems.
- Reprogramming of $200,000 to the Naturalization Program to fund increased printing needs.
- Reprogramming of $304,000 from the ADIT Program to fund the increased needs of automation projects.
- Reprogramming of $297,000 to account for an error in the personnel funding requirements in the Overseas Program.

This reprogramming request is explained more fully in the enclosed information paper. The Department will provide any additional information you may require.

Sincerely,

Kevin D. Rooney
Assistant Attorney General
for Administration

Enclosures

I&NS:COPEB:PS:PDM:MWM:mkv: 7/11/79

THIS LETTER ALSO FORWARDED TO:

Honorable John M. Slack, Chairman
Subcommittee on Departments of State,
Justice, Commerce, The Judiciary
and Related Agencies
Committee on Appropriations
House of Representatives
Washington, D.C. 20515

Honorable Ernest F. Hollings, Chairman
Subcommittee on Departments of State,
Justice, Commerce, The Judiciary
Related Agencies
Committee on Appropriations
United States Senate
Washington, D.C. 20510

Honorable Peter W. Rodino, Jr.
Chairman, Judiciary Committee
House of Representatives
Washington, D.C. 20515

Mr. Franklin D. Raines
Associate Director for
Economics and Government
Office of Management and Budget
Washington, D.C. 20503

cc: Mr. Andersen
Mr. Nahan
Mr. Kirby
Mr. Pulley
Mr. Furr
Mr. Yost
Mr. Roney
Mr. Diefenbeck
Mr. Murray
Mr. Adams

Appropriation:	Salaries and Expenses. Immigration and Naturalization Service
Item:	Creation of the Office of Refugee and Parole and the new I&NS office in Bangkok, Thailand

Fiscal Summary

	Pos.	Amount
1. Reprogrammed from:		
Border Enforcement & Inspections Program	-9	-$253,000
2. Reprogrammed to:		
Service to the Public Overseas	9	+253,000

Description/Justification

This reprogramming would provide the personnel and fiscal resources to establish the Office of Refugee and Parole in the Central Office. It also would provide the resources for the new I&NS office in Bangkok, Thailand as approved by the State Department on December 16, 1978 (wire no. 316812). This reprogramming is permanent.

The establishing of an Office of Refugee and Parole in the Central Office is necessary because of the expansion of the ideological and geographical parameters of refugee programs. The responsibilities of this unit would be adjudicating requests for humanitarian and public interest parole, implementing authorized refugee programs and responding to public and Congressional inquiries. This supports the President's expanded refugee effort.

The recent build-up of the flow of refugees into countries of first asylum has necessitated the opening of an office in Bangkok, Thailand to expedite processing.

Effects

The creation of the Office of Refugee and Parole would allow I&NS to process more expeditiously persons applying for conditional entry or parolee status. I&NS has experienced a steadily increasing need for the granting of these types of benefits in the last three years. The number of aliens paroled into the United States increased by 70 percent between 1977 and 1978. Between 1978 and 1980 the number of aliens paroled is expected to increase by over 100 percent. The I&NS will establish an office in Bangkok, Thailand to assist in the processing of persons applying for benefits through the Indo-Chinese Refugee Program. The creation of a Central Office Refugee and Parole Unit will centralize the management of this aspect of the Service's mission. The recently submitted Budget Amendment for FY 1980 calls for a substantial expansion of this program. A Central Office staff to coordinate this expansion is therefore essential. This reprogramming request does not duplicate any resources requested in the FY 1980 Budget Amendment.

This reprogramming will have a slight impact on the Inspections Program, due to the loss of several positions. However, the functions performed by these persons will aid the Inspections Program by expediting processing of noncitizens who will eventually enter this country.

Appropriation: Salaries and Expenses,
Immigration and Naturalization Service

Item: Maintenance of Non-Immigrant Document Control (I-94) System

Fiscal Summary

	Pos.	Amount
1. Reprogrammed from:		
Support Operations		
Training	...	-$296,000
Records	-4	-41,000
2. Reprogrammed to:		
Support Operations		
Data Systems	...	+296,000
Statistics	+4	+41,000

Description/Justification

This reprogramming will allow the funding of a portion of the FY 1979 keying requirements of I-94 documents into the NIDC System, and will provide the positions and funds necessary to facilitate the coding of those documents prior to keying. The Service had requested $700,000 in the FY 1979 Budget for keying, of which $100,000 was authorized. Because of a recent increase above the magnitude of documents originally anticipated, a total of $996,000 is now required to fully update the NIDC System in FY 1979. The Service is therefore requesting to reprogram $296,000 from existing funds and has submitted a request for $600,000 in a FY 1979 Budget Supplemental. The movement of $296,000 would be a one-time reprogramming.

In addition, the increase in the volume of documents has caused a backlog in the coding of these documents, which occurs prior to keying. The transfer of four positions to Statistics will enable coding to occur on a current basis. The movement of these positions and related funds is permanent.

Effects

Keeping the record of non-immigrant arrivals and departures on a current basis will enable the service to gain a better measure of control on the flow of documented aliens into and out of the United States. This reprogramming will not have a negative impact on the Training Program since the hiring freeze and the OMB FY 1979 ceiling reduction have reduced Training requirements for FY 1979. This reprogramming will not have a negative impact on the Records Program because periodic restrictions on hiring and a high turnover rate within the program have resulted in an undesirably high lapse rate. This reprogramming therefore enables a more productive usage of these positions.

Appropriation: Salaries and Expenses,
Immigration and Naturalization Service

Item: Funding Operational Costs of U.S. Army-Loan
Helicopters and Replacement of a Piper Aircraft

Fiscal Summary

	Amount
1. Reprogrammed from:	
Program Direction Executive Direction	-$50,000
Support Operations Communications Systems	-50,000
2. Reprogrammed to:	
Border Enforcement Border Patrol - Immediate Border	+100,000

Description/Justification

This reprogramming will allow I&NS to fund the operational costs of helicopters loaned by the U.S. Army and the replacement of a Piper aircraft, which was destroyed recently in a crash. This reprogramming will enable I&NS to test the operational cost-effectiveness of a helicopter in areas on the Southwest Border other than Chula Vista, California and El Paso, Texas. The replacement of the Piper, which was destroyed in a crash, will enable the resumption of enforcement efforts on the Southern Texas Border. This is a permanent reprogramming. Funds will be utilized to fund the operational costs of helicopters in FY 1980.

Effects

Based on our experience in the Chula Vista, California Sector, the use of a helicopter should significantly enhance I&NS' deterrance and control efforts along the southern border of the United States. A complete evaluation program will be established to determine the extent of the operational impact of the helicopters.

Appropriation: Salaries and Expenses,
Immigration and Naturalization Service

Item: Establishing Administrative Assistant Positions
in Three District Offices

Fiscal Summary

	Pos.	Amount
1. Reprogrammed from:		
Support Operations Records	-3	-$53,000
2. Reprogrammed to:		
Program Direction Executive Direction and Control	3	+53,000

Description/Justification

This reprogramming provides for an administrative assistant position in each of three large District Offices. Their function will be to relieve the District Directors of routine administrative duties, thus allowing them more time to perform managerial and directional duties. This is a permanent reprogramming.

Effects

The position of administrative assistant is an essential one to any large I&NS District Office. The administrative assistant coordinates for the District Director administrative matters such as building management, personnel actions, office space requests, the acquisition of equipment and supplies, correspondence with the regional office, and overall communications within the District Office. The creation of these positions will enable the District Director to focus more thoroughly on major operational problems and sensitive cases involving service to the public which require his attention. This reprogramming will have no adverse effect on the Records Program since periodic hiring restrictions and a high turnover rate have resulted in an undesirably high lapse rate.

Appropriation: Salaries and Expenses,
Immigration and Naturalization Service

Item: Creation of Additional Positions in Personnel
to Respond to Increasing Workload

Fiscal Summary

	Pos.	Amount
1. Reprogrammed from:		
Border Enforcement Inspections	-1	...
Support Operations Records	-14	...
2. Reprogrammed to:		
Program Direction Administrative Services	+15	...

Description/Justification

Over the past three years the I&NS Authorized Force has increased by approximately 25 percent. In addition, changes in staffing procedures included the implementation of a new Merit Staffing Plan and affects all non-bargaining unit employees. This has resulted in a vast increase in the workload in the Personnel operation including an increase in the number of rating panels required, the number of appraisals required to fill each position, the amount of time required for advisory service to panel members, and the number of positions for which recruitment efforts are required. In addition, the Service is also in the process of implementing an approved Upward Mobility Plan. Eleven of the fifteen positions will be reprogrammed to respond to these increases in workload.

New laws and regulations in the area of wages and compensation (e.g., FLSA), equal rights for women and minorities require the addition of one Personnel Management Specialist to interpret and affect these new policies. This position will insure consistent Servicewide compliance with these complex requirements.

One position will be reprogrammed to enable accurate manpower planning and to maintain the maximum staff level possible through use of the automated Position Accounting Control System.

Two positions will be reprogrammed to comply with DOJ Order 1779.2, as amended, which required the Service to implement and maintain an active and meaningful Health and Safety Program.

Effects

This reprogramming is permanent. These positions will enable the Personnel Office to respond in a timely manner to the increased staffing services required in I&NS.

This reprogramming will have little effect on the Records Program because periodic hiring restrictions on hiring, and a high turnover rate have resulted in an undesirably high lapse rate. The movement of these positions to Personnel will help to reduce the Servicewide lapse rate and enable the maintaining of maximum staffing in all programs. It also reduces the number of "workload excess" positions in I&NS.

Appropriation: Salaries and Expenses,
Immigration and Naturalization Service

Item: Adjustments to Authorized Positions in Several Programs

Fiscal Summary

	Pos.	Amount
1. Reprogrammed from:		
Border Enforcement		
Inspections	-1	...
Border Patrol	-1	-$31,000
Service to the Public		
Adjudications	-1	...
Naturalization Operation	-1	-12,000
Support Operations		
Records	-6	-95,000
Program Direction		
Executive Direction	-3	...
2. Reprogrammed to:		
Service to the Public		
Information Services	+4	+34,000
Support Operations		
Training	+2	...
Research and Development	+1	+31,000
Program Direction		
Executive Direction	+3	+53,000
Administrative Services	+3	+20,000

Description/Justification

These reprogrammings are permanent. They involve both technical and real reprogrammings. The following are real reprogrammings: One position will be reprogrammed from Border Patrol to Research and Development in order to enable testing of high technology electronics devices on the Southern Border. Three positions will be reprogrammed into Information Services (one from Adjudications, one from Naturalization and one from Records) to alleviate the critical understaffing of information counters in three District Offices (San Antonio, San Francisco and New York). Three positions will be reprogrammed to Executive Direction to help meet the increased workload involved in the Service's compliance with the Freedom of Information and Privacy Acts, the planning and evaluation activity in the Northern Regional Office and the clerical needs of the District Director in Houston. The reprogramming of three positions from Executive Direction (two to Training and one to Administrative Services) is a technical adjustment. It corrects an error in the coding of positions by Program. Therefore, no movement of funds is necessary. The reprogramming of three positions from Records (one to Information Services and two to Administrative Services) is a technical adjustment resulting from reclassification actions based on desk audits in two District Offices.

Effects

The establishing of an electronics technician position will enable the Service to operate, maintain and test high technology electronics devices such as radar, infrared, communications, and computer systems, which are being considered for use in both enforcement and non-enforcement activities. This reprogramming will enable the operation of a test facility on the Southern Border. The loss of one position will have minimal impact on the Border Patrol Program. In fact, the potential benefits to be gained by this reprogramming could greatly enhance the productivity of the Border Patrol operation by providing it with more sophisticated technology.

The reprogramming of three positions into Information Services will alleviate the critical need for additional contact representatives in three locations. At present, there are only two contact representatives at the San Antonio District. Persons in need of assistance have been arriving as much as thirty minutes before the counter opens and have had to wait as long as two hours to have basic questions answered. The position to be reprogrammed is a clerk-typist position from within the same office. There is a constant need to provide better service at information counters in New York City and San Francisco as the workload is continually increasing. The positions to be reprogrammed are also from within the New York City and San Francisco District Offices. The reprogramming of one position from Inspections to Executive Direction will enable the clerical needs of the Houston District Director to be met in a timely manner. This Inspections position is from within the Houston District Office. The reprogramming of one position from Records to Executive Direction will enable the Northern Regional Office to meet its increased workload in the planning and evaluation function. The Records position is from within the Northern Regional Office. The effects on losing programs are minimal, since these reprogrammings enable a more efficient handling of the workflow within these offices.

The reprogramming of one position into Executive Direction will enable faster response time to Freedom of Information and Privacy Act requests. Workload in this area has steadily increased in the past several years. This reprogramming will have a minimal impact on the Records Program. These reprogrammings will also reduce the number of workload excess positions in I&NS.

The technical adjustment of positions will have no programmatic effect. The number of authorized positions for these programs is now reflected correctly.

Appropriation: Salaries and Expenses
Immigration and Naturalization Service

Item: Reprogramming for Increased Costs in Deportation of Undocumented Aliens

Fiscal Summary

	Amount
1. Reprogrammed from:	
Support Operations	
Training	-$178,000
Construction and Engineering	-212,000
2. Reprogrammed to:	
Detention and Deportation	
Deportation, Trial Litigation and Judicial Review	+390,000

Description/Justification

This is a one-time reprogramming. Additional funds are needed to cover the increased cost of deportation of undocumented aliens classified as other than Mexicans (OTM's). The number of OTM's deported during the first six months of this year is up 17.2 percent over the same period last year. This has caused the cost of deportation of aliens to increase by 6.2 percent since the beginning of this fiscal year. The average cost for removal of an OTM is $274, whereas the cost for removal of a Mexican is $15. This reprogramming will provide the funds necessary to meet these increased costs in FY 1979.

Effects

The reprogramming has no negative impact on the losing programs. Funds are to be reprogrammed from the Training Program because the Service's training needs have been altered due to a reduction in the hiring of new Border Patrol Agents during this fiscal year. The funds from the Construction and Engineering program were for the San Luis fencing project. The funds remaining will enable the fence to be constructed in accordance with the Administration's policy.

Appropriation: Salaries and Expenses
Immigration and Naturalization Service

Item: Funding for New Immigration Inspection Positions

Fiscal Summary

	Amount
1. Reprogrammed from:	
Border Enforcement Alien Documentation, Identification and Telecommunications (ADIT)	-$89,000
Program Direction Administration Services	-41,000
2. Reprogrammed to:	
Border Enforcement Inspections	+130,000

Description/Justification

This one-time reprogramming will enable the Service to better meet its operational needs in the admission of persons to the United States. OMB reduced our FY 1979 budget for the Inspections program to help offset the cost of the October 1978 Federal Pay Raise. The number of Inspectors authorized to be hired increases in FY 1980 by 77. Filling these new positions now will help accommodate the increased flow of persons through ports of entry in the summer months.

Effects

The reprogramming has no negative programmatic effects. The contract costs for the ADIT program are not running as high as anticipated in that the number of alien identification cards being produced is not up to their originally projected level. The funds reprogrammed from Administrative Services are monies that will not be obligated for the Health and Safety program this year because the number of physical examinations for employees are fewer than anticipated and the cost per physical is averaging slightly lower than budgeted. Funds for these positions are already included in the FY 1980 Budget.

Appropriation: Salaries and Expenses
Immigration and Naturalization Service

Item: Funding for the Treasury Enforcement Communications System (TECS) Terminals

Fiscal Summary

	Amount
1. Reprogrammed from:	
Border Enforcement	
Alien Documentation, Identification and Telecommunications (ADIT)	-$49,000
2. Reprogrammed to:	
Border Enforcement	
Inspections	+49,000

Description/Justification

This one-time reprogramming is for the operational costs of the automated Treasury Enforcement Communications Systems (TECS) at three inspection locations: Nassau and Freeprot, Bahamas, and Washington, D.C. (Dulles Airport). This joint system with Customs will expedite the inspection process by automating the Service Look-Out Book at these locations.

Effects

This reprogramming has no negative impact on the ADIT program. The funds budgeted for the ADIT program for this fiscal year were based on a very high production rate of the alien cards. The process used in the production of the cards was being automated and the programming and installation of the equipment was not as rapid as anticipated. This delayed the number of alien cards being produced, and thus resulted in a cut-back of funds being expended.

Appropriation: Salaries and Expenses,
Immigration and Naturalization Service

Item: Funding for GSA Operational Building Costs
Above SLUC

Fiscal Summary

	Amount
1. Reprogrammed from:	
Support Operations Training	-$100,000
2. Reprogrammed to:	
Border Enforcement Border Patrol	+100,000

Description/Justification

This reprogramming is a permanent adjustment for the recurring building operating costs above that provided by SLUC. Because of the increased number of apprehensions of undocumented aliens along the Southern Border, facilities have been required to stay open longer. Utility costs for heating and air conditioning have increased tremendously this year. It is projected that this rate of apprehensions will at least continue at the current rate, and in all probability will escalate in future years. Thus these costs will continue in future years.

Effects

This reprogramming has no negative effects on the Training Program because the hiring of new Border Patrol Agents was not funded this year. In the future years the Training Program will be reduced to meet this essential operating expense of the Border Patrol. The movement of these funds will enable a correct reflecting of the operating costs of the Border Patrol in the Southern Region of the United States.

Appropriation: Salaries and Expenses, Immigration and Naturalization Service

Item: Funding for Purchase of Replacement Sedans

Fiscal Summary

	Amount
1. Reprogrammed from:	
Support Operations Construction and Engineering	-$167,000
2. Reprogrammed to:	
Border Enforcement Border Patrol	+167,000

Description/Justification

This one-time reprogramming is needed for replacement of Border Patrol sedans. Due to the increased alien activity along the southern border, excessive mileage is being put on the Service's vehicles. Many are due for replacement in accordance with GSA standards. These vehicles will be compact and sub-compact styles which will reduce the purchase cost, and will enhance I&NS' conservation of energy.

Effects

The reprogramming has no effect on the Construction and Engineering Program. The funds are being taken from the San Luis fence project. The remaining funds will enable the Service to construct the fence in the San Luis area in accordance with the Administration's policy. This is not a reversal of earlier reprogrammings. The funds reprogrammed from vehicle purchases in prior reprogrammings were to meet fixed, permanent increases in basic operational costs being incurred by the Service. Had there not been a change in the fencing policy on the Mexican Border these funds would not have become available.

Appropriation: Salaries and Expenses,
Immigration and Naturalization Service

Item: Funding for Enhancement of Sensor Equipment

Fiscal Summary

	Amount
1. Reprogrammed from:	
Support Operations Construction and Engineering	-$108,000
2. Reprogrammed to:	
Support Operations Communications Systems	+108,000

Description/Justification

This reprogramming is a one-time movement of funds to improve the sensor equipment along the Arizona Border. The present systems will be improved by adding updated detection devices. By periodically replacing detection devices the quality of the existing systems can be maintained.

Effect

This reprogramming has no effect on the Construction and Engineering program as the funds are being taken from the San Luis fence project. The change in design of the fence to meet the Administration's policy resulted in a savings. These funds, now being utilized for sensor enhancement, will still be used as a deterrent to undocumented persons entering the United States along the Arizona/Mexican Border.

Appropriation: Salaries and Expenses,
Immigration and Naturalization Service

Item: Funding of Increased Printing Requirements

Fiscal Summary

	Amount
1. Reprogrammed from:	
Service to the Public Overseas	-$200,000
2. Reprogrammed to:	
Service to the Public Naturalization	+200,000

Description/Justification

This reprogramming is necessary because of an underestimating of the printing needs in this program within the Service to the Public Activity. It will enable the printing of necessary documents to ensure that proper services and benefits are available to the public as mandated. It is a permanent reprogramming.

Effects

This reprogramming does not have a negative effect on the Overseas Program. It brings the funding of this program in line with its operating costs.

Appropriation: Salaries and Expenses,
Immigration and Naturalization Service

Item: Increased Requirement for Automation Projects

Fiscal Summary

	Amount
1. Reprogrammed from:	
Border Enforcement ADIT	-$304,000
2. Reprogrammed to:	
Support Operations Data Systems	+304,000

Description/Justification

This one-time reprogramming is necessary in order to facilitate the acceleration of the automation of I&NS' district offices. The funds will be used for design and engineering support, site alteration, training design and materials, recuritment efforts, a Center for Quality in Working Life study, software design, and bar-code equipment and maintenance. These funds will be made available in order to meet the proposed schedule for implementation. The need for these resources prior to FY 1980 funding is referenced by the Standard Model Office Implementation Plan. These needs were contemplated in the development of the FY 1980 Budget Amendment for automation.

Effects

This reprogramming will enable (1) the obtaining of engineering support for site alteration, (2) initial action on-site alteration for several offices, (3) the development of a training program and the purchase of training materials which take into consideration the needs of both newly

hired system managers and the Service's operating personnel, (4) a na-
tionwide recruitment effort to reach highly qualified persons, (5) the
conducting of participatory study in a district office which will help
to specify and further define necessary changes in workflow, inter-
office communications needs, and future staffing needs as they relate
to automation; it will serve as a model by which Central Office staff
can orient district office personnel throughout the Service. (6) the
development of software specifications for the standard system, and,
(7) the purchase and maintenance of bar-code equipment to expand the
testing of the A-File tracking concept.

This reprogramming will have no negative impact on the ADIT program
because the automation of the card production process has taken longer
than originally anticipated. This has reduced the number of cards
that will be produced, thus reducing the funding requirements of the
program this year.

Appropriation: Salaries and Expenses,
Immigration and Naturalization Service

Item: Accounting Adjustment for Foreign Service Local
Employment in the Overseas Program

Fiscal Summary

	Amount
1. Reprogrammed from:	
Service to the Public Status Verification	-$297,000
2. Reprogrammed to:	
Service to the Public Overseas	+297,000

Description/Justification

This reprogramming is a technical adjustment and permanent. In the development of the FY 1979 Execution Plan the funds for the payment of foreign service local hires working in overseas locations were not assigned to this program. They are paid on a separate pay scale.

Effects

This reprogramming adds funds for 30 clerical workyears in the Overseas Program. The reprogramming of these funds equates to 12 workyears from the Status Verification Program. It will have no negative impact on the Status Verification Program since it has been funded above its authorized level of employment. Actions taken during the year to bring it in line with its authorized level will reduce the funding needs.

DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
FY 1979 Reprogramming Request
(Dollars in thousands)

	Revised Base for FY 1979 Execution Plan		Reprogrammed In		Reprogrammed Out		Reprogramming Request		Revised Base for FY 1980 Estimates	
	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount
Inspections	1,667	$43,180	...	$179	11	$253	-11	-74	1,656	$43,106
Border Patrol	2,510	59,115	...	367	1	31	-1	336	2,509	59,451
Investigations (Anti-Smuggling)	312	8,089	...	...	...	...	...	...	312	8,089
ADIT	208	9,567	...	...	...	442	...	-442	208	9,125
Border Patrol (Other than Border)	221	6,407	...	...	...	...	...	...	221	6,407
Investigations	957	27,613	...	...	...	...	...	...	957	27,613
Detention	504	15,811	...	180	...	...	...	180	504	15,991
Deportation	407	16,285	...	210	...	...	...	210	407	16,495
Trial Litigation	84	2,476	...	...	...	...	...	...	84	2,476
Judicial Review	100	3,348	...	...	...	...	...	...	100	3,348
Intelligence	42	1,076	...	...	...	...	...	...	42	1,076
Adjudications Operations	859	19,163	...	...	1	...	-1	...	858	19,163
Naturalization Operations	454	10,384	...	200	1	12	-1	188	453	10,572
Status Verification	256	8,428	...	...	...	237	...	-237	256	8,191
Information Services	302	6,216	4	34	...	...	4	34	306	6,250
Overseas	68	3,073	9	550	...	200	9	350	77	3,423
Training	64	4,920	2	...	...	574	2	-574	66	4,346
Research and Development	1	446	1	31	...	...	1	31	2	477
Construction and Engineering	7	5,193	...	...	...	487	...	-487	7	4,706
Data Systems	62	6,103	...	600	...	...	...	600	62	6,703
Communications Systems	10	1,877	...	108	...	50	...	58	10	1,935
Records	1,020	13,745	...	...	27	189	-27	-189	993	13,556
Statistics	49	892	4	41	...	...	4	41	53	933
Executive Direction and Control	429	17,466	6	106	3	50	3	56	432	17,522
Administrative Services	404	14,417	18	20	...	41	18	-21	422	14,396
Total	10,997	305,350	44	2,626	44	2,626	...	...	10,997	305,350

DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
FY 1979 Reprogramming Request

Budget Activity	FY 1979 Budget Activity Structure		Border Enforcement		Interior Enforcement		Detention and Deportation		Intelligence		Service to the Public		Support Operations		Program Direction		1979 Budget Activity Structure	
	Pos.	Amt.	Pos.	Amt.	Pos.	Amt.	Pos.	Amt.	Pos.	Amt.	Pos.	Amt.	Pos.	Amt.	Pos.	Amt.	Pos.	Amt.
Border Enforcement	4,697	$119,951	4,685	$119,363	...	...	...	...	...	...	9	$193	1	$335	2	...	4,697	$1[illegible]57
Interior Enforcement	1,178	38,020	...	...	1,178	$38,020	...	...	...	...	...	...	...	...	...	...	1,178	38,020
Detention & Deportation	1,095	37,920	...	...	...	...	1,095	$37,920	...	...	...	...	...	...	...	...	1,095	37,920
Intelligence	42	1,076	...	...	...	...	...	...	42	$1,076	...	...	...	...	...	...	42	1,076
Service to the Public	1,939	47,326	...	...	...	...	...	...	...	...	1,939	47,306	...	...	...	...	1,939	47,326
Support Operations	1,213	33,176	...	317	...	...	...	390	...	...	2	92	1,190	32,321	21	$186	1,213	33,176
Program Direction	833	31,823	...	91	...	...	...	...	...	...	...	...	2	...	831	31,732	833	31,823
Total	10,997	305,350	4,685	119,771	1,178	38,020	1,095	38,310	42	1,076	1,950	47,599	1,193	32,656	854	31,918	10,997	305,350

DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
SALARIES AND EXPENSES
(Dollars in thousands)

	1979 Program Structure Pos.	1979 Program Structure Amount	Inspections Pos.	Inspections Amount	Border Patrol Pos.	Border Patrol Amount	Investigations (Anti-Smuggling) Pos.	Investigations (Anti-Smuggling) Amount	ADIT Pos.	ADIT Amount	Border Patrol (Other than Border) Pos.	Border Patrol (Other than Border) Amount	Investigations Pos.	Investigations Amount	Detention Pos.	Detention Amount	Deportation Pos.	Deportation Amount	Trial Litigation Pos.	Trial Litigation Amount	Judicial Review Pos.	Judicial Review Amount	Intel Pos.	Amount	Adjudications Operations Pos.	Adjudications Operations Amount	Naturalization Operations Pos.	Naturalization Operations Amount
Border Enforcement																												
Inspections	3,037	$43,180	3,056	$43,937	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Border Patrol	2,510	99,004	...	...	2,520	$99,004	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Anti-Smuggling Program	312	8,089	...	[illegible]	...	...	312	$8,089	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
ADIT	209	9,367	...	[illegible]	...	...	...	...	209	$9,183	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Interior Enforcement																												
Border Patrol (Other than Border)	771	6,487	...	...	...	...	...	...	...	...	771	$6,487	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Investigations	957	27,613	...	...	...	...	...	...	...	...	...	...	957	$27,613	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Detention and Deportation																												
Detention	584	15,011	...	...	...	...	...	...	...	...	...	...	...	...	584	$15,011	...	...	...	...	...	...	...	...	...	...	...	...
Deportation	607	14,385	...	...	...	...	...	...	...	...	...	...	...	...	...	...	607	$14,385	...	...	...	...	...	...	...	...	...	...
Trial Litigation	86	2,476	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	86	$2,476	...	...	...	...	...	...	...	...
Judicial Review	100	3,348	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	100	$3,348	...	...	...	...	...	...
Intelligence	48	1,876	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	48	$1,876	...	...	...	...
Service to Public																												
Adjudications Operations	658	18,183	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	658	$18,183	...	...
Naturalization Operations	458	10,351	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	458	$10,351
Status Verification	216	6,400	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Information Services	302	6,216	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	[illegible]
Overseas	18	3,873	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	[illegible]
Support Operations																												
Training	44	4,000	...	...	...	[illegible]	...	...	...	...	...	...	...	...	...	...	...	[illegible]	...	...	...	...	...	...	...	...	...	...
Research and Development	1	448	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Construction and Engineering	7	5,100	...	...	...	[illegible]	...	...	...	...	...	...	...	...	...	[illegible]	...	[illegible]	...	...	...	...	...	...	...	...	...	...
Data Systems	62	6,303	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Communications Systems	10	1,077	...	...	...	10	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Records	1,080	13,768	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Statistics	49	683	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Program Direction																												
Executive Direction and Control	477	17,488	...	...	...	90	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Administrative Services	436	14,417	...	81	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Total	10,997	306,358	3,056	43,188	2,520	99,451	312	8,089	209	9,183	825	6,487	957	27,613	584	15,011	607	14,885	86	2,476	100	3,348	48	1,875	688	18,183	483	10,572

DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
SALARIES AND EXPENSES
(Dollars in thousands)

	Status Verification		Information Services		Overseas		Training		Research & Development		Construction & Engineering		Data Systems		Communications Systems		Records		Statistics		Executive Direction & Control		Administrative Services		1979 Program Structure	
	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount
Border Enforcement																										
Inspections	---	---	---	---	[illegible]	$213	---	---	1	$33	---	---	---	---	---	---	---	---	---	---	1	---	1	---	1,657	$43,770
Border Patrol	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	8,510	58,115
Anti-Smuggling Program	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	317	8,989
ADIT	---	---	---	---	---	---	---	---	---	---	---	---	---	$504	---	---	---	---	---	---	---	---	---	---	290	9,567
Interior Enforcement																										
Border Patrol (Other than Border)	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	581	[illegible]
Investigations	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	857	[illegible]
Detention and Deportation																										
Detention	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	981	15,011
Deportation	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	437	14,795
Trial Litigation	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	61	2,036
Judicial Review	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	308	3,348
Intelligence	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	42	2,878
Service to Public																										
Adjudications Operations	---	---	1	18	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	489	15,162
Naturalization Operations	---	---	---	---	---	257	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	664	18,336
Status Verification	256	$8,198	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	256	8,198
Information Services	---	---	266	$6,800	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	302	6,216
Overseas	---	---	---	---	37	2,433	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	68	3,873
Support Operations																										
Training	---	---	---	---	---	---	66	$4,346	---	---	---	---	---	796	---	---	---	---	---	---	---	---	---	---	84	4,929
Research and Development	---	---	---	---	---	---	---	---	1	466	---	---	---	---	---	---	---	---	---	---	---	---	---	---	3	644
Construction and Engineering	---	---	---	---	---	---	---	---	---	---	7	$4,304	---	---	---	---	---	---	---	---	---	---	---	---	3	[illegible]
Data Systems	---	---	---	---	---	---	---	---	---	---	---	---	62	6,333	---	800	---	---	---	---	---	---	---	---	62	[illegible]
Communications Systems	---	---	1	18	---	---	---	---	---	---	---	---	---	---	38	1,800	---	---	---	---	---	---	---	---	18	1,8[illegible]
Records	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	995	$13,566	9	111	9	$186	18	$120	1,020	15,7[illegible]
Statistics	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	62	482	---	---	---	---	63	892
Program Direction																										
Executive Direction and Control	---	---	---	---	---	---	8	---	---	---	---	---	---	---	---	---	---	---	---	---	638	17,618	1	---	629	17,468
Administrative Services	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	480	18,2[illegible]	[illegible]	11,[illegible]
Total	256	8,198	266	6,800	37	2,433	66	4,346	8	480	7	4,304	62	6,333	38	1,826	995	13,566	62	593	638	17,628	480	18,246	10,962	300,256

Notes - * Indicates vehicle temporarily out of service for repairs.
** Indicates vehicle out of service - not repairable.

IMMIGRATION AND NATURALIZATION SERVICE

MONTHLY REPORT ON STATUS OF MOTOR VEHICLE FLEET - APRIL 1980
U.S. BORDER PATROL

PROJECTION OF BORDER PATROL SEDAN REPLACEMENT FY 80 - 292

EASTERN REGION

Total Sedans: 69
Total Trucks: 20

Vehicles Assigned	Vehicles Out of Service	Percent Out of Service	Over 60,000 miles	Garage Personnel Authorized	Garage Personnel Filled
89	11	12%	48	2	2

Buffalo, NY Border Patrol Sector

Total Sedans: 16
Total Trucks: 4

Sector Headquarters

Fleet No.		Beg. Mileage	End. Mileage	Total
0413	74 FORD Custom 500	101902	103726	1824
07038**	Plymouth	58428	61329	2901
0409**	" " "	76153	76153	-0-
0408**	" " "	90995	90995	-0-
0407	" " "	85823	85900	77
0406**	" " "	-0-	-0-	-0-
0405	" " "	108076	109228	1152
0403**	" " "	-0-	-0-	-0-
0402	" " "	96022	97655	1633
0401**	" " "	81650	81650	-0-
A2802	78 DODGE Custom W15	10327	10813	486
A1602	76 DODGE Ramcharger	49516	49707	191
2202	72 CHEV C10	55377	55650	273
07006	74 FORD LTD	77162	80489	3327

Niagara Falls Station

Fleet No.		Beg. Mileage	End. Mileage	Total
07023	77 PLYM. Gran Fury	76982	82991	6009
07011	" " "	73505	75357	1852
0414**	74 FORD Custom 500	84852	84852	-0-
0412	" " "	97607	98278	671
A1601	" DODGE Ramcharger	48979	49318	339
07009	PLYM. Gran Fury	71262	74509	3247

Houlton Border Patrol Sector

Sedans: 14
Trucks: 9

Fleet No.		Beg. Mileage	End. Mileage	Total
0016	79 PLYM. Gran Fury	3	40	37
08011	74 Ford LTD	30861	34461	3600
08010	" " "	37384	39069	1685
07022	" " "	50114	51414	1300
1910	79 DODGE Ramcharger A10	15810	18207	2217
1903	79 CHEV Blazer	18545	19848	1303
8604	76 FORD Torino	49122	49714	592
A2801	78 CHEV C0209	16430	16869	439

Jackman Station

00017	78 FORD LTD	54815	56762	1947
07039	77 PLYM. Gran Fury	62642	66309	3667
1909	79 DODGE Ramcharger A10	10617	20827	2210
1908	" " "	11006	11036	30

Van Buren Station

07040	77 PLYM. Gran Fury	70218	71396	1178
07008	" " "	56207	58641	2434
07005	" " "	48040	50122	2082
1907	79 DODGE Ramcharger A10	18320	19941	1621

Fort Fairfield Station

07004	77 PLYM. Gran. Fury	62838	65106	2268
07003	" " "	61434	64069	2635
1905	79 DODGE Utility AW100	14750	15218	468

Calais Station

07041	77 PLYM. Gran Fury	78151	81478	3327
07007	" " "	55723	57506	1783
07002	" " "	45682	46873	1191
1904	79 DODGE Utility AW100	9981	10142	161

Ogdensburg Border Patrol Sector

Total Sedans: 14
Total Trucks: 2

Ogdensburg Station

07045	77 PLYM. Gran Fury	76745	79184	2439
07044	" " "	95529	97248	1719
07042	" " "	26398	26438	40
07001	" " "	60938	61765	877
0436	74 FORD Custom 500	81090	81423	333
A3601	76 CHEV Carryall	49939	52397	2458

Watertown Station

07043	77 PLYM. Gran Fury	100067	102348	2281
07024	" " "	114310	118629	4319
0431	74 FORD Custom 500	118630	121136	2505

Massena Station

07025	77 PLYM. Gran Fury	110635	114030	3395
0438	74 FORD Custom 500	118035	120115	2080
0433	" " "	106770	107655	885

Malone Station

07046	77 PLYM. Gran Fury	117200	121265	4065
07026	" " "	89055	93130	4075
0437	74 FORD Custom 500	103490	105505	2015
1501	75 AMC Jeep	24135	25984	1849

Swanton Border Patrol Sector

Total Sedans: 25
Total Trucks: 5

Swanton Station

07079	77 PLYM. Volare	43899	44998	1099
07035	77 PLYM. Gran Fury	89398	93749	4351
07034	" " "	70473	75046	4573
07021	" " "	64805	66104	1299
07020	" " "	47792	48609	817
07015	" " "	91732	93958	2226
07012	" " "	72286	74409	2123
0445	74 FORD Custom 500	87585	88492	907
A2901	79 DODGE Pickup W15	5015	5537	522
A1801	78 CHEV Suburban	20136	21720	1584
0603	76 FORD Torino	45866	46422	556

Richford Station

07036	77 PLYM. Gran Fury	71960	74690	2730
07032	" " "	70985	71840	855
1911	79 DODGE Ramcharger AW100	10310	11459	1149

Derby Line Station

08003	78 FORD LTD	39200	41650	2450
07016	77 PLYM. Gran Fury	70327	72045	1718
07014	" " "	59861	63224	3363
07013	" " "	61782	63900	2118

Beecher Falls Station

08004**	78 FORD LTD	-0-	-0-	-0-
08002	" " "	32291	33308	1017
1401**	74 AMC Jeep	67777	67777	-0-

Rouses Point Station

08001	78 FORD LTD	71185	73909	2724
07033	77 PLYM. Gran Fury	93346	96146	2800
07031	" " "	94220	96675	2455
07019	" " "	70972	74742	3770
07018	" " "	103083	106132	3049
07017	" " "	93384	95745	3361
07010	" " "	90865	93598	2733
0447	74 FORD Custom 500	107665	109928	2263
0337**	" " "	-0-	-0-	-0-

WESTERN REGION

Total Sedans: 256
Total Trucks: 439

Vehicles		Percent Out of Service	Over 60,000 miles*	Garage Personnel	
Assigned	Out of Service			Authorized	Filled
695	95	14%	208	37	26

El Centro Border Patrol Sector

Total Sedans: 43
Total Trucks: 63

04783	74 FORD Custom 500	1078382	108700	862
04784	" " "	84145	86285	2140
04785	" " "	95805	96768	963
05741	75 PLYM. Gran Fury	62571	63615	1044
05742	" " "	98460	102194	3734
05743	" " "	61876	63866	1987
05745	" " "	82897	86478	3580
05746	" " "	60559	61765	1206
05747**	" " "	89241	89241	-0-
05751	" " "	68790	69326	536
05752	" " "	54875	59295	4420
05753**	" " "	91011	91011	-0-
05754	" " "	62620	62827	207
06714	76 PLYM. Gran Fury	95538	96231	693
06715	" " "	94704	96501	1691
06716	" " "	75625	76584	956
06717	" " "	88345	89758	1413
06723	" " "	80055	81855	1800
07122	77 PLYM. Gran Fury	81358	85854	4496
07124	" " "	28823	29637	814
07125	" " "	27212	27574	362
07126	" " "	70667	73735	3068
07127	" " "	57095	58611	1616
07128	" " "	78070	81598	3528
07129	" " "	92662	968692	4207
07130	" " "	32217	33328	1108

El Centro Sector - Calexico, CA

04772	74 FORD Custom 500	59536	59666	130
04773	" " "	79838	80107	277
05744	75 PLYM. Gran Fury	59818	60107	289
05749	" " "	49616	49772	156
05750*	" " "	50222	50222	-0-
06722	76 PLYM. Gran Fury	31228	31484	256

El Centro Sector - Indio, CA

04782	74 FORD Custom 500	67639	68050	411
06718	76 PLYM. Gran Fury	40428	42112	1684
06719	" " "	42316	44281	1965
06720	" " "	37508	39806	2298

El Centro Sector - Riverside, CA

06721	" " "	61123	63248	2125
07123	77 PLYM. Gran Fury	26377	29155	2778
07307	" " "	33237	35051	1814
07309	" " "	80316	82049	1733
08304	78 PLYM. Gran Fury	34143	36364	2221
07308	77 PLYM. Gran Fury	51043	52008	965
07627	77 PLYM. Volare	22300	23305	1005
8083	70 CHEVELLE Nomad Sedan Delivery	58736	59406	670
3611	76 CHEV Suburban Carryall	57168	59609	2441
3901	79 CHEV Suburban Carryall	53066	57351	4285
4527	75 DODGE B300 Maxivan	54971	55159	188
4625	76 DODGE B300 Maxivan	69426	72561	3135
4626	" " "	77884	79706	1822
4678	" " "	90644	92900	2256
4857	78 DODGE B300 Maxivan	64710	68253	693

El Centro Sector - Calexico, CA

2405	74 IHC Pickup	47394	48127	733
4563A	75 DODGE B300 Maxivan	79980	80916	936

El Centro Sector - Indio, CA

4531	75 DODGE B300 Maxivan	49193	49863	670

El Centro Sector - Riverside, CA

4856	78 DODGE B300 Maxivan	35430	38516	3086
4858	" " "	36303	38671	2368

El Centro Headquarters

1704	77 DODGE Ramcharger	75246	75736	490
1706	" " "	69180	70738	1558
1709	" " "	78848	80021	1173
18058	78 CHEV Blazer	52276	54032	1756
18059	" " "	40607	41996	1389
18061	" " "	57215	61207	4720
18062	" " "	53083	55714	2631
18063	" " "	59022	60718	1696
18064	" " "	50872	54299	3427
18065	" " "	67599	71769	4170
18066	" " "	60595	63650	3055
18127	78 DODGE Ramcharger	47694	49265	1571
A2911	79 CHEV Cab/Chassis with Service Body	6309	7086	777
A2912	" " " "	2345	3574	1229
A3602**	" " " "	35797	35797	-0-
A3605	" " " "	34356	35309	953
A3903	79 CHEV Suburban Carryall	43272	46544	3272

El Centro Sector - Calexico, CA

1537	75 DODGE Ramcharger	61455	61874	419
1540	" " "	62232	62860	628
1542	" " "	65757	67286	1529
1701	77 DODGE Ramcharger	55393	56418	1025
1702	" " "	47464	48669	1205
1703	" " "	60513	62289	1776
1751	" " "	37568	39557	939
1752	" " "	38210	39791	1581
18001	78 DODGE Ramcharger	19324	20711	1387
18002	" " "	31042	32916	1874
18003	" " "	34850	36706	1856
18004	78 DODGE Ramcharger	23000	24244	1244
18005	" " "	28643	30067	1424
18006	" " "	25539	27328	1789
18007	" " "	22863	24200	1337
18009	" " "	33994	34761	767
18010	" " "	27834	28874	1040
18128	" " "	30335	32574	2239
18129	" " "	21175	21894	777
18130**	" " "	23319	23319	-0-
18131	" " "	33513	34804	1291
18132	" " "	31474	32373	899
18133	" " "	26345	28300	1955
19001	79 CHEV Blazer	8062	8926	864
19002	" " "	11558	12666	1109
19003	" " "	8090	8541	451
19004	79 CHEV Blazer	8527	9073	546
A2513	79 CHEV. Cab	5762	6446	684
A2914	AM Gen. Police Van	7294	8556	1262

El Centro Sector - Riverside, CA

18008	78 DODGE Ramcharger	28920	30664	1744

El Centro Sector - Indio, CA

A3902	79 CHEV Suburban Carryall	26710	28070	1360
18057	78 CHEV Blazer	39824	40855	1031
18060	" " "	29688	30712	1024

Tucson, AZ Border Patrol Sector

Total Sedans: 51
Total Trucks: 60

Tuscon Sector Headquarters

06773	75 PLYM. Gran Fury	73990	74600	610
05774	" " "	80757	83220	2463
05776	" " "	68755	69433	678
05778	" " "	72916	73307	391
06726	76 PLYM. Gran Fury	47778	48300	522
06727	" " "	51900	52188	288
06728	" " "	61814	64289	3015
06730	" " "	69187	71645	2458
06741	" " "	66169	69993	3824
07142	77 PLYM. Gran Fury	48618	49664	1046

Tuscon Sector - Casa Grande, AZ

07144	" " "	44105	45739	1634
06743	" " "	64382	66508	2126

Tuscon Sector - Douglas, AZ

04881	74 FORD Custom 500	88128	89870	1742
05777	75 PLYM. Gran Fury	94536	95331	792
06729	76 PLYM. Gran Fury	80747	83615	2859
06732	" " "	69911	72488	2497
06736**	" " "	81444	81444	-0-
07138	77 PLYM. Gran Fury	61454	63530	2076
07141	" " "	55963	58833	2870

Tuscon Sector - Gila Bend, AZ

05775	" " "	64625	66671	2046
06742	76 PLYM. Gran Fury	64881	65620	739
07146	" " "	47083	47996	913

Tuscon Sector - Naco, AZ

06883	75 PLYM. Gran Fury	75232	77176	1944
07140	77 PLYM. Gran Fury	65258	68666	3408

Tuscon Sector - Nogales, AZ

04879**	74 FORD Custom 500	93650	93651	-0-
05766	75 PLYM. Gran Fury	77421	80728	3307
05779	" " "	86687	88813	2126
06731	76 PLYM. Gran Fury	74392	76479	2087
06733	" " "	70400	72253	1853
06734	" " "	68521	69960	1439
06738**	" " "	87098	87158	60
06740	" " "	69985	72469	2484
07135	77 PLYM. Gran Fury	35807	36823	1016
07143	" " "	62642	65138	2495
07145	" " "	50141	50680	539

Tuscon Sector - Phoenix, AZ

05767	75 PLYM. Gran Fury	70384	71415	1031
06739	76 PLYM. Gran Fury	45145	45218	73
07137	77 PLYM. Gran Fury	43696	45352	1656
07147	" " "	28080	28226	146

Tuscon Sector - Wilcox, AZ

06735	76 PLYM. Gran Fury	94025	96523	2495
07139	77 PLYM. Gran Fury	57998	61727	3729

Tuscon Sector - Why/Ajo, AZ

05771**	" " "	94507	94572	65
05772	" " "	79888	82813	2925
07136	" " "	72939	73638	699

Tuscon Sector Headquarters

07314	77 AMC Matador	49206	50583	1377
07316	" " "	49367	50388	1021
07317	" " "	47916	49358	548
07318	" " "	31162	32580	1155
08306	78 PLYM. Gran Fury	37374	39286	1912

Tuscon Sector - Nogales, AZ

07315	77 AMC Matador	43831	46741	2910

Tuscon Sector Headquarters

07824	77 PLYM. Volare	44929	46573	1644
2528	75 DODGE Pickup	60721	61500	779
4670	76 DODGE B300 Maxivan	84996	85975	979
4720	77 DODGE B300 Maxivan	75810	78702	2892
4721	" " "	76120	78225	2105
4734	" " "	71380	73335	1954
4735	" " "	47811	48894	1083
4810	78 DODGE B300 Maxivan	80670	86025	5355
4811	" " "	43051	46556	3505
4862	" " "	58580	59966	1386
4900	79 DODGE Tradesman Van	10074	11855	1781

Tucson Sector - Casa Brande, AZ

4551A	75 DODGE B300 Maxivan	81610	82434	824
4717	" " "	64721	65990	1269
4863	78 DODGE B300 Maxivan	29341	31371	2030

Tuscon Sector - Douglas, AZ

2406	74 IHC Pickup	71060	72456	1396
2514	" " "	73103	74259	1156
4569A	75 DODGE B300 Maxivan	71829	72071	242

Tuscon Sector - Gila Bend, AZ

4714	77 DODGE B300 Maxivan	50441	50900	459

Tuscon Sector - Naco, AZ

2527	75 DODGE Pickup	91430	93998	2568
4716	75 DODGE B300 Maxivan	60482	61923	1441

Tuscon Sector - Nogeles, AZ

2513	75 IHC Pickup	81814	82464	650
4575	75 DODGE B300 Maxivan	58032	58751	719
4718	77 DODGE B300 Maxivan	39148	40977	1845
4732	" " "	58796	60341	1545
4864	78 DODGE B300 Maxivan	24542	25483	941
4898	78 CHEV Stepvan	5319	5319	-0-

Tucson Sector - Why/Ajo, AZ

2402	74 IHC Pickup	75768	77660	1992
4719	77 DODGE B300 Maxivan	74297	76131	1834

Tuscon Sector - Phoenix, AZ

2515	75 IHC Pickup	73168	74848	1680
4733	77 DODGE B300 Maxivan	66012	68204	2172
4809	78 DODGE B300 Maxivan	19735	21804	2059

Tuscon Sector - Wilcox, AZ

4602	76 DODGE B300 Maxivan	97618	99464	1846
4669	" " "	71184	71781	597

Tuscon Sector Headquarters

18013	78 DODGE Ramcharger	27553	28688	1135
18069	" " "	50317	52000	1683
18073	" " "	57973	59432	1459
18134	" " "	38356	39662	1306
19005	79 CHEV Blazer	23330	25668	2338
A3608	76 AMC Police Van	53066	53233	167

Tuscon Sector - Douglas, AZ

18012	78 DODGE Ramcharger	34990	36246	1256
18053	78 CHEV Blazer	40759	43019	2260
18055	" " "	44864	45656	792
18056	" " "	41509	42897	1388
1806	78 DODGE Ramcharger	50661	51930	1269
A3603	76 AMC Police Van	34714	35334	620

Tuscon Sector - Gila Bend, AZ

18135	78 DODGE Ramcharger	41158	43646	2488

Tuscon Sector - Naco, AZ

1739	77 DODGE Ramcharger	67666	71496	3830
A3604	76 AMC Police Van	65615	67584	1969
18070	" " "	39823	43367	3544

Tuscon Sector - Nogales, AZ

18011	78 DODGE Ramcharger	23444	26326	1982
18071	" " "	34942	36394	1452
18072	" " "	29554	30528	1028
18074	" " "	37415	39824	2409
18136	" " "	29314	30068	754
19007	" " "	17420	20141	2721
19008	" " "	15734	17199	1465

Tuscon Sector - Why/Ajo, AZ

18054	78 CHEV Blazer	50772	55211	4439
19006	" " "	24968	25906	938

Tuscon Sector - Phoenix, AZ

1566	75 DODGE Ramcharger	57870	58304	434

Tucson Sector - Wilcox, AZ

A2621	75 DODGE Pickup	70403	72479	2076

Livermore, CA Border Patrol Sector

Total Sedans: 30
Total Trucks: 29

Livermore Sector

05761	75 PLYM. Gran Fury	66894	69119	2257
06703	76 PLYM. Gran Fury	55257	56561	1304

Livermore Sector - Bakersfield, CA

06704	76 PLYM. Gran Fury	66470	67447	977
06709	" " "	49113	51795	2682
07132	77 PLYM. Gran Fury	65593	68661	3068

Livermore Sector - Fresno, CA

05759	75 PLYM. Gran Fury	58455	61025	2570
05760	" " "	60861	63268	2407
06701	76 PLYM. Gran Fury	40116	42029	1913
06706	" " "	52107	54879	2808
06710	" " "	63477	66180	2503

Livermore Sector - Oxnard, CA

07101	77 PLYM. Gran Fury	40386	41996	1610
07106	" " "	51657	53964	2307
07108	" " "	51422	53820	2398

Livermore Sector - Sacramento, CA

06702	76 PLYM. Gran Fury	71493	72675	1182
06708	" " "	41956	45605	3639
07131	77 PLYM. Gran Fury	80117	81162	1045

Livermore Sector - Salinas, CA

06705	76 PLYM. Gran Fury	69406	72324	918
06712	" " "	72498	74240	1742
07134	77 PLYM. Gran Fury	29041	29879	838

Livermore Sector - San Luis Obispo, CA

07120	77 PLYM. Gran Fury	52135	54067	1932

Livermore Sector - Stockton, CA

05756	75 PLYM. Gran Fury	79860	81774	1914
06707	76 PLYM. Gran Fury	51935	53425	1490
07133	77 PLYM Gran Fury	36727	38317	1590
07310	77 GMC Matador	54895	56175	1280
07311	" " "	49950	51324	1374
08305	78 PLYM. Fury	31703	32699	996

Livermore Sector - Fresno, CA

07313	77 AMC Matador	45943	47560	1617

Livermore Sector - Sacramento, CA

07312	77 AMC Matador	53431	55473	2042

Livermore Sector

07628	77 PLYM. Volare	48550	49852	1302
4656	76 DODGE B300 Maxivan	89026	91548	2522
4859	78 DODGE B300 Maxivan	37510	38942	1432

Livermore Sector - Bakersfield, CA

4861	78 DODGE B300 Maxivan	33874	35452	1578
4802	" " "	37347	40541	3194
4803	" " "	40520	42576	2056

Livermore Sector - Fresno, CA

4652	76 DODGE B300 Maxivan	83573	85740	2167
4653	" " "	87657	89295	1638
4654	" " "	100151	100745	415
4655	" " "	93504	95780	2276
4806	78 DODGE B300 Maxivan	37774	39853	2079
4808	" " "	39658	42000	2232

Livermore Sector - Oxnard, CA

4612	76 DODGE B300 Maxivan	93218	96100	2882
4645	76 DODGE B300 Maxivan	84552	87305	2753
4841	78 DODGE B300 Maxivan	38060	40438	2378

Livermore Sector - Sacramento, CA

4650	76 DODGE B300 Maxivan	112547	114384	1837
4731	77 DODGE B300 Maxivan	88553	91072	2519
4805	78 DODGE B300 Maxivan	59728	63590	3861

Livermore Sector - Salinas, CA

4648	76 DODGE B300 Maxivan	100879	102231	1352
4804	78 DODGE B300 Maxivan	38963	40804	1841

Livermore Sector - San Luis Obispo, CA

4840	78 DODGE B300 Maxivan	38629	40205	1576

Livermore Sector - Stockton, CA

4647	76 DODGE B300 Maxivan	79625	80089	464
4649	" " "	86104	86726	622
4807	78 DODGE B300 Maxivan	35049	36384	1235
4860	" " "	30971	34043	3072

Livermore Sector - Headquarters and Stations

A2622	78 DODGE Pickup	51325	52300	975
A2657	76 DODGE Pickup	100890	103501	2611
A3803	78 CHEV Suburban	28154	29711	1557

Livermore Sector - Fresno, CA

A2655	76 DODGE Pickup	88240	89270	1030

Livermore Sector - San Luis Obispo, CA

1733	77 DODGE Ramcharger	59570	61994	2424

Yuma, AZ Border Patrol Sector

Total Sedans: 29
Total Trucks: 78

Yuma Sector Headquarters

04792	74 FORD Custom 500	83070	83775	705
05781	75 PLYM. Gran Fury	53882	54730	848
06745	" " "	63950	66817	2867
06746	" " "	59667	62154	2487
06748*	" " "	65194	65194	-0-
06749	" " "	68223	69947	1724
06750	" " "	47498	48421	923
06751	" " "	58022	59977	1955
06752	" " "	63282	66421	3139
06753	" " "	62555	64080	1525
06754	" " "	55805	59485	3573
06755	" " "	77160	80553	3393
06756	" " "	71936	73891	1955
07148	77 PLYM. Gran Fury	25625	28902	3277
07149	" " "	26034	26376	342
07150	" " "	23116	23491	375

Yuma Sector - Blythe, CA

06757	" " "	46709	48588	1879

Yuma Sector Headquarters

07319	77 AMC Matador	55586	57391	1805
07320	" " "	53229	55133	1904
07321	" " "	34746	35569	823
07322	" " "	41775	43686	1191
07323	" " "	42409	43362	953
08307	78 PLYM. Gran Fury	19025	19401	376
07825	77 PLYM. Volare	50331	52207	1876
00630	80 PLYM. Volare	00000	00483	483
00631	" " "	00000	00009	9
2502	75 IHC Pickup with Camper	50034	50742	708
2503	" " " " "	61015	62349	1334
4672*	76 DODGE Maxivan	66471	66471	-0-
4675	" " "	86846	86846	-0-
4676*	" " "	50748	50748	-0-
4677	" " "	66970	67645	675
4813	78 DODGE Maxivan	59417	61402	1985
4814	" " "	59325	61427	2102
4865	" " "	88951	97724	8773

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Yuma Sector - Blythe, CA

4812	78 DODGE Maxivan	71078	73457	2379

Yuma Sector - Tacna, AZ

1707	75 DODGE Ramcharger	89795	91979	2148
18015*	76 " "	55420	57804	2384
19011	78 DODGE Ramcharger	29799	33722	3923
19013	" " "	26276	29750	3474
19015	" " "	26097	28501	2404

Yuma Sector Headquarters

1501A	75 DODGE Ramcharger	70360	70886	526
1510A	" " "	72724	73711	987
1708	" " "	89473	92168	2695
1710	" " "	74699	77182	2483
1711*	" " "	77720	77720	-0-
1712	" " "	70379	73256	2877
1713	" " "	88611	92711	4100
1716	" " "	85119	89538	4419
1717	" " "	69923	70559	636
1718	" " "	78649	78649	-0-
18014	78 DODGE Ramcharger	53662	56523	2861
18017	" " "	56516	59665	3149
18018	" " "	38386	38386	2500
18020	" " "	44987	48247	3260
18021	" " "	43458	45538	2080
18022	" " "	37855	39684	1829
18023	" " "	41938	44976	3038
18024	" " "	35911	36377	466
18025	" " "	50330	53306	2976
18026	" " "	53575	55930	2355
18027	" " "	29441	30066	625
18028*	" " "	52149	54177	2028
18029*	" " "	45599	47936	2337
18030	" " "	49408	51743	2335
18032	" " "	45941	48264	2323
18033	" " "	43677	47047	2370
18034	" " "	49609	51953	2344
18035	" " "	39242	40514	1272
18036	" " "	46643	48856	2213
18037**	" " "	26247	49315	2392
18067	CHEV. Blazer	296343	30793	1159
18075	" " "	47824	50237	2413
18076	" " "	61426	64040	2676
18077	" " "	57197	59947	2750
18078	" " "	58240	60062	1822
18079*	" " "	52579	55183	2604
18080	" " "	57532	60563	3031
18081	" " "	57563	60120	2557
18082	" " "	56164	58425	2811
18083*	" " "	43075	44099	1241
18137	" " "	46923	49315	2392
18138	" " "	41152	43780	2629
18139	" " "	31815	34645	2830
18140	" " "	43186	45445	2259
18141	" " "	42929	45481	2552
18142	" " "	42418	44099	1591
19009	" " "	19855	22240	2385
19010	" " "	26011	29000	2989
19012	" " "	10119	11526	1407
19014	" " "	21725	24797	3072
19016	" " "	20030	21759	1729
19017	" " "	17325	18826	1501
19018	" " "	20607	22352	1745
19019	" " "	16565	17849	1284
19020	" " "	20705	23990	3285
A2576	76 ICH Pickup Cab & Chassis	71618	72078	460
A2626	76 DODGE Pickup Cab & Chassis	39097	39425	195
A2915	76 CHEV. Pickup Cab & Chassis	5506	7180	1662
A2916	" " "	13203	14301	1098
A3607	AMC Police Van	32590	32590	-0-

Yuma Sector - Blythe, CA

18031	78 DODGE Ramcharger	33385	34599	1258

Yuma Sector - Tacna, AZ

4866	78 DODGE Maxivan	26278	27176	590

Chula Vista, CA Border Patrol Sector

Total Sedans: 127
Total Trucks: 139

Chula Vista Sector

03001*	73 PLYM. Fury	85738	85738	-0-
04707*	74 FORD Custom 500	78196	78196	-0-
04736	" " "	81364	81911	547
05740	" " "	66119	66526	407
06761	" " "	36497	37824	1327
07102	77 PLYM. Gran Fury	37278	38184	906
07103	" " "	38163	39536	1373
08101*	78 FORD LTD	16740	17474	734
09101*	79 CHEV Impala	5536	5963	427
09102*	" " "	8114	8896	782
09103	" " "	8349	9337	982
04739	74 FORD Custom 500	89472	89472	-0-
04917	" " "	102562	102954	392
05701	75 PLYM. Gran Fury	74902	75238	336
05708	" " "	80402	80402	-0-
05711	" " "	89557	89557	-0-
05712	" " "	81737	82805	1068
05714	" " "	80534	82500	1966
05716	" " "	67592	68194	602
05720	" " "	56889	58459	1570
05724	" " "	75928	75973	45
05731*	" " "	91794	93765	1971
05734	" " "	76920	76920	-0-
05735*	" " "	80608	80974	366
05739	" " "	65712	66450	738
06684	" " "	54507	54810	303
06762*	" " "	81268	81268	-0-
06766*	" " "	93615	95245	1630
06771	" " "	77683	78619	936
06772	75 PLYM. Gran Fury	74910	75536	626
06773*	" " "	71746	71746	-0-
06783	76 PLYM. Gran Fury	92832	95388	2256
07112*	77 PLYM. Gran Fury	93033	93033	-0-
07113	" " "	98446	99699	1253
07115	" " "	104833	107485	2652
07117	" " "	34322	35199	877
09106	" " "	4753	5779	1026
09107	" " "	4940	5676	736

Chula Vista Sector - Brownfield, Ca

03108	73 FORD Custom 500	89876	90649	723
04899*	" " "	64852	64852	-0-
05710	75 PLYM. Gran Fury	90354	91017	663
05713	" " "	73978	74601	623
05715	" " "	87455	88910	1454
05718	" " "	74700	76508	1808
05722	" " "	63084	63562	478
05728	" " "	71600	72725	1125
05738	" " "	68027	68027	-0-
05780*	" " "	91982	91982	-0-
05843*	" " "	66992	66992	-0-
06760	76 PLYM. Gran Fury	61780	62996	1216
06765	" " "	92341	94643	2302
06768	" " "	88987	90613	1626
06776*	" " "	91492	91492	-0-
07109*	" " "	39357	40995	1638
07114	" " "	59294	61385	2091
09104	" " "	4623	5350	727
09105	" " "	8027	8666	639
09118	" " "	12242	14435	2193

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Chula Vista Sector - Campo, CA

07116	77 PLYM. Gran Fury	92843	94628	1785
08104	78 FORD LTD	63212	65027	1815
08105	" " "	70338	74122	3784
09123	" " "	11336	15285	3949
09124	" " "	34448	37915	3467
09125	" " "	14513	20506	5993
09126	" " "	17730	21793	4063
09127*	" " "	28544	28544	-0-
09128	" " "	25131	29500	4369

Chula Vista Sector - El Cajon, CA

09119	76 PLYM. Gran Fury	19744	25203	5459
09120*	" " "	14727	18475	3748
09121	79 CHEV. Impala	17756	2125	3499
09122	" " "	24423	27200	2477

Chula Vista Sector - San Clemente, CA

07104	77 PLYM. Gran Fury	31456	31958	502
08102	78 FORD LTD	39220	40651	1430
08103	" " "	36628	38290	1662
09108	79 CHEV. Impala	10550	11325	865
09109	" " "	14000	14918	918
09114	" " "	11595	14424	2829
09115	" " "	8746	9388	642
09116	" " "	2807	4239	1432
09117	" " "	8176	9209	1033
09129	" " "	10983	12766	1783
09130	" " "	10969	11414	445
09131	" " "	12138	13320	1182
09132	" " "	14684	15966	1282

Chula Vista Sector - Temecula, CA

06758	77 PLYM. Gran Fury	74308	77508	3200
06770	" " "	67295	68298	1003
06778	76 PLYM. Gran Fury	114999	116650	1651
06780	" " "	96083	98796	2713
06781	" " "	79761	81779	2018
06782	" " "	73944	76395	2415
06784	" " "	69475	72281	2806
07111	" " "	81949	84333	2384
08106	78 FORD LTD	74998	76354	1356
08107	78 FORD LTD	54585	55369	784
08108	" " "	62514	64935	2421
08110*	" " "	45575	47262	1687
09110	" " "	12738	17029	4291
09111	79 CHEV. Impala	98599	11241	1382
09112	" " "	9677	10764	1087
09113*	" " "	16520	16520	-0-
06617	76 PLYM. Fury	47311	48961	1750
07301	77 AMC Matador	48670	49635	965
07302	" " "	51338	51739	401
07303	" " "	53470	55604	1103
07304	" " "	54805	55800	995
07306	" " "	36834	37562	728
08301	78 PLYM. Fury	21405	22250	845
08302	" " "	22689	23732	1043
09301*	79 CHEV Malibu	6977	7631	654
09302	" " "	4798	5582	784
09303	" " "	10596	11865	1269
09304	" " "	14854	15910	1056
09305	" " "	11373	12050	677
09306	" " "	10410	11551	1141
09307	" " "	8326	9265	939
09308	" " "	11230	12871	1641
09309	" " "	18737	20530	1793
09310	" " "	95086	10088	320
09311	" " "	9308	10797	494

Chula Vista Sector - Campo, CA

09313	79 CHEV Malibu	18942	21000	2058

Chula Vista Sector - El Cajon, CA

09314	" " "	17855	19734	1879

Chula Vista Sector - San Clemente, CA

09312	79 CHEV Malibu	19810	21872	2062

Chula Vista Sector - Temecula, CA

08303	78 PLYM. Fury	46149	47711	1562

Chula Vista Sector - Headquarters

07626	77 PLYM. Volare	32221	33117	896
8901	79 PLYM. Volare	9043	10604	1551
8902	" " "	13091	13890	799
8604*	78 PLYM. Fury Sport Suburban	52192	54658	2466
1404	74 JEEP Cherokee	29239	29627	388
1407**	" " "	37073	37073	-0-
1408**	" " "	30230	30230	-0-
1409**	" " "	34075	34075	-0-
1429	" " "	35970	36173	203
1430**	" " "	29235	29235	-0-
1506	75 DODGE Ramcharger	44726	45751	1025
A2901*	79 CHEV Pickup	7189	7985	796
A2902	" " "	3689	4020	331
1507	" " "	74004	74343	339
1721*	" " "	32241	32241	-0-
1723	" " "	16742	16916	174
1725*	" " "	28944	28944	-0-
1727	" " "	40590	40920	336
1729	" " "	44436	45692	1256
1731*	" " "	29335	29887	551
1734	" " "	36621	37656	1035
1741	" " "	39300	39643	343
1745	" " "	43353	44143	790
18100	78 DODGE Ramcharger	23127	24458	1331
18121	" " "	23560	25140	1590
18122	" " "	24086	26006	2080

Chula Vista Sector - Brownfield, CA

1720	" " "	46557	49007	2450
1722	" " "	36955	37792	237
1724	" " "	37310	38538	1408
1726	" " "	32267	32988	721
1728	" " "	40975	42844	1869
1730*	" " "	45032	45032	-0-
1732*	" " "	28287	28287	-0-
1735	" " "	26297	27319	1022
1737*	" " "	37165	37165	-0-
1738	" " "	26392	27020	628
1742	" " "	60109	60730	621
1743	" " "	56021	57435	1414
1744	" " "	52603	54106	1503
1746*	" " "	37980	37980	-0-
1748*	" " "	49542	49542	-0-
1749	" " "	22169	22213	23
1750	" " "	62275	64068	1793
18102	" " "	20275	22299	2024
18103	" " "	24884	25148	264
18104	" " "	20513	22148	1635
18105*	" " "	23784	23784	-0-
18106	" " "	25779	27509	1730

Chula Vista Sector - Campo, CA

1740*	77 DODGE Ramcharger	34861	35084	438
18107	78 DODGE Ramcharger	49131	52833	3702
18108	" " "	52498	57383	4885

18109	" " "	42837	45909	3072
18110	" " "	41114	44578	3464
18111	" " "	57801	59805	2004
18112*	" " "	54197	57138	2941
18113**	" " "	48027	48027	-0-

Chula Vista Sector - El Cajon, CA

18114	78 DODGE Ramcharger	29016	31183	2167
18115	" " "	36928	38084	1156
18116	" " "	40984	41404	420
18117	" " "	30722	32879	2157
18118	" " "	42470	45882	3412
18119	" " "	47871	48535	664
18120	" " "	50208	52282	2074

Chula Vista Sector - San Clemente, CA

18123	78 DODGE Ramcharger	27665	28701	1036
18124	" " "	27812	28091	279

Chula Vista Sector - Temecula, CA

A3606	76 AMC Police Van	25684	26079	395
18125	78 DODGE Ramcharger	16536	17445	909
18126	" " "	6610	6754	144

Chula Vista Sector - Headquarters

2401	74 IHC Pickup	58347	58820	473
2414*	74 IHC Pickup	51829	51829	-0-
2531	75 IHC Pickup	18558	18575	17
2532	" " "	39411	40001	590
2661	76 CHEV Pickup	38406	40075	1669
4405	74 DODGE B300 Maxivan	93039	93975	936
4543A	75 DODGE B300 Maxivan	75669	76379	710
4548A	" " "	91407	92725	1318
4615	" " "	77486	78357	871
4801	78 DODGE B300 Maxivan	12006	13024	1018
4842	" " "	9259	9419	160
4843	" " "	25680	27211	1531
4844	" " "	24367	26741	2374
2533	76 IHC Pickup	28690	29159	469
4567A	75 DODGE B300 Maxivan	65576	67151	1575
4603*	" " "	60693	61596	903
4610	" " "	93646	94250	604
4613	" " "	89727	91597	1870
4616*	" " "	78088	78088	-0-
4618	" " "	72525	74467	1942
4702	" " "	59705	61516	1811
4705	" " "	55365	55365	-0-
4707	" " "	80799	82757	1958
4709	" " "	63165	64249	1084
4711	" " "	62273	63323	1050
4713	77 DODGE B300 Maxivan	61271	64930	3659
4727	" " "	60676	62754	2078
4730	" " "	44957	45095	138
4827	" " "	12300	12993	693
4846	" " "	42183	45512	3329
4847*	" " "	25531	25751	220
4850	" " "	32210	36020	3810
4855	" " "	38337	39172	835

Chula Vista Sector - Brown Field, CA

4546A	75 DODGE B300 Maxivan	86774	86774	-0-
4801	76 DODGE B300 Maxivan	40465	40937	422
4809	" " "	86150	88011	1861
4811	" " "	69475	70352	877
4814	" " "	70919	70919	-0-
4817	" " "	84609	85110	501
4704	" " "	71227	72979	1752
4706	" " "	68411	71114	2703
4708	" " "	83652	85847	2195
4710*	" " "	85595	86557	962

4712	" " "	76339	76300	981
4715	77 DODGE B300 Maxivan	64714	66175	1461
4728	" " "	40651	40651	-0-
4729	" " "	19034	19034	-0-
4740	" " "	65489	65846	357
4846	" " "	39685	40445	757
4848	" " "	39521	42302	2781
4849	" " "	24201	25361	1313
4863	" " "	24161	27034	2873

Chula Vista Sector - Campo, CA

4833	78 DODGE B300 Maxivan	23392	24749	1357
4834	" " "	18946	20145	1199
4835	" " "	27020	28915	1895
4836	" " "	18188	18700	512
4837	" " "	21302	22148	846
4838	" " "	26299	27610	1311
4839	" " "	17997	19455	1458

Chula Vista Sector - El Cajon, CA

4828	" " "	24309	26467	2158
4829	" " "	53560	58215	4655
4830	" " "	27060	28903	1843
4831	" " "	31427	32555	1128
4832*	" " "	51022	53593	2571

Chula Vista Sector - San Clemente, CA

3140	71 CHEV Suburban Carryall	15661	15759	98
4505	75 DODGE Duravan (parcel delivery)	14762	14811	49
4820*	78 DODGE B300 Maxivan	27639	29100	1461
4821	" " "	34136	35980	1844
4822*	" " "	33678	36309	2631

Chula Vista Sector - Temecula, CA

3139	71 CHEV Suburban Carryall	34903	35155	252
4823	78 DODGE B300 Maxivan	21608	22765	1157
4824	" " "	28946	30165	1219
4825	" " "	46734	48152	1418
4826	" " "	31440	32948	1508
4899	" CHEV. Stepvan "	3744	3841	97

SOUTHERN REGION

Total Sedans: 479
Total Trucks: 478

Vehicles Assigned	Vehicles Out of Service	Percent Out of Service	Over 60,000 miles*	Garage Personnel Authorized	Garage Personnel Filled
957	94	10%	509	30	25

Del Rio, Texas Sector

Total Sedans: 61
Total Trucks: 96

05788*	75 PLYM Gran Fury	92050	92050	-0-
05790	" " "	89114	90281	1167
05791*	" " "	80921	80921	-0-
05793	" " "	127035	128339	1304
05798	" " "	114036	114036	-0-
05802*	" " "	91040	93196	2155
05807	" " "	111419	113691	2272
05900**	" " "	102991	102991	-0-
06020	76 " "	53280	54614	1334
06217	" " "	86470	89560	3090
06219*	" " "	102775	102775	-0-
06220	" " "	89476	91534	2058
07232	77 " "	67141	71136	3995
07233	" " "	85649	90497	4848
07234	" " "	90836	92820	1984
07236	" " "	53926	55304	1379
07237	" " "	29800	31087	1287
07239	" " "	46540	47500	960
08006	78 FORD LTD	17279	17541	262
08007	" " "	23210	23727	517
08009	" " "	16862	17444	582
1716	77 DODGE Ramcharger	48328	50355	2027
1722	" " "	42706	44478	1772
1763	" " "	61251	62344	1093
1764*	" " "	51133	51133	-0-
1814	78 " "	41665	43785	2120
1816	" " "	55364	59031	3567
1819	" " "	38696	41057	2361
1821	" " "	43977	46147	2170
1825	" " "	54092	56967	2875
1845	" " "	43311	45218	1907
1849	" " "	41636	42289	653
2525	75 DODGE PICKUP			
2526	" " " w/shell	121358	122174	816
A2801	78 DODGE PICKUP	7133	7405	272
A2802	" " "	12113	12865	752
3403*	74 INT Carryall	33527	33668	141
4525	75 DODGE Maxivan	59402	59773	371
4550A	75 DODGE VAN	57170	59690	2520
2534	75 IHC Pickup	70215	70437	455
4620	76 DODGE VAN	70457	70910	453
4624	" " "	49658	50703	1045
4711	77 DODGE Maxiwagon	64837	67739	2902
4850	78 " "	42570	44373	1803
4851	" " "	34814	39653	4839
4852	" " "	30037	32701	2664
4853	" " "	37042	37992	950
58301	73 CHEV Sedan Del.	112433	116429	3996
8906	79 " " "	3925	4462	537
7017	70 GILLIG BUS	423271	427580	4309
7308	73 INT. BUS	151998	152477	479
7311*	" " "	109539	109539	-0-
7724	77 INT. BUS	46276	49836	3560
05796	75 Ply. Gran Fury	88294	88294	-0-
07276	77 " " "	45175	45175	-0-

1515	75 DODGE Ramcharger	65750	65750	-0-
1516	" " "	74293	74293	-0-
1517	" " "	68031	68031	-0-
1518	" " "	96978	96978	-0-
1519	" " "	68756	68756	-0-
1520	" " "	62074	62074	-0-
1522	" " "	72165	72165	-0-
1523	" " "	72403	72403	-0-
1525	" " "	70884	70884	-0-
1526	" " "	72415	72415	-0-
1528	" " "	41830	41830	-0-
1529	" " "	116479	116479	-0-
1530	" " "	67804	67804	-0-
1541A	" " "	54277	54277	-0-
1542A	" " "	55416	55416	-0-
1715	77 DODGE Ramcharger	47262	47262	-0-
1719	" " "	33660	33660	-0-
1720	" " "	43265	43265	-0-
1721	" " "	31352	31352	-0-
2535	75 DODGE PICKUP	66557	66557	-0-
3401	74 IHC Carry-all	38998	38998	-0-
3402	" " "	51500	51500	-0-
4522	75 DODGE VAN	76496	76496	-0-
4524	" " "	62307	62307	-0-
4619	76 " "	65041	65041	-0-
4621R	" " "	74018	74018	-0-
5004	70 FORD STAKEBED	51617	51617	-0-

Brackettsville Station

05787	75 PLYM Gran Fury	97180	99295	2115
05804	" " "	117937	117937	-0-
06227	76 PLYM Gran Fury	84865	87040	2175
07229	77 PLYM Gran Fury	95852	98543	2691
1798	" DODGE Ramcharger	77659	79824	2165
1822	78 Dodge Ramcharger	54529	57058	2529
1824	" " "	46695	47872	1177
1847	" " "	54700	56647	1947
1852	" " "	33637	35741	2104
2523A	75 Dodge Pickup w/shell	111109	112420	1311

Carrizo Springs

05795	75 PLYM. Gran Fury	138326	141765	3439
06228	76 PLYM. Gran Fury	116575	118451	1876
07235	77 PLYM. Gran Fury	96513	98692	2179
1717	77 DODGE Ramcharger	71024	72179	1155
1762	" " "	62851	65601	2750
1820	78 DODGE Ramcharger	54744	56719	1975
1848	" " "	47315	50040	2725
3622	76 CHEV. Carryall	115352	119182	3830
3788P	77 DODGE Police Van	23905	24750	845

Comstock Station

06218	76 PLYM. Gran Fury	40470	41331	861
07230	77 PLYM. Gran Fury	26158	28323	2165
1718	77 DODGE Ramcharger	98061	100984	2923
1817	78 DODGE Ramcharger	57839	61290	3451
1818	" " "	53347	56397	3050
2521	75 DODGE Pickup w/shell	94765	95466	701

Ozona Station

06225	76 PLYM. Gran Fury	76550	78990	2440
07226	77 PLYM. Gran Fury	64660	66780	2120
3621	76 CHEV. Carryall	113250	135140	1890

Sonora Station

05803	75 PLYM. Grand Fury	81400	83916	2516
05805	" " "	97946	98632	686
06226	76 PLYM. Grand Fury	85555	88090	2535
07227	77 PLYM. Grand Fury	79323	81935	2612
07228	" " " "	107404	107404	4952
3803	78 CHEV. Carryall	77575	80970	3395
4722	77 DODGE Van	88890	91957	3067

Uvalde Station

04223	76 PLYM. Gran Fury	96015	97519	1504
07231	77 PLYM. Gran Fury	75714	77565	1851
1761	77 DODGE Ramcharger	42228	43795	1567
1825	78 DODGE Ramcharger	21059	22520	1461
1861	" " "	27744	28585	841
3668	78 CHEV. Carryall	39819	42016	2197

Eagle Pass Station

05723	80 PLYM. VOLARE	6	67	61
05789**	75 PLYM. Gran Fury	113814	113814	-0-
05790**	" " " "	111438	111438	-0-
05799**	" " " "	115084	115084	-0-
05800**	75 PLYM. Gran Fury	84794	84794	-0-
06018	75 PLYM. Gran Fury	119542	125667	6125
06215	" " " "	63617	66918	3301
06216	" " " "	95478	95478	-0-
06221	" " " "	99190	102829	3639
06222	" " " "	105350	108227	2877
06224	" " " "	103527	103948	421
07225	77 PLYM. Gran Fury	54540	56379	1839
07276	" " " "	63468	64997	1529
07277	" " " "	21972	23036	1064
07278	" " " "	82414	83781	1367
1514	75 DODGE Ramcharger	81586	83427	1841
1813	78 DODGE Ramcharger	45981	47692	1711
1815	78 DODGE Ramcharger	60324	63349	3025
1826	" " "	28051	30270	2219
1844	" " "	53303	56070	2767
1846	" " "	53617	57653	4036
1880	" " "	64798	68483	3685
[illegible]	75 DODGE Pickup	133592	136395	2803
[illegible]	" " "	86038	86230	192
37899	77 DODGE Police Van	33468	34853	1385
37900**	" " " "	22144	22144	-0-
4420*	74 DODGE Van	78091	78091	-0-
4622	76 DODGE Van	78139	79872	1733
4623	" " "	54416	55270	854
4721	77 DODGE Van	81025	84582	3557
4810	78 DODGE Van	15563	17318	1755
05797	75 PLYM. Gran Fury	8116	9309	1193
05803	" " " "	59463	61179	1716
07224	77 PLYM. Gran Fury	63180	65045	1865
07238	" " " "	66336	67667	1331
5003*	79 Stakebed	983	983	-0-

El Paso, Texas Sector

Total Sedans: 100
Total Trucks: 111

Alamogordo Station

05609	76 PLYM Gran Fury		62806	2568
09092	78 FORD LTD	43804	45581	1777
09093	79 CHEV Impala	20007	21571	1564
09094	" " "	22033	24746	2713
4632	76 DODGE Van	78326	79332	1006

Carlsbad Station

06229	76 PLYM Gran Fury	85655	86329	674
1836	78 DODGE Ramcharger	38937	40184	1247
4934	78 DODGE Mail Wagon	81875	84490	2615
4957	" " " "	41132	43075	1943

Deming Station

05817**	75 PLYM Gran Fury	84242	84242	-0-
09826	79 CHEV Impala	39318	44796	5478
09896	" " "	24180	26272	2092
1792	77 DODGE Ramcharger	94090	96184	2094
1774	" " "	93871	95263	1392

1775	"	"	"	73287	77435	4148
1800	78	"	"	55555	55746	191
1801	79	"	"	23784	26319	2535
A2564**	75	DODGE	Power Wagon	133279	133279	-0-
A2654	76	"	"	107192	108830	1638
4630	"	"	Van	94400	95934	1534
4639	"	"	"	61771	61931	160
4808	78	"	"	36515	39541	3026
4826	"	"	Step "	5090	5096	6

El Paso Border Patrol Hq.

00703	80	PLYM.	Volare	-0-	36	36
04788	74	FORD	Custom 500	77472	78573	1101
04795	"	"	"	86518	87178	660
04798	"	"	"	94782	95614	832
04807	"	"	"	87840	88710	870
04809	"	"	"	89412	90239	827
04811**	"	"	"	81478	81478	-0-
04812	"	"	"	91126	91654	528
04813	"	"	"	86882	87208	326
04815	"	"	"	86890	86890	-0-
04817**	"	"	"	84242	84242	-0-
04818	"	"	"	67160	68425	1265
05818**	75	PLYM.	Gran Fury	97480	97480	-0-
05819**	"	"	"	81408	81408	-0-
05823	"	"	"	93716	94209	493
05824	"	"	"	85081	85211	130
05825	"	"	"	98772	100202	1429
05826	"	"	"	95036	95106	70
05827	"	"	"	96487	96804	317
05828	"	"	"	82948	83586	638
05829*	"	"	"	79967	80238	271
05832	"	"	"	68024	69109	1085
05834	"	"	"	89192	90078	886
05835	"	"	"	85956	85956	-0-
05837	"	"	"	93507	94296	789
05838	"	"	"	88534	89012	478
05839*	"	"	"	99779	99788	9
06021	76	"	"	77380	79710	2330
06023*	"	"	"	64910	64910	-0-
06230	"	"	"	103911	105436	1525
06231	"	"	"	119324	120689	1365
06232	"	"	"	92600	94232	1632
06233	"	"	"	85838	86745	907
06234	"	"	"	99734	100703	969
06235	"	"	"	101796	103056	1260
06236	"	"	"	81596	82654	1058
06237**	"	"	"	82687	82687	-0-
06238	"	"	"	73277	74140	863
06239	"	"	"	94431	95413	982
06240	"	"	"	96169	97537	1368
06241	"	"	"	102541	103226	685
06242	"	"	"	124762	124762	-0-
06244	"	"	"	74240	74994	754
06245	"	"	"	86105	86105	-0-
07204	77	"	"	52400	53258	858
07205	"	"	"	96047	97128	1081
07206	"	"	"	86873	86873	-0-
07207	"	"	"	97707	99284	1577
07208**	"	"	"	92379	92379	-0-
07209	"	"	"	88712	89538	826
07210	"	"	"	106125	107755	1487
07211	"	"	"	104202	105334	1132
07212	"	"	"	133201	133201	-0-
07266*	"	"	"	89629	89638	9
07269	"	"	"	72533	72851	318
07270	"	"	"	85201	87822	2621
09001	78			58613	60925	2312
09217	79	CHEV	Impala	30436	34329	3893
09218	"	"	"	43433	47086	3653
09219	"	"	"	32697	37273	4576
09220	"	"	"	33676	38257	4332
09221	"	"	"	36859	41106	4247
09222	"	"	"	36476	41271	4795
1768	77	DODGE	Ramcharger	55286	56453	1167

1835	78	"	"	28649	30038	1389
1837	"	"	"	28960	30971	2011
1838	"	"	"	43874	46645	2771
1839	"	"	"	45127	46695	1568
1840	"	"	"	39031	39884	853
1841	"	"	"	39545	42612	3067
1842	"	"	"	31502	37170	668
1843	"	"	"	37704	42589	4885
1902	79	DODGE	Ramcharger	16344	18852	2508
A2618	76	DODGE	Pickup	76550	77381	831
4506A	75	DODGE	Van	83316	83495	118
4507A	"	"	"	77429	78162	733
4628	76	"	"	76277	77310	1033
4631	"	"	"	101603	102232	629
4633	"	"	"	88059	90750	2691
4634	"	"	"	66944	67104	160
4636	"	"	"	55736	56443	707
4637	"	"	"	76960	77278	318
4638	"	"	"	91700	92393	693
4640	"	"	"	64065	65842	1777
4642	"	"	"	88172	90257	2085
4644	"	"	"	66992	67231	239
4707	77	"	"	101872	104197	2325
4708	"	"	"	103576	104802	1226
4712**	"	"	"	122606	122606	-0-
4713	"	"	"	141311	142440	1129
4800	78	"	"	81037	83576	2719
4802	"	"	"	90549	95322	4773
4803	"	"	"	62843	64452	1609
4805	"	"	"	56438	58750	2312
4806	"	"	"	51839	53912	2073
4838	"	"	"	23100	23131	31
4839	"	"	"	22764	23425	661
4841	"	"	"	23443	25386	1943
4842	"	"	"	23757	26107	2350

Fabens Station

04791	74	FORD	Custom 500	95347	95347	-0-
06027	76	PLYM	Gran Fury	79116	80404	1288
1704	77	DODGE	Ramcharger	53595	54620	1025
1773	"	"	"	68739	71122	2383
1802	78	"	"	40654	42882	2228
1803	"	"	"	34951	36409	1458
1903	79	"	"	17731	19749	2018
A2556	75	DODGE	Power Wagon	98468	100488	2020
A2619	76	"	"	90609	93334	2725
A2661	"	"	"	89019	90177	1158
4809	78	DODGE	Van	30658	31662	1004

Fort Hancock Station

07268	77	PLYM	Gran Fury	70465	70659	194
06025	76	"	"	64495	65137	642
1771	77	DODGE	Ramcharger	67932	70191	2259
1772	"	"	"	50497	51423	926
1804	78	"	"	34951	36409	1458
1805	"	"	"	30952	32957	2005
A2853	76	DODGE	Power Wagon	60009	60009	-0-
4635	75	DODGE	Van	44515	44987	472

Las Cruces Station

07202	77	PLYM	Gran Fury	32372	34009	1637
07271	"	"	"	62696	62696	-0-
09207	79	CHEV	Impala	19321	23268	3947
09208	"	"	"	21185	24792	3607
09209	"	"	"	22351	25063	2712
4629	76	DODGE	Van	54453	55486	1033
4829	78	"	"	32822	32822	-0-
4830	"	"	"	36631	38641	2010
4831	"	"	"	39955	41320	1365
4832	"	"	"	35756	36936	1180

Lordsburg Station

06020	76 PLYM Gran Fury	92337	93681	1344
09210	79 CHEV Impala	32762	35457	2695
09211	" " "	27993	29999	2006
1701**	77 DODGE Ramcharger	97340	97340	-0-
1776	" " "	68405	68759	356
1777	" " "	61699	61708	9
1806	78 " "	44799	46109	1310
A2620	76 Power Wagon	105760	105761	1
4643	76 DODGE Van	80282	82081	1799
4833	78 " "	45610	47459	1849
4840	" " "	45707	49333	3626

Sierra Blanco Station

06026	76 PLYM Fury	90565	92616	2051
09212	79 CHEV Impala	13258	15220	1962
09213	" " "	16665	20355	3690
09214	" " "	12337	15460	3123
1703	77 DODGE Ramcharger	72686	74088	1402
1769	" " "	57097	58748	1651
1770	" " "	63530	63788	258
1807	78 " "	24725	26768	2043
1904	79 " "	11390	13959	2569
A2589*	75 " Power Wagon	90820	90820	-0-
A2590*	" " " "	85747	85747	-0-
A2652	76 " " "	94916	94916	-0-
4834	78 DODGE Van	15402	16007	605

Truth Or Consequences Station

08000	78 FORD LTD	139079	143689	4610
09215	79 CHEV Impala	54037	58140	4103
09216	" " "	48346	55103	6757
A2593	75 DODGE Power Wagon	81343	82304	961
4848	78 " Van	53176	53250	74

Ysleta Station

05812	75 PLYM Gran Fury	85030	86701	671
05820	" " "	98730	100389	1659
1833	78 DODGE Ramcharger	38889	40447	2558
1834	" " "	51855	53285	1430
4627	76 " Van	107717	107740	23
4636A	" " "	87489	87508	19
4835	" " Van	33050	35785	2735
4836	" " "	34468	35803	1335
4837	" " "	39048	41197	2149

Ysleta Hq

05810	75 PLYM Gran Fury	79926	81610	1684
07201	77 " "	19668	19990	322
07203	" " "	57614	60350	2736
07213	" " "	85245	87013	1768
07214	" " "	105587	106620	1033
07215	" " "	84567	86340	1773
09201	79 Chev Impala	8188	8554	366
09202	" " "	5257	5680	423
A2615	76 DODGE Power Waon	69501	69682	181
A2800	78 " Pick-up	25503	27149	1646
A2901	79 Chev Truck	10519	11929	1410
4502A	75 DODGE Van	71862	72026	174
4557	" " "	77405	77693	188
4843	78 " "	71691	82003	10312
4844*	" " "	88475	88475	-0-
4845	" " "	91604	99624	8020
4846	" " "	59285	59527	242
4847	" " "	81645	88853	7208
55399	63 FORD Truck	84376	84968	230
5901	79 DODGE Truck	5634	6579	945
6601	76 FORD Demi-trk-trac	43660	45337	1677
8701	77 AMC Sedan Del	49251	52000	2749

Laredo, Texas Sector

Total Sedans: 43
Total Trucks: 40

04835	74 FORD Custom 500	75333	75333	-0-
04838	" " " "	70800	71352	552
05840	75 PLYM. Gran Fury	108271	108271	-0-
05842	" " "	106831	108608	1777
05844	" " "	99696	99732	36
05846	" " "	46085	48136	2051
05847**	" " "	62267	62267	-0-
05848	" " "	81696	82895	1199
05849	" " "	87412	88236	824
05850	" " "	78160	79695	1535
06247*	76 " "	85653	85653	-0-
06248	76 PLYM. Gran Fury	81647	84722	3075
06249*	" " "	76688	76688	-0-
06251	" " "	70193	71274	1081
06252	" " "	72983	74495	1512
06253	" " "	72614	74537	1923
06254	" " "	68070	70125	2055
06255*	" " "	75161	75161	-0-
06256	" " "	87397	87397	-0-
07240	77 PLYM. Gran Fury	57910	61638	3728
07241	" " "	86528	87864	1336
07242	" " "	80506	83615	3109
07243	" " "	47534	48740	936
07244	" " "	55095	57715	2620
07245	" " "	50885	52766	1881
07246	" " "	55037	57969	2932
07280	" " "	15609	16013	404
08020	78 FORD LTD	59574	64982	5408
1545	75 DODGE Ramcharger	61100	61294	194
1706	77 " "	53684	54623	939
1707	" " "	61277	61277	-0-
1744**	" " "	42463	42463	-0-
1745	" " "	50199	50405	206
1746	" " "	36778	37002	224
1747	" " "	47426	47623	197
1748*	" " "	41498	41498	-0-
1749	" " "	84228	84780	552
A2573*	75 IHC Pickup With Shell	51004	51004	-0-
2662**	76 CHEV Pickup	71750	71750	-0-
A2803	78 DODGE Pickup	16540	17869	1329
A2804	" " "	16757	18449	1692
4562A	75 DODGE Maxivan	10125	10812	687
4657	76 DODGE Van	113549	114566	1017
4658	" " "	62478	63260	782
4659	" " "	83177	83915	738
4660	" " "	80879	81285	406
4726	77 " "	94806	96475	1569
4817	78 " "	62424	66837	4413
4827	78 CHEV Van	10180	10743	563
4828	" " "	6081	6461	380

Laredo Tx, Hq

04834	74 FORD Custom 500	90369	91311	942
06031	76 PLYM Gran Fury	32520	33118	598
06032	" " "			
06033	" " "	38292	39262	970
06034	" " "	53740	54790	1050
07247	77 " "	21272	21374	102
4446	74 DODGE Van	58823	60033	1210
4566	75 " "	33318	33530	212
4812	78 " "	76620	81930	5310
4813	" " "	74066	75785	1719
5904	79 " "	4014	5325	1311
SA2581	75 DODGE Pick-up	58472	59094	622
SA4516A	" " Van	100916	101706	790

Hebbronville, Tx Station

05841	75 PLYM Gran Fury	63472	64750	1278
06250*	76 " "	89076	89076	-0-
08010	78 FORD LTD	77941	82390	4449

1750	77 DODGE Ramcharger	57745	58027	282
1751	" " "	64582	64740	158
4662	76 DODGE Van	92979	95633	2654
4710	77 " "	103817	106030	2213
4816	78 " "	58842	60867	2015

Cotulla, Tx Station

06259	76 PLYM Gran Fury	90131	92260	2129
07279	77 " "	78396	81161	2765
1705	77 DODGE Ramcharger	77879	80375	2496
4661	76 DODGE Van	87495	88367	872
4814	78 DODGE Van	68076	69533	1557
4815	" " "	71709	75339	3630

Corpus Christi, Tx Station

06257	76 PLYM Gran Fury	77015	79280	1465
06258	" " "	78025	78953	928
4564	75 DODGE Van	103850	105389	1539

Galveston, Tx Station

06260	76 PLYM Gran Fury	.66335	67520	1185
08009	78 FORD LTD	33171	35495	2324
4663	76 DODGE Van	87371	88092	721

Marfa Tx, Sector

Total Sedans: 34
Total Trucks: 55

Marfa Tx, Hq

04853*	74 FORD Custom	92227	92227	-0-
05854	75 PLYM Gran Fury	75878	76487	609
05861	" " "	69820	71059	1239
06035	76 " "	70339	72320	1981
06036	" " "	54512	56385	1873
06040	" " "	49826	51066	1240
06264	" " "	46976	47713	737
07274	77 " "	37609	38245	636
08003	78 FORD LTD	9682	9976	294
08004	" " "	9885	10312	427
08005	" " "	15815	16136	321
1523A**	75 DODGE Ramcharger	68068	68068	-0-
1535**	" " "	78064	78064	-0-
1811	78 " "	6889	7113	224
2508	75 IHC Pickup	69365	69634	269
A2[illegible]2	75 DODGE Utility	71130	72902	1772
A2903	79 DODGE Utility	4419	5103	662
4666	76 DODGE Van	82887	87077	4190
4714	77 DODGE Van	114373	116732	2359
5902	79 DODGE Flatbed	4357	5859	1502
8615*	77 PLYM Sedan Delivery	94001	94001	-0-

Presidio, Tx Border Patrol Station

06265	76 PLYM Gran Fury	99914	100757	843
07217	77 " "	30513	31113	600
07218	" " "	82223	84200	1977
07220	77 " "	47060	47674	614
1709	77 DODGE Ramcharger	64263	65989	1726
1786	" " "	56721	59051	2330
1787	" " "	49031	50893	1862
1788	" " "	53083	53725	642
1863	78 " "	40454	42826	2372
3701*	77 CHEV Suburban	99365	99365	-0-

Big Spring, TX

3628	76 CHEV Suburban	132278	134275	1997
3629	" " "	127297	128500	1203

Pecos, TX

06042	76 PLYM Gran Fury	61986	62685	699
06262	" " "	38459	39923	1541
07272	77 " "	31862	32650	788
3630	76 CHEV Suburan	83230	88402	5172
3704	77 " "	77762	80056	2294

Lubbock, TX Border Patrol Station

06039	76 PLYM Fury	56801	58062	1261
06261	" " "	60502	61558	1056
07216	77 " "	45931	47245	1314
3801	78 CHEV Suburban	55233	56632	1399
4665	76 DODGE Maxivan	115510	116288	778

Van Horn, TX Border Patrol Station

06263	76 PLYM Gran Fury	73017	73167	150
07221	77 " " "	74295	77272	2977
1710	77 DODGE Ramchager	67789	70085	2296
1860	78 " "	45743	47612	1869
1861	" " "	42061	43653	1591
1864	" " "	27620	29147	1527
A2701	77 DODGE Ramcharger	31780	33127	1347

Fort Stockham, TX Border Patrol Station

06038	76 PLYM Gran Fury	96679	98495	1816
07219	77 " "	57108	59000	1892
3624	76 CHEV Suburban	123797	123797	-0-
3702	77 " "	128085	131848	3763

Sanderson, TX Border Patrol Station

05860	75 PLYM Gran Fury	53936	53958	22
07222	77 " " "	39099	39099	-0-
1810	78 DODGE Ramcharger	50340	53583	3243
1862	" " "	44695	47022	2327
3625	76 CHEV Suburban	114612	118511	3899
3703	77 " "	105875	106892	1017

Alpine, TX Border Patrol Station

05856	75 PLYM Gran Fury	75016	79061	4045
05859	" " " "	93135	96426	3291
1795	77 DODGE Ramcharger	62608	65739	3131
1865	78 " "	65576	70042	4465
1866	" " "	50127	54918	4791
1867	" " "	51689	54881	3192

Marfa, TX Border Patrol Sector Hq

05852	75 PLYM Gran Fury	68619	69902	1283
05853	" " " "	67995	70261	2265
05862	" " " "	79077	80060	913
07223	77 " " "	33254	34622	1368
1790	77 DODGE Ramcharger	76751	79352	2601
1791	" " "	60475	61959	1484
1792	" " "	76146	77896	1750
1793	" " "	72745	76444	1899
1808	78 " "	46364	49165	2801
1809	" " "	46318	50156	3838
1812	" " "	46954	50206	3257
1858	" " "	54046	56987	2941
1859	" " "	53300	56015	2715
A2902	79 DODGE Utility	12606	15093	2487
3626	76 CHEV Surburban	95018	99388	3370
3627	" " "	68184	72505	4321
3789P	77 DODGE Police Van	26058	27761	1703
4531	75 IHC Van	12655	12885	230
5003**	70 IHC Flatbed	52104	52104	-0-

Amarillo, TX Border Patrol Station

06037	76 PLYM Gran Fury	81070	83015	1945
3623	76 CHEV Suburban	126055	129260	3205
3800	78 " "	68653	71694	3041
4664	76 DODGE Van	87471	91300	3829
7730	76 INT. Har. Bus	45388	45917	529

McAllen, Texas Sector

Total Sedans: 47
TOtal Trucks: 73

McAllen, TX Border Patrol Hq

05878	75 PLYM Gran Fury	61632	61851	219
05879	" " " "	54561	54561	-0-
06046	76 " Fury	50643	51184	541
06275	" " "	88583	88583	-0-
07202	77 PLYM Fury	29759	30359	599
07401	77 AMC Matador	33686	34399	713
4705	77 DODGE Maxivan	108527	112120	3593
4715	" " "	107874	110837	3003
4716	" " "	107050	108278	1228
4717	" " "	108750	111806	3056
4819	78 " "	85987	89431	3444
5905	79 Chev D-300 Truck	8151	8930	779
7313	73 IHC Load Star-1700	130164	130639	475
7727	77 IHC Bus	89106	90135	1029
8413	74 PLYM Sub Wagon	65815	67969	2154
8800	78 AMC Concord	7689	8511	822
8801	" " "	15953	17546	1593
04865	74 Ford Custom 500	13677	14826	1149
04872	" " " "	2137	3517	1380
05865	75 PLYM Gran Fury	56150	57771	1621
05872	" " "	54960	56186	1226
05873	" " "	78429	78775	346
05875	" " "	69603	70356	753
06045	76 " "	57619	59095	1476
06048	" " "	58646	60317	1671
05266	" " "	28304	28579	275
06273	" " "	62081	64244	2163
07402	77 AMC Matador	51786	53579	1793
07403	" "	44733	46895	2162
07404	" "	56166	57994	1828
1755	77 DODGE Sport Utility	48656	48684	208
1827	78 DODGE Ramcharger	40214	42436	2222
1831	" " "	39024	42340	3316
1855	" " "	34114	36929	2815
1856	" " "	42365	45015	2650
2666	76 Chev C-10	63295	63355	61
A2904	79 Chev C-20	19013	21914	2901
3641	76 Chev Surburban	79537	80638	1101
3644	" " "	78534	78553	499
3646	" " "	72085	73343	1258
3647	" " "	72439	73787	1348
3705	77 " "	75026	75599	573
3706	" " "	81306	81552	246
3708	" " "	75579	76711	1132
3914	79 " "	16728	18602	1874
3919	" " "	16974	19803	2829
3920	" " "	19069	20040	971
3923	" " "	14733	16479	1746
3926	" " "	15696	16798	1102
3927	" " "	15370	17810	2440
4667	76 DODGE Maxivan	63804	64459	651
4668	" " "	64144	64144	-0-

Brownsville Station

05868	75 PLYM Gran Fury	55323	55447	124
05871	" " "	71567	72893	1326
05881	" " "	48511	49160	649
06043	76 " "	80068	80680	613
06047	" " "	53859	55224	1365

06268	" " "	78773	80241	1468
06272	" " "	63398	63629	231
06274	" " "	41400	41611	211
1832	78 DODGE Ramchargor	20918	22650	1732
2536	75 FORD F-100	40289	40639	350
2537	" " "	45796	46253	457
3634	76 CHEV. Suburban	62038	63173	1135
3638	" " "	62925	63498	573
3804	78 " "	40950	42578	1628
3805	" " "	37818	39651	1833
3806	" " "	44333	46019	1686
3912	79 " "	23575	25593	2018
3921	" " "	18942	20919	1977
4818	78 DODGE Maxivan	40441	46299	5858

Rio Grande City Station

04866	74 FORD Custom 500	88108	89516	1468
05876	75 PLYM. Gran Fury	88094	88804	710
06044	76 " "	74009	75021	912
06277	" " "	91360	91360	-0-
07248	77 " "	74157	76256	2099
07405	77 AMC Matador	50382	52000	1618
1765	77 DODGE Ramcharger	39094	39322	228
1828	78 DODGE Ramcharger	56156	59846	3690
1829	" " "	47842	51112	3270
1830	" " "	51222	53041	1819
1853	" " "	56827	57668	841
1854	" " "	46257	47739	1482
A2906	79 CHEV. C-20	5913	6000	87
4502	75 IHC Stepvan	11091	11143	52
4566A	75 DODGE Maxivan	76249	76327	80

Mercedes Station

05866	75.PLYM. Gran Fury	114370	114310	-0-
05857	" " "	71147	71147	-0-
05874	" " "	62450	62525	75
07250	77 " "	30512	30626	114
1760	77 DODGE Rancharger	38588	38588	-0-
A2905	79 CHEVROLET C-20	4685	7388	903
3651	76 CHEV. Suburban	88719	89940	1221
3911	79 CHEV. Suburban	16997	18482	1485
3913	" " "	18206	20043	1837
3915	" " "	16566	18261	1695
3922	" " "	18000	20125	2125

Falfurrias Station

05869	75 PLYM. Gran Fury	81775	82615	840
05877	" " "	85365	85741	376
06267	76 " "	61168	62060	892
06276	" " "	66640	68078	1438
07249	77 " "	58304	59038	734
07406	77 AMC Matador	120501	124659	4158
1756	77 DODGE Ramchargor	69952	72549	2597
1757	" " "	59298	60913	1615
1759	" " "	70930	73512	2582
A2805	78 DODGE DW-300	54681	56938	2257
3916	79 Chev. Surburban	35968	39269	3301

Kingsdale, TX Border Patrol Station

05880	75 PLYM Gran Fury	97638	100089	2451
06269	76 " "	61274	65623	4339
06270	" " "	62278	63943	1655
07251	77 PLYM. Gran Fury	68617	72218	3601
07281	" " "	54689	57763	3074
1713	77 DODGE Ramchargor	60942	62316	1374
1714	" " "	53497	54427	930
1758	" " "	58165	60348	2183
2665	76 CHEV C-10	83584	86290	2710
3808	78 CHEV.Suburban	66353	68891	2538

Harlington, TX Border Patrol Station

04873	74 FORD Customs 500	88207	89014	807
05870	75 PLYM Gran Fury	68171	68937	766
06271	76 " "	90545	91702	1157
07252	77 " "	51147	52311	1164
3707	77 CHEY Surburban	98724	99998	1274
3807	78 " "	50331	51448	1117
3917	79 " "	20843	23156	2313
3918	" " "	20713	23683	2970
3925	" " "	23406	26366	2960
3925	79 CHEV Suburban	12851	16333	3482

Miami Border Patrol Sector

Total Sedans: 20
Total Trucks: 8

07260	77 PLYM Gran Fury	64191	65653	1462
07264	" " " "	25401	25727	326
08283	78 " " "	33876	34723	900
4402	74 CHEV Van			
4718	77 DODGE Van	69764	72268	2504
4719	" " " "	43044	45613	2569

Jacksonville, Fl Border Patrol Station

0402	74 FORD Custom 500	95010	95651	641
0409	" " " "	84790	86190	1400
07261	77 PLYM Gran Fury	41369	44292	2924

Miami, Fl Border Patrol Sector Hq

0302	73 FORD Custom 500	107326	107911	585
0403	74 " " "	62736	63607	871
0406	" " " "	85390	87998	2608
0407	" " " "	98781	99827	1016
0411	" " " "	99869	101331	1462
08284	78 PLYM Fury	13975	15622	1647
3782P	77 DODGE Paddy Wagon	29504	30561	1057

Orlando, Fl Border Patrol Station

0414	74 FORD Custom 500	113397	114532	1135
07263	77 PLYX Gran Fury	49029	51340	2311
1501	75 Jeep Cherokee	49569	49569	-0-
3401	74 CHEV Sportvan	67768	70514	2746

Tampa, Fl Border Patrol Station

0304**	73 FORD Custom 500	106132	106132	-0-
0405**	74 " " "	90915	90915	-0-
07265	77 PLYM Gran Fury	50073	53184	3111
4691	76 DODGE Sportvan	69765	71920	2155

West Palm Beach, TX Border Patrol Station

0306	73 FORD Custom 500	88057	89062	1005
0408	74 " " "	86203	87045	842
07262	77 PLYM Gran Fury	52621	54154	1533
3784P	77 DODGE Paddy Wagon	18768	18977	209

New Orleans Border Patrol

Total Sedans: 27
Total Trucks: 10

New Orleans, LA

0422	74 FORD Custom 500	93012	94114	1102
04855	" " " "	76773	77140	367
06205	76 PLYM Gran Fury	54380	55495	1115
07255	77 PLYM Gran Fury	43784	44025	241
07256	" " "	58631	59690	1059

New Orleans, Hq.

07258	77 PLYM Gran Fury	41671	42416	745
07259	" " "	30983	35371	4388
4820	78 DODGE Maxiwagon	8902	9729	827
4901	79 DODGE Tradesman Van	25034	27062	2028
4902	" " " "	23825	25871	2046
8601	76 PLYM Station Wagon	40677	41374	707
00748	80 PLYM Volare	7	436	429
00749	" " "	0	8	8
00750	" " "	20	23	3
00751	" " "	0	8	8

Lajitis, TX

0415	74 FORD Custom 500	112856	114108	1252
06209	76 PLYM Gran Fury	83670	85376	1705
4501	75 DODGE Van	83997	84908	911

Baton Rouge, LA

06202	76 PLYM Gran Fury II	86997	86999	2
06206	" " " "	108760	110166	1406
07257	77 " " "	60450	62055	1605

Gulfport, MISS

06207	76 PLYM Gran Fury	79830	80668	838
07254	77 " "	73381	76162	2781
4503	75 DODGE Van	83540	83906	366

Mobil, Ala Border Patrol Station

06214	76 PLYM Gran Fury	60498	61388	890
07253	77 " " "	66175	67710	1535

Pensacola, Fla

06201	76 PLYM Gran Fury	80300	82320	2020
06203	" " " "	52499	54197	1698

North Little Rock, Ark

06208	76 PLYM Gran Fury	116092	116092	-0-
06213	" " " "	107104	107809	705
4720	74 DODGE Van	71923	72868	945

Miami, OK

06210	76 PLYM Gran Fury	101279	103533	2254
06211	" " " "	102362	104544	2182
06212	" " " "	105991	107856	1865
3785	77 DODGE Police Van	64038	66096	2058
4101	71 DODGE Stepvan	5587	5588	1
4690	76 DODGE Van	62455	62860	405
7307	73 IHC Loadstar	64486	65432	946

NORTHERN REGION

Total Sedans: 73
Total Trucks: 31

Vehicles		Percent Out of Service	Over 60,000 Miles*	Garage Personnel	
Assigned	Out of Service			Authorized	Filled
104	51%	53	0	0	

Grand Forks Border Patrol Sector

Total Sedans: 16
Total Trucks: 10

0443	74 FORD Galaxy 500	77671	78928	1257
0610	76 PLYN. Grand Fury	80901	82221	1320
0714	77 PLYM. Grand Fury	67795	69538	1743
0860	78 FORD LTD	21672	24141	2469
A3703	77 CHEV. Suburban	38573	38943	370
3706	" " "	27545	27612	67
3804	78 " "	23632	24505	873
1501**	75 AMC Jeep	49671	49671	-0-
0038	80 PLYM. Grand Fury	-0-	-0-	-0-

Bottineau Station

0608	76 PLYM. Gran Fury	107871	110991	3120
0713	77 PLYM.Gran Fury	69740	72300	2560
1601	76 DODGE Ramcharger	42953	43297	344

Duluth Station

0717	77 PLYM. Gran Fury	74558	75293	735
0609	76 PLYM. Gran Fury	95480	96780	1300

Grand Marais Station

0718	77 PLYM. Grand Fury	33150	34780	1630
1802	78 DODGE Ramcharger	22003	22282	279

International Falls Station

0715	77 PLYM. Grand Fury	84376	87393	3017
1801	78 DODGE Ramcharger	37991	40345	2354

Pembina Station

0441	74 FORD Galaxy 500	92062	93904	1842
0611	76 PLYM. Grand Fury	56292	57998	1706
3704	77 CHEV. Suburban	65885	68015	2130

Portal Station

0607	76 PLYM. Grand Fury	116020	118569	2549
0712	77 " " "	99847	103127	3280
A3802	78 CHEV. Suburban	29456	31139	1683

Warroad Station

0716	76 PLYM. Grand Fury	66835	68222	1387
8801	78 AMC Concord	14250	16299	2049

Spokane Border Patrol Sector

Total Sedans: 11
Total Trucks: 8

0338	73 FORD LTD	82824	85691	2867
0613	76 PLYM. Fury	55228	56369	1141
A3805	78 CHEV Sub.	37781	38475	694
0462	74 FORD LTD	107152	107654	502
0731	77 PLYM. Fury	46304	48728	2424
0732	" " "	29717	30809	1092
1905	79 DODGE Ramcharger	10468	11180	712
4701	77 DODGE Van 4x2	43644	44216	572

Oroville Station

0733	77 PLYM. Fury	72674	75983	3309
1805	78 DODGE Ramcharger	56351	60544	4193
4606	75 " Van 4x2	69362	69363	301

Colville Station

0861	78 FORD LTD	36355	37801	1446
1904	79 DODGE Ramcharger	11365	12600	1235

Bonners Ferry Station

0729	77 PLYM. Fury	62517	63531	1014
0730	" " "	40075	41435	1360

Whitefish Station

0727	77 PLYM. Fury	70296	72111	1815
1804	78 DODGE Ramcharger	37431	38750	1319

Roosville Station

0728	77 PLYM. Fury	80341	83112	2771
1502	76 JEEP CJ-6	42153	43042	889

Havre Border Patrol Sector

Total Sedans: 15
Total Trucks: 9

0457	74 FORD Custom 500	109056	111425	2369
0721	77 PLYM. Gran Fury	49115	50552	1437
0725	" " "	50962	52000	1038
A3804	78 CHEV. Carryall	28831	30562	1731
0641	76 PLYM. Gran Fury	39467	41266	1799

Browning Station

0612	76 PLYM. Gran Fury	94761	95790	1029
A3602	76 CHEV. Carryall	82987	85421	2434
A9404	74 CHEV. Carryall	66994	66991	-0-

Shelby Station

0724	77 PLYM. Gran Fury	71962	73583	1621
0722	" " "	65328	67496	2168

Sweetgrass Station

0447	74 FORD Custom 500	131554	131744	190
0720	77 PLYM. Gran Fury	58000	59985	1985

Malta Station

0453	74 FORD Custom 500	98186	99744	1558
0723	77 PLYM. Gran Fury	64851	67494	2643

Wolf Point

0719	PLYM. Gran Fury	42357	44496	2139
1902	79 DODGE Ramcharger	8980	11845	2865

Plentywood Station

0452	74 FORD Custom 500	106408	106615	207
1903	79 DODGE Ramcharger	7300	8409	1109

Twin Falls Station

0726	77 PLYM. Gran Fury	62004	62320	316
0859	78 FORD LTD	40235	41955	1720
A3902	79 CHEV. Carryall	11750	12150	400
4802	78 DODGE Maxivan	36145	36511	366
4803	78 DODGE Maxivan	31781	33587	1806
1803	78 DODGE Ramcharger	22825	23184	359

Detroit Border Patrol Sector

Total Sedans: 16
Total Trucks: 2

0418	74 FORD Custom 500	85309	86140	831
0857	78 FORDLTD	27792	29275	1483
1901	79 DODGE Ramcharger	14628	16116	1488
4918	79 DODGE TradesmanVan	12228	12279	51

Detroit Station

0417**	74 FORD Custom 500	-0-	-0-	-0-
0419	" " " "	90237	91060	823
0416**	" " " "	-0-	-0-	-0-
0428	" " " "	115333	116626	1293
0605	76 PLYM. Gran Fury	78218	80706	2488
0706	77 " "	93972	95747	1775
0707	77 PLYM. Gran Fury	54339	54755	416

Port Huron Station

0708	77 PLYM. Fury	81333	82798	1465
0858	78 FORD LTD	43524	45990	2466

Sault Ste. Marie Station

0606	76 PLYM. Gran Fury	82759	83976	1475
0705	77 PLYM. Gran Fury	73327	74228	913

Trenton Station

0709	" " " "	78177	80676	2499
0710	77 " "	77886	80711	2825
0711	77 PLYM. Gran Fury	43481	44791	1310

Blaine Border Patrol Sector

Total Sedans: 15
Total Trucks: 2

0403	74 FORD LTD	65000	67050	2050
0404	" " "	68419	69968	1549
0856	78 " "	25525	27216	1691
A3801	78 GMC Suburban	22270	23545	1275

Blaine Station

0402	74 FORD LTD	99241	100029	788
0406	" " "	87383	88728	1345
0409	" " "	90222	92144	1922
0601	76 PLYM. Fury	91380	94214	2834
0701	77 PLYM. Fury	66770	69563	2793
0702	" " "	74442	75866	1424

Bellingham Station

0415	74 FORD LTD	117925	120606	2681
0703	77 PLYM. Fury	73131	73970	839
0704	" " "	73860	75630	1770

Lynden Station

0602*	76 PLYM. Fury	DECLARED EXCESS		
0603	" " "	152533	155989	3456
0604	" " "	128820	131716	2896
A1403	74 AMC Jeep Cherokee	50257	50349	92

May 27, 1980

Honorable Edward M. Kennedy
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Your Committee has requested the Immigration and Naturalization Service to respond to certain questions about INS' operations and activities. One of these questions concerns the independent management study of INS being conducted under my direction for the President's Management Improvement Council. Since the question concerns the scope and timing of the study and suggestions for ways the Committee and the Senate can be supportive of our effort, I am providing a direct response for purposes of maintaining my complete independence as directed by Congress.

The scope of the PMIC Management Study is extremely broad. Because of concerns shared by the Attorney General and various committees and subcommittees of the Congress, the initial priority set for the study was the review of ADP efforts. On March 18, 1980, a study as well as the specifics for resolving ADP concerns was approved. A copy of that proposal is attached. Subsequently, detailed work plans have been developed for reviews of the procurement processes within INS, the fiscal and accounting procedures and the personnel program. Copies of these work plans are also attached. Work plans for the review of other management areas will be developed according to the schedule in the study proposal. We will provide copies of these plans to the Committee when they are completed.

The overall time frame for completion of the PMIC effort is anticipated to be approximately 18 months from inception. However, the study will be completed in parts. The time frames for completion of the various components have been set out in the action plans, and an interim report dealing with each specific area will be produced. It should be emphasized that this effort is not intended to be only a study, but to be an assistance effort within the INS to accomplish immediate changes.

The best way this effort can be assisted by the Committee and the Senate as a whole is to maintain an awareness of the effort, be available for discussions, and recognize that there is not a quick fix to the problems of the agency. The management problems of INS have been severe. In a statement on May 20, 1980 to the House Subcommittee on Government Information and Individual Rights, I presented my particular concerns about the lack of accountability and follow-through within the agency. The institution of systems of accountability, the institution of a long-range planning process, and the enhancement of efforts to assure integrity within the agency are crucial. Formal checks and balances must be established and communicated throughout the agency. Many key actions have been taken by INS. The results from these may not be immediately perceptible, but will in a cumulative fashion be the key to the improvement of the agency in the long term.

One of the principal roles that the PMIC can serve is to assure that the continual priority of dealing with accountability, integrity, and planned activities is maintained and that the established mechanisms are used to deal with the crises that inevitably arise to face the Immigration and Naturalization Service. Based upon the current relationship with top management of the agency, I am confident that this role can be played effectively.

I look forward to keeping the Committee informed of our progress, and am available for any discussions that the Committee members or staff may wish to have.

A copy of this response has been provided to INS for inclusion in their response to the Committee.

Sincerely,

John P. Kratch
Study Director, PMIC

Attachments

cc: Acting Commissioner
Associate Deputy Commissioner,
Planning, Evaluation, Budgeting

PREPARED STATEMENT OF THE AIR TRANSPORT ASSOCIATION OF AMERICA FOR THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

Immigration and Naturalization Service
Fiscal Year 1981 Authorization

The United States flag air carriers are vitally interested in the operations of the Immigration and Naturalization Service at airports. The Air Transport Association of America is a trade and service organization which represents virtually all United States scheduled carriers. In behalf of our 32 member airlines which are engaged in air commerce to, from and within the United States, we would like to address several aspects of Immigration and Naturalization Service (INS) operations which directly impact the airline industry.

Immigration Staffing at Airports

Air travel to the United States has doubled in the past five years, increasing by 110 percent. More airline competition and new international air services called for by the U.S. Government have contributed to this growth, which has proved highly beneficial to the nation as a whole. However, the Government has not provided commensurate inspection

services to accommodate the increased traffic in terms of needed Immigration staffing at airports.

While air traffic climbed during these last five years, the inspection staff at airports has not. The low level of staffing causes severe bottlenecks in processing international arrivals through U.S. Immigration at airports of entry. It is not unusual for incoming travelers to experience delays of several hours at such places as Chicago, Honolulu, Los Angeles, Miami, New York and San Francisco.

In Miami, for example, the number of international passengers is more than doubling each 5 years. The projected increase this year is 40 percent. But there has been no commensurate increase in the number of Immigration inspectors to process this traffic. While 15 additional Immigration inspectors have been earmarked for the new Miami Airport facility scheduled to open in mid-April, this will only start to "catch-up" with inspector staff shortages of the last 5 years. Even the additional 15 Immigration inspectors pledged by the Acting Commissioner of Immigration for the new Miami Airport facility may now be in jeopardy as a result of the freeze on Government employment announced by the President on 14 March, 1980.

A recent "letter-to-the-editor" in a Miami newspaper illustrates the situation at that airport:

To the Editor:

> My husband and I recently returned from a trip to Guatemala. We had intended to spend several days in Miami. What we found and experienced at Miami International Airport upon our return changed our minds from ever coming to your fair city by plane.
>
> It took the Immigration officials two hours and 40 minutes to process us. This included the waiting time while standing with no opportunity to rest. This is inhumane!
>
> Not only was this most unpleasant, uncomfortable, and painful (as well as a great waste of time), but also most embarrassing in front of many foreign travelers. Nobody has ever experienced anything similar at any other American or foreign airport in the world. Why should your city have this infamous distinction?
>
> Larissa Onyshkevych
> Lawrenceville, N. J.

(The Miami Herald, 24 February 1980)

Miami, however, is not unique in this situation. Ordeals such as described in the above letter await travelers elsewhere, and, as alluded to, must be discouraging to foreign travelers. At Los Angeles, for example, a temporary Immigration facility is scheduled to be completed for opening in late April; however, the 17 Immigration inspectors needed to staff this satellite terminal have not been designated. It is imperative that this be done now since recruiting and training of the 17 inspectors is necessary before they are placed on line. We ask the help of this Committee in accomplishing this.

Visitors to the United States receive a poor welcome when they are required to wait extended periods of time for the U.S. Immigration inspection. Their first exposure to the

United States is while being processed through Immigration formalities. This can be a chilling experience if the inspection process is delayed, or if the inspectors appear cold or indifferent because they are harried. The situation occurs all too frequently at U.S. airports of entry because of inadequate Immigration staffing.

To put the matter into an economic perspective, the business generated by the foreign visitors helps with our balance of payments. The U.S. Travel Service estimates that in 1979: 1) foreign tourist receipts in the U.S. were over $10 billion; 2) because of the "multiplier effect", international travel receipts added at least $33 billion more to the U.S. economy; and 3) tax from tourist receipts totaled $1.3 billion. Thus, the U.S. should make every effort to continue this contribution to our economy by not allowing the congestion at airports to repel foreign visitors on their arrival.

The Canadian Government has become increasingly concerned over the lack of U.S. Immigration staffing at several of the preclearance airports in that country. The U.S.-Canada Preclearance Bilateral Agreement of 1974 specifies that "The Party conducting preclearance shall... provide a sufficient number of inspectors to carry out with reasonable speed and efficiency preclearance of passengers..." There is concern that inadequate staffing may jeopardize this bilateral agreement, without which it would be impossible to accommodate the approximately 4 million air travelers which are annually precleared in Canada. It is interesting to note that the preclearance airport of Toronto is the second largest "U.S. airport of entry", Kennedy Airport in New York being the first.

The severity of the staffing problem was highlighted recently when the Eastern region of the Immigration Service ran short of funds in February and proposed to reduce staffing at preclearance and U.S. airports in the region by 25 percent on all Sundays and Holidays until further notice. Although this threat was averted at the last minute by Congressional intervention, we understand that the other three Immigration regions face similar critical problems, and that service may be curtailed at any time in these regions.

The plain fact is that Immigration budget requests for inspection personnel have been, and still are, unrealistic. This is not because INS officials fail to recognize the seriousness of the situation, but because the Department of Justice and the Office of Management and Budget will not allow INS to submit realistic budget requests to the Congress. Attached is a list of U.S. and preclearance airports showing the additional inspectors needed at each location. We realize unfortunately, that it may be questionable whether funds will be forthcoming to fill these positions in the near future. However, the discrepancy between the real need for 375 inspectors and the budget request of 15, serves to emphasize the severity of the problem.

INS officials state they are doing the best they can within the budget constraints, and that without additional inspectors, the only recourse is to let the lines get longer and to pay more overtime. It would appear, however, that it would be more prudent to invest in more regular tour-of-duty inspectors, rather than paying overtime on a double-time basis.

We believe it is the Government's responsibility to provide sufficient staffing to conduct the programs it requires without penalizing the public whose interests it purports to serve. If it cannot, or will not, do so, then the necessity for the program should be re-evaluated.

Payment for Immigration Space at Airports

There has been considerable concern over the years on the part of the Immigration Service, airport operators and the airlines about the arrangements for providing Immigration space at U.S. airports of entry and the several preclearance airports in Canada, Bermuda and the Bahamas.

Immigration today must negotiate with airport operators to obtain whatever space can be made available free of charge to the Federal Government for processing arriving international air travelers. As a consequence, the facilities provided Immigration are often inadequate and contribute to the congestion. The Immigration Service is authorized under Public Law 87-255 to seek necessary airport facility funding.

The Senate report accompanying that legislation concluded:

> Since these duties are strictly governmental and generally of no direct benefit to the users, your committee is of the view that it is a matter of simple equity for the Federal government to bear the responsibility for assuming the costs it incurs in connection with the execution of its duties.

Despite this authorization, funds have never been appropriated for the rental of facilities. We urge this Committee to obtain the necessary funding by making the authorization mandatory.

Facilitation Improvements

The Immigration Service, in cooperation with U.S. Customs, designed and implemented an experimental inspection procedure at the Philadelphia Airport called "one-stop". Arriving air travelers at Philadelphia now proceed immediately to the Customs counters where a "one-stop" inspection is performed, either by an Immigration, or Customs official. That official performs the primary inspection formalities for his agency and the sister agencies, whether Customs, Immigration, or Agriculture.

The one-stop procedure is also in operation at the new U.S. preclearance station at the Edmonton, Alberta Airport. The procedure accelerates the flow of international arriving air travelers through U.S. formalities while making the most economic and efficient utilization of limited manpower resources. The concept should be extended as a cost-reduction and facilitation measure to Los Angeles, Tampa, and Houston as soon as possible, and to other airports when needed facilities are available.

Another facilitation measure which we urge this Committee to support is the proposed extension of U.S. Immigration preclearance to Frankfurt, Germany for an experimental six-month test. Preclearance results in reduced passenger congestion at U.S. ports of entry and requires less total staffing abroad than in the U.S. A side benefit of preclearance is that the illegal, or otherwise inadmissible, alien is intercepted before boarding his flight overseas and not after deplaning in the U.S.

The cost required to staff preclearance at Frankfurt, Germany for the six-month test would be minimal, and we urge this Committee's endorsement of the test proposal.

CONCLUSION

In conclusion... the time has come for the United States to operate its Immigration Service on a realistic financial basis. Immigration inspector staffing should be consistent with the responsibilities and obligations of the Immigration Service under our immigration laws. If budget constraints impose Immigration inspector staff reductions, then the Immigration inspection process itself must be reduced on a comparable basis. If the national interest precludes large-scale changes in the process, then adequate staff must be made available.

We support the Administration and the Congress in efforts to reduce Federal spending and control inflation, and accordingly, have not proposed a large increase in the funding ceiling for Immigration inspectors. However, we believe there may be other programs within the Justice Department which do not so visibly and directly impact the American public as do INS inspections, and which do not require the immediate funding attention which inspection staffing does. While congestion and inconvenience could be endured as a price of government frugality or inaction, it must be realized that this simply discourages foreign travel to the United States and is harmful to the economy of this nation.

We hope the Committee will address the issues raised either by enabling the Immigration Service to perform its duties efficiently and effectively or by re-evaluating the role and responsibilities of the Immigration and Naturalization Service.

ADDITIONAL IMMIGRATION STAFFING REQUIREMENTS

FISCAL YEAR 1981

U.S. AIRPORTS-OF-ENTRY AND PRECLEARANCE AIRPORTS

Northern Region	Additional Inspectors
Anchorage	4
Chicago	6
Cincinnati	1
Cleveland	2
Calgary, Canada	3
Denver	2
Detroit	2
Duluth	1
Edmonton, Canada	2
Great Falls, Montana	1
Kansas City	2
Milwaukee	1
Omaha	1
Portland, Oregon	1
St. Louis	2
Salt Lake City	1
St. Paul	3
Seattle	2
Spokane	1
Vancouver, Canada	4
Winnipeg, Canada	2
Indianapolis	2
Subtotal	46

Western Region	
San Francisco	10
Honolulu	42
Agana, Guam	4
Los Angeles	31
Las Vegas	1
Tucson	1
Phoenix	0
Subtotal	89

Eastern Region	
Maguire AFB	2
JFK (New York)	23
Bangor	1
Boston	8
Baltimore	1
Philadelphia	7
San Juan, PR	16
Charlotte Amalie, V.I.	5
Christensted, V.I.	5
Dulles (Washington, D.C.)	5

Eastern Region (continued)	**Additional Inspectors**
Andrews AFB	0
Toronto, Canada	16
Montreal, Canada	18
Hamilton, Bermuda	3
Subtotal	120
Southern Region	
Atlanta	9
Albuquerque	2
Miami	30
Ft. Lauderdale	4
Tampa	1
Orlando	1
West Palm Beach	1
Memphis	0
Nashville	0
San Antonio	3
Houston	20
Dallas-Ft. Worth	30
Harlingen	1
Freeport, Bahamas	4
Nassau, Bahamas	3
El Paso	2
Key West	1
New Orleans	8
Subtotal	120

TOTAL: 375

DEPARTMENT OF JUSTICE AUTHORIZATION CIVIL DIVISION AND GOVERNMENT LITIGATION

THURSDAY, APRIL 3, 1980

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:40 a.m., in room 2228, Dirksen Senate Office Building, Hon. Max Baucus presiding.

Present: Senators Baucus, Hatch, and Simpson.

OPENING STATEMENT OF SENATOR BAUCUS

Senator BAUCUS. The hearing will come to order.

This morning we continue hearings on the Department of Justice Authorization bill for fiscal year 1981. Today's hearings focus on oversight of the Civil Division and Government litigation.

On March 20, we held our first day of hearings on the Civil Division; on March 27, we held hearings on oversight of the Federal Legal Council and on the Federal Government's coordination of litigation resources and policy. Today we hope to further address the subjects covered by both of those hearings.

In working on these issues, I ran across a statement by Prof. John Davis of the University of Maryland. In one of his studies on Government litigation, Professor Davis observed:

> There has been a continuing effort by Attorneys General to centralize responsibility for all Government litigation in Justice, a continuing effort by many agencies to escape from that control with respect to civil litigation, and a practice by Congress of accepting the positions of the Attorney General in principle and then cutting them into pieces in practice.

At this morning's hearings we intend to address the following questions:

Should responsibility for Government litigation be centralized in the Department of Justice?

Why are many agencies attempting to escape from Department of Justice control with respect to civil litigation?

Have some of the feuds between the Department of Justice and other agencies been so serious that prosecutions have been substantially delayed or in some cases dropped altogether?

To what degree is the Congress responsible for increasing the tensions between the Department of Justice and other Federal agencies?

These are just some of the questions that we hope to discuss this morning.

We are grateful to have with us four distinguished individuals who can help us explore these important issues. Dean Rex Lee and Prof. Barbara Babcock are both former Assistant Attorneys General for the Civil Division. We are also pleased to have with us the current Assistant Attorney General for the Civil Division, Alice Daniel, and Assistant Attorney General for Legislative Affairs, Alan Parker.

Our first witnesses will be a panel of Dean Rex Lee and Ms. Barbara Babcock.

First, I understand Senator Hatch would like to introduce one of the witnesses.

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Thank you, Senator Baucus.

I am pleased to take part in this hearing today, although very briefly. I welcome our representatives from the Department of Justice, Assistant Attorney General Alice Daniel and Assistant Attorney General Alan Parker. I also welcome Ms. Daniel's predecessor at Justice, Prof. Barbara Babcock, for whom I have a great deal of respect. I am especially delighted to welcome Dean Rex E. Lee who I believe to be one of the foremost legal thinkers in the country today. Following his graduation from the University of Chicago Law School, Dean Lee served as law clerk to Associate Justice Byron White during the Supreme Court's 1963–64 term. He thereafter became a partner in the prestigious Phoenix law firm of Jennings, Strauss & Salmon.

In November 1971, Dean Lee was chosen from a distinguished field of candidates to become the first dean of the J. Reuben Clark Law School at Brigham Young University in Provo, Utah. The accomplishments of the J. Reuben Clark Law School and its reputation as an outstanding national law school are directly attributable to the efforts and leadership of Dean Lee. His deanship was interrupted for a 2-year period during which he also served as Assistant Attorney General for the Civil Division under Attorney General Levi.

Welcome, Dean Lee.

I commend Senator Baucus for his efforts in seeking to establish a dialog on the subject at hand. As mentioned in the prepared testimony of both Dean Lee and Professor Babcock, the issue of vesting exclusive litigation authority in the Department of Justice whenever Federal interests are involved is neither new nor uncontroversial.

The interests of the Federal agencies and departments in maintaining litigational independence and the interests of the Attorney General in coordinating a coherent governmentwide litigational policy appear to collide head on.

It is my desire that all of these interests may be subject to that interest which should always be foremost in our efforts to seek legislative solutions: the interest of the people of the United States.

I pledge my support to Senator Baucus in seeking to find the solution that will indeed best serve that interest.

Senator Baucus, I am really pleased to be able to introduce Dean Lee and welcome Barbara Babcock to our committee. I am sure you will get the straight scoop here today.

If you will forgive me, I am 45 mintues late to the Budget Committee markup. We were there till 12 last night, and I have never had such an interesting experience as I have had in the last 2 years as serving on the Budget Committee. We are finding that every agency of Government, every person in the United States has his or her or its own special preference and special needs and, frankly, it is almost impossible to ever cut the budget. We are going to do it this year whether people like it or not.

So, with that, I am very happy to be able to introduce Dean Lee and be with you for a few short minutes here this morning. And, if you will forgive me, I will leave for the Budget Committee.

Senator **Baucus**. Thank you, Senator.

Senator Simpson, do you have any statements?

Senator **Simpson**. Just very briefly, Mr. Chairman.

My office is right next to the Budget Committee hearing room, and I have heard these cries of anguish and howling for about a week, and very distracting for my office staff. Thank you very much.

I really have no formal statement. I am interested in the Department of Justice position with regard to S. 1858, which is a bill to bring the National Guard under coverage of the Federal Tort Claims Act. At the appropriate time, I will come back to the testimony for purposes of getting more information on that issue.

I thank you, Mr. Chairman, for your courtesy and look forward to hearing the testimony. It is nice to see you again, Dean. It is a pleasure to see you here and greetings from all of us to you. Thank you.

Senator **Baucus**. Thank you, Senator.

I, too, want to thank both of you for coming. You have come a long distance from Utah and Palo Alto, Calif., and I appreciate that very much. We are frankly very honored to have you here, not only because of your accomplishments in legal academia, but because you both served as Assistant Attorney General for the Civil Division and also because you are no longer there and have the benefit not only of perspective but hopefully of candor. I very much look forward to your views.

I also found your prepared remarks quite helpful. I want to commend both of you for drawing out in greater distinction and clarity some of the problems you have experienced.

I have a series of questions I would like to ask both of you. One of you may feel more inclined to respond based upon certain experience than the other, but I encourage you both to participate.

I begin by generally asking your individual or combined view where you in your experience felt the Civil Division was weakest. If you could name one or two areas that needed to be shored up more than any others, what would they be? Either of you can begin.

PANEL OF FORMER DOJ OFFICIALS:

STATEMENTS OF BARBARA BABCOCK, AND REX LEE, FORMER ASSISTANT ATTORNEYS GENERAL, CIVIL DIVISION

Ms. **Babcock**. I think, again, as I said in my prepared testimony, that the essential weakness comes from a resource problem, which

These are just some of the questions that we hope to discuss this morning.

We are grateful to have with us four distinguished individuals who can help us explore these important issues. Dean Rex Lee and Prof. Barbara Babcock are both former Assistant Attorneys General for the Civil Division. We are also pleased to have with us the current Assistant Attorney General for the Civil Division, Alice Daniel, and Assistant Attorney General for Legislative Affairs, Alan Parker.

Our first witnesses will be a panel of Dean Rex Lee and Ms. Barbara Babcock.

First, I understand Senator Hatch would like to introduce one of the witnesses.

OPENING STATEMENT OF SENATOR HATCH

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Ms. BABCOCK. I think, again, as I said in my prepared testimony, that the essential weakness comes from a resource problem, which results in our not always being able to deliver what we advertise, which is a sophisticated litigation skill. The ideal is that that is what we can provide for the agencies, and because we have not had the resources to train and to keep lawyers in the Civil Division and to develop them, to develop really experienced trial lawyers in great numbers, we cannot always deliver what we promise in terms of this sophisticated litigation skill.

The second area I really think is the backup of modern complex litigation, computer capacities, first-rate paralegals, that kind of support staff, which is really necessary for doing the kind of litigation that the Civil Division is entrusted with. My favorite story on this is when I first got to the Civil Division, I was really coming with the promise, I thought, that I was going to be running the largest and most important law firm maybe in the world. What I found was a bunch of very capable, but extremely hardworking young lawyers with their files in boxes, with GS-3 secretaries typing on 20-year-old typewriters, three to an office. I went to the Attorney General and said what is this? This is not a modern law firm. This is pitiful in terms of the cases that the Civil Division has responsibility for. I really think that that is the essential problem with the Civil Division, that it just has not been able to keep up with the demand of its caseload and with the demands of the more complex kind of cases that have been entrusted to it.

Senator **Baucus**. The Civil Division cannot keep up because of inadequate support services or cannot keep up because of insufficient authority to litigate?

Ms. **Babcock**. It is not authority to litigate, no. I think it is inadequate resources, both in terms of lawyers and support services.

Senator **Baucus**. How does that compare with other divisions in Justice?

Ms. **Babcock**. It depends on where you are looking. The glamour division, for instance if you compare Civil with Antitrust, for instance, which I really designate as the glamour Division—Congress has always been interested in it, and they have tremendous resources; and if you compare the kinds of cases, the numbers of cases, the variety of cases that Civil handles with Antitrust, I think you will find it a terrifically disproportionate resource allocation.

Senator **Baucus**. Mr. Lee.

Mr. **Lee**. I have too little to add to that. I am in accord with everything Ms. Babcock has said. If I had to choose between those two, I would say need for additional lawyering resources is greater than the backup. The ideal situation, Mr. Chairman, in my view, would be that the Civil Division has at any given time a stable of highly experienced and very capable trial lawyers on whom it can draw, move from one case to the other in the big case. We have made movement in that direction.

Probably the biggest step forward in that respect was under Ms. Babcock's leadership with reorganization of the Civil Division. But we still are not where we ought to be. You take in almost any instance in the big case, and I made some inquiry yesterday to determine that this is still the case, take an airplane crash for example. Any time that there is an airplane crash anywhere in the world involving an American carrier or any time that there is an airplane crash, commercial airplane crash anywhere in the United States, the United States will be involved. The defense of those cases is always handled by the Civil Division.

Time after time after time, it is always the same. There will be essentially three groups of parties that will be involved. They will be the plaintiffs' party. There will be a group of private defendants, and there will be the Government. The lawyering responsibilities are approximately equal on a case-to-case basis. Typically there will be a half dozen lawyers representing the plaintiffs. There will be 8 or 10 representing various defendants, and one representing the interests of the United States. Now, that is just plain economic bad sense because you are dealing with multimillion-dollar kinds of litigation. There is no law firm in the world, there is no private client in the world that would go into litigation of that magnitude with that kind of a lawyering component. That is an instance where the Government is "economizing" and the result of that attempt to economize is a great loss in dollars and cents.

Senator Baucus. I find it a little confusing. I would think that OMB, which historically had liked to save money, would look at that problem and realize there should be more civil attorneys to save Uncle Sam money in the long run.

Mr. Lee. You would think so. I used that example both of the years when we were in budget hearings before OMB, and I might as well have been talking to the wall.

Senator Baucus. Why was it like talking to the wall?

Mr. Lee. I do not know. I guess I do know. I think it is that no one has ever really focused on this problem like it should be focused on. I think there is a tendency to think that a lawyer is a lawyer is a lawyer. I think it may be more appropriate that this be looked at by Judiciary Committee that is composed of lawyers and is more sensitive to those kinds of things.

For whatever reason, that kind of message just never got across. I want to stress this. That is not the only instance. I think it is most egregious. There are other indications. At any given time the Civil Division is handling defending litigation whose claims amount to many billions of dollars, and the ratio of the dollar value of litigation to the number of lawyers who are handling that litigation, I am sure, is many times in the case of the Civil Division that it is any other law firm in the world, and probably on the order of double digit ratios.

Senator Baucus. Have you any way to approximate what the savings to the Government would be if the number of Civil Division attorneys were doubled or tripled?

Mr. Lee. That would necessarily be a subjective judgment.

Senator Baucus. What is your subjective judgment?

Mr. Lee. I would prefer to put it in these terms: that if you believe in the free enterprise system, as I do, and in the free enterprise system as allocator of resources, you have to conclude that in the sphere of our endeavor in which the free market is permitted to make those kinds of allocations of resources, at least in the large litigation area, the lawyering resources are allocated on the order of something like 5 to 1.

If you had to come down and put a dollar figure, at the very least I would say that it would be on the order of tens of millions of dollars.

Senator Baucus. Annually?

Mr. **Lee**. Yes.

Senator **Baucus**. I neglected to let each of you make opening statements. Your statements will be included in the record, but if either of you want to make a general opening statement, please feel free to do so at this time.

Ms. **Babcock**. If you want me to orally present what I have said in my prepared statement, I will do it, but if it is going to be submitted for the record, that is fine.

Senator **Baucus**. It will be included in the record at the end of your oral testimony.

The next question concerns the relationship that the Civil Division has with its client agencies. Attorneys in private practice obviously have to have a very good relationship with their clients. Sometimes one hears complaints that perhaps the Civil Division does not have the same quality of client relationship as the private bar has.

Is that a valid complaint and what can be done to shore up relationships between Civil and its clients?

Ms. **Babcock**. I think that there certainly is a complaint, and there is some validity to it. I do think, as I say in my statement, that there is an intractable quality to this problem because we have a situation that differs from the lawyer in private practice in many ways, but in the major way it differs because we are dealing with the general counsels. We deal with the agencies through their general counsels' offices which means that we have lawyers for clients. I think that really creates an odd kind of problem.

Literally, no lawyer is ever completely satisfied with the job that another lawyer does because you have a sense that you could have done it better. At least you would have done it differently. So there will always be a great deal of mutual criticism, I think, inherent in the relationship. But again the deeper problem, I think, comes from the fact that the lawyer in the Justice Department does not have just a single client. He does have the client agency, the client agency is like an ordinary private client, expects miracles from the lawyer, requires counseling and handholding. But the lawyer for the Justice Department has not only that client with all of its, what we call, narrow and parochial interests just as any private client would have, and its desire to win the case, but lawyer for the Government—for Justice Department also must consider a greater interest, the public interest, if you will, which is not always congruent with the interests of the client.

Finally, the lawyer for the Justice Department has many other clients in addition to the one that he is representing in a specific case, and he must pull together a consistent position for all of these clients, which may not be satisfying to any one particular client, who is not really interested in how a position raised for him may affect other agencies. I think a lot of the problem comes out of this multipayroll, this unusual role that a Government lawyer must play, here he has a client relationship, a client-lawyer relationship, but piled upon that he is representing other interests.

Senator **Baucus**. Can Civil do anything to help improve its relationship, even though the nature of its role is different than the private bar?

Ms. **Babcock**. Yes; I think it can. Again it brings me back to the resource problem, which I think is at the heart of it. I do not think that we have always had time in the Civil Division, literally time and resources to do the kind of handholding, of persuading, of cajoling and explaining to the agencies why we are doing what we are doing.

Senator **Baucus**. What did you specifically do to try to improve this resource problem? Did you bang on the doors of your superiors in OMB?

Ms. **Babcock**. Yes; and I did take a really personal interest in the budget and pressed very hard. We were able to make some strides but not anywhere near——

Senator **Baucus**. Why were you not able to make more strides? Dean Lee has given one reason as perhaps insufficient Judiciary Committee attention to this problem.

Ms. **Babcock**. I think part of the problem is that nobody really understands the Civil Division. It is hard to get people's attention.

Senator **Baucus**. Within Justice?

Ms. **Babcock**. Within Justice where it is referred to as a catchall division because of the tremendous variety of work that the Civil Division does. It is just very hard to get anybody to focus on it. Then, in some ways, I got the feeling we were our own worst enemies because we have managed in the face of really staggering odds to do a very, very good job. So that on the one hand we are managing somehow. It is not as if we are failing. So you come in and say we have got to have more resources, but you cannot also say we are not doing a first-rate job.

When you get to it, the way we are doing the job is taking it out of the hides of our lawyers. They are just working inhumanly hard doing more than should be expected of anybody, and that is what causes them to leave sooner than they should.

Senator **Baucus**. My staff was down talking to some Civil Division attorneys and came back to me very impressed with how hard the Civil Division attorneys were working. I guess particularly the Appellate Section, bloodshot eyes and so on.

Ms. **Babcock**. It is true throughout the Division. For one thing, if you came down on any particular day you would find that 50 percent of the trial lawyers are out on the road traveling around all over the country trying cases.

Senator **Baucus**. Dean Lee, what did you do to try to improve relationships with client agencies and what can be done today?

Mr. **Lee**. I do not know what the circumstances today are, Mr. Chairman, but I felt at the time I was there that this matter of client relations was a serious problem. I think that proper attention and sensitivity to the needs of the client agency are the concomitant of exclusivity of Justice Department exclusivity. I think that is just a quid pro quo that has to accompany exclusivity, and I think both of them are important.

Barbara has put her finger on one of the problems. That is there are just so many things that you can do. My dominant lawyering experience had been as a private practitioner. Of course, our bread and butter or the bread and butter of private practitioners is a client, and as a consequence, I come from the tradition of keeping the client happy. As a consequence, I accord quite a high priority to client relations.

We did two concrete things. One was to schedule a series of luncheons, not for the purpose of talking about particular cases, but just for the purpose of discussing generally our relationships with X agency on a periodic basis with a number of different agencies. We would just pick one out. We started with HEW, which is our principal client, and went from there. The other thing we attempted to do was to meet at the various sections and discuss this problem generally with them and urged them to be as sensitive as they could to the needs of the agency. Necessarily anything like that is done at the expense of something else, but I felt that that was important because, as I say, I think it is the concomitant of exclusivity.

Senator **Baucus**. What you are saying is one of the reasons for poor client relations is because Justice does not have sufficiently exclusive authority and therefore has to share responsibility?

Mr. **Lee**. No. I am saying this. If Justice is given the exclusive litigation authority, then I think that the fact of that exclusivity makes it incumbent on Justice that there is accompanying responsibility that goes with that kind of authority, and accompanying responsibility is to be extra sensitive to the agency's needs.

Senator **Baucus**. Is the converse true, too? The more litigation authority erodes and slips away from the control of Justice, the more tension there is between Justice and client agencies.

Mr. **Lee**. I think that is true. This is the message for the Justice Department, not agencies, and I think it is also true and I found alarming degree of this that in those instances where the Justice Department does have exclusivity, there is a tendency because you are not billing the client to simply say that is their view, it is not our view. Therefore, we will follow our view. Without being as sensitive as Justice Department lawyers should be to the needs of the agency, and that is a criticism of Justice. I think that is a message that needs to get across to the Civil Division lawyers, that we tried to get across to them.

Senator **Baucus**. Ms. Babcock, your statement refers to an increase in the civil caseload and a decline in the criminal caseload. In view of that shift, why was there not a shift in resources from the Criminal to the Civil Division?

Ms. **Babcock**. I could not account for it. I think it did happen. Beyond just saying, when I came, there was just a sense of long neglect and I just think there was a period of long neglect in the Civil Division, when people just simply did not realize both within the Department and in OMB and in appropriations process what was happening. It is not only an increase in the caseload itself, just raw numbers, but in complexity and size of the cases, had both increased dramatically over the last decade.

I really cannot account for the state of neglect.

Senator **Baucus**. I have asked this question several times before at previous hearings and still do not have a good answer.

Ms. **Babcock**. Yes. When I saw the budget picture and caseload picture, I was quite alarmed and really developed what I came to call my hysterical woman act in terms of the budget because I really did feel—it is quite dramatic in terms of the job that the Civil Division has to do compared to resources that it has to do it with

Senator **Baucus**. Dean Lee, in your statement you criticized the President's Executive order for not addressing the issue of litigation authority. Two weeks ago, General Counsel for the Securities and

Exchange Commission stated before this committee that the Federal Legal Council should not address that issue. The reason was that the issue is too explosive and would create too many problems. I take it you feel the administration should not have ducked that question and should have handled it in some way?

Mr. **Lee**. My position in whatever policymaking authority is going to deal with the issue, the representation of the United States in court in any fashion ought to address the principal problem. I think this is very definitely against the national interest to attempt to deal with some small aspect of the problem without dealing with the core problem.

Senator **Baucus**. Ms. Babcock, is it true that this particular administration has supported legislation for individual agencies which had the effect of giving those agencies its own litigation authority?

Are you aware of any instances?

Ms. **Babcock**. I do not recall any. I am having to rely on memory. It seems to me, I do not think the administration did support it. It is sort of a constant thing, at least when I was there, that efforts of agencies to get litigation authority will be slipped into some bill, and we have to just keep watching. At the time that Pat Wald was Assistant Attorney General of the Legislative Affairs, I can remember many occasions when she would say they have done it again. They have slipped it into some bill here and we were always aware of it and unable to get it taken out.

Senator **Baucus**. Are you aware of any instances where the issue arose and there was a conflict between Justice and another agency where the White House got involved and decided the agency should be given litigation authority?

Ms. **Babcock**. I do not recall anything like that.

Senator **Baucus**. Are you aware of any instances like that even though it may have occurred after you were Assistant Attorney General for the Civil Division?

Ms. **Babcock**. Not that I remember.

Senator **Baucus**. Ms. Babcock, in the memorandum of understanding which you worked on regarding the Division of Litigation responsibility between the Civil Division and the Federal Election Commission, there is a provision that if the Civil Division and the FEC are unable to agree on a position with regard to the Commission's enforcement powers, the Commission may then represent itself or acquire private counsel.

That is in paragraph 8 of that memorandum. Why was this provision inserted?

Ms. **Babcock**. Again, I'm having to rely on memory. I think it has to do with their peculiar statute and their enforcement, just not enforcement aspects. I think in terms of defending the FEC against lawsuits that we do not give up any, in the memorandum of agreement, that we do not give up any powers or do not contemplate, as we say, there, that they would hire private counsel.

I think it is something in their statutes particularly on enforcement.

Senator **Baucus**. Were you aware of that provision when the legislation was going through the Congress?

Ms. **Babcock**. I was not there at the time that legislation was going through.

Senator Baucus. My understanding actually is it is not in the statute, just in the written agreement between the Commission and Justice.

Ms. Babcock. And the Justice Department.

I think that is right. I think there is some asset of their enforcement powers, of their statute, which causes us to think there might be situations in which it would be appropriate for them to litigate themselves and which we did not fill as to defending them when they were sued.

Senator Baucus. According to Harvey Pitt, then General Counsel of the SEC, he met with you and your staff, and you agreed that the SEC would defend itself in actions brought under the Freedom of Information Act, Privacy Act, and the Sunshine Act. My question is, why?

Ordinarily, I would think if there is any group of cases that perhaps Justice should have authority to litigate, that would be the group.

Ms. Babcock. I feel very strongly that the Freedom of Information Act cases are a paradigm example of where you need centralized litigation authority, since all agencies are being sued under this act. The positions the Government takes as to what should be released under the act or how the act should be treated should be consistent.

There are hundreds and hundreds of these cases. The situation with the SEC, and again I am having to rely on my memory, was that we felt very strongly that we should handle their Freedom of Information Act cases just as we handled other agency cases, but our situation with the SEC was that they have so long had a kind of across-the-board litigation authority of their own, and they do have a very strong core of litigation lawyers, which most of the agencies do not have, and they do not have lawyers that really have the capability, the litigation capability that I think that represents probably about a battle that we lost.

To say that we all got together and agreed, I think is probably an exaggeration. I am sure we put up a fight, but in the end, gave up.

Senator Baucus. Where did you lose the battle?

You feel that the Civil Division should have that authority and yet the SEC, in fact, ended up with authority. Where did you lose the battle?

Ms. Babcock. I really cannot remember——

Senator Baucus. Do you remember at what level and who made the decision? What happened?

Ms. Babcock. I really am not sure.

I can reconstruct the reasons why we might have given up on this. You remember, as I say, in my prepared statement, this whole battle is a cyclical one. It comes up every 10 or 15 years, and it just happened at the time I was there it was coming very much to the fore. We were being attacked, it seemed, on all sides, with the agencies actually getting together with each other and holding conspiratorial meetings about how they were going to get their own litigation authority.

As I recall, this SEC matter was just a minor aspect. Again, the real trouble with it is that SEC has developed and had their own litigation authority, so that our usual argument that you cannot do it for yourself, you just do not have the capability, had less strength with the SEC.

Senator Baucus. Did you lose any major ones?

Ms. Babcock. In losing litigation authority?

Senator Baucus. Yes.

Ms. Babcock. I consider the memorandum of understanding with DOE a major loss.

Senator Baucus. In addition to the DOE memorandum of understanding, did you lose any other?

Ms. Babcock. No. I think we held pretty firm, and it was a battle. In fact, it was almost a daily battle in terms of meeting with the agencies and the pressures that were being brought.

Senator Baucus. When Carla Hills testified before this committee, Dean Lee, she took the position that some agencies, particularly the independent regulatory agencies, should have their own litigation authority on substantive policy issues.

As I look at your statement, I sense that you disagree with that?

Mr. Lee. I am absolutist on that, Mr. Chairman.

I think the principle is a sound one and it ought to be centralized, and when you start making exceptions, you get into the business of line drawing, and I think this is one instance is which line drawing is wasteful.

It is inefficient, and it also just does not make sense.

Senator Baucus. The SEC should not litigate its——

Mr. Lee. Absolutely not.

Senator Baucus. Should not have any litigating attorneys?

Mr. Lee. Neither should Labor or any other agency.

There should be a cooperative effort between the Government's litigating force, which should be the Department of Justice, and those lawyers who have substantive expertise in the particular areas.

But there always has to be a lead lawyer in the courtroom and it is this simple, that lead lawyer ought to be employed by the Department of Justice.

That is a simple proposition. It is one Franklin D. Roosevelt essentially established almost a half century ago. Since that time, there has been a gradual erosion. It would be the greatest service that could be performed if that would be reinstituted with no exceptions.

Senator Baucus. What if there were shared responsibility, but a lead lawyer within the Justice——

Mr. Lee. That is fine. That just makes good sense.

Again, there is analog to that in the private sphere. When I was in private practice, I did a lot of work with House counsel who were full-time employees, lawyer employees, of the client, and they assisted and they took part and they brought that greater expertise with regard to particular cases that I did not have.

But there had to be and always was a lead lawyer, and that was the private law firm. That is the role that the Justice Department ought to play.

Senator Baucus. Last year Senator Thurmond made the interesting observation, which I think most people in the country would agree with. It begins:

> It seems to me we have a lot of litigation that ought to be settled administratively by the Justice Department, by the White House, and by somebody without having one government agency suing another. It does not look right.
>
> The public does not understand it.

I am wondering to what degree you agree with that and how often, in your experience, was the Government unnecessarily litigating against itself?

Mr. **Lee**. I, of course, agree with this. That is one of the reasons as set forth in my statement for exclusivity. I remember maybe a half dozen instances where we had to make a choice between absolutely 180 degree conflicting viewpoints of different agencies.

I am sure that there were more. I was there for 2 years. It is not a terribly common practice. But usually the Government is on the same side, but as I say, I do remember a handful of instances in which there were surely conflicting positions taken by two different agencies.

Senator **Baucus**. We have a provision in the bill we have introduced, S. 2401, which provides that the Attorney General resolve all disputes between agencies. I take it you feel that that should be applied to disputes not only between Justice and executive agencies, but also independent regulatory agencies?

Mr. **Lee**. Yes. I think 2401 is basically very good legislation. I would like to add one single sentence, and have indicated in my prepared testimony what that sentence ought to be.

Senator **Baucus**. Tell us right now.

Mr. **Lee**. That all authority to represent the United States and all of its departments and agencies in litigation is vested exclusively in the Justice Department. You give me an opportunity, I might polish that sentence up a bit. That is the thrust.

Senator **Baucus**. Ms. Babcock, let us get into that Department of Energy-Justice memorandum of understanding.

Can you tell this committee how that memorandum of understanding came into being and just generally what happened? What led up to it?

Why do we have it?

Ms. **Babcock**. Again, I have to reconstruct it from memory after some time, but it did come about in the consideration of the EPAA legislation, as I remember, and in which the agency through, in a sense, its committee in Congress urged that with this legislation should be included their own litigation authority.

I think they actually had legislative language drafted, and so it was under the threat that such legislation might be passed and overtly stated threat such legislation might be passed that the Department, through the Associate Attorney General, engaged to try to work out a memorandum of understanding in order to avoid having the thing set in legislation with the Department having its own litigation authority.

Senator **Baucus**. The Department of Energy.

Ms. **Babcock**. What did I say?

Senator **Baucus**. I think that is what you implied.

Ms. **Babcock**. With the Department of Energy having its own litigating authority, and so that I describe in my testimony that Civil Division had a gun at its head. We certainly feel that way. It was either come up with some memorandum, and a memorandum that was satisfactory not only to the Department of Energy, but also to the Congress, in order to avoid having this legislation which would have created we thought a very bad precedent.

So the negotiations on the memorandum of understanding were protracted, difficult, and I would say in their result totally unsatisfactory.

That memorandum for any lawyer as a contract is a nightmare. You look at the legislative history of the contract, it is even worse. I just think it is an example of the worst kind of——

Senator **Baucus.** You say a gun was held at the Department of Justice's head, and therefore you negotiated under duress?

Ms. **Babcock.** I certainly felt that way, and everybody in the Civil Division felt that way.

Senator **Baucus.** Why did the Attorney General give away litigating authority?

Ms. **Babcock.** It was the threat of having something worse happen, which is to have it written in legislation.

Again, you have to look at the timing of the thing, which was the agencies were all trying to get such memoranda, or such legislation, to get their own, acting in concert to get their own litigation authority, so if one of them did actually manage to get a bill written, that we thought could be very dangerous as a precedent.

Senator **Baucus.** Who did the Department go to?

Did the Department go to the administration and try to seek administration support to preserve the Department's litigation authority?

Ms. **Babcock.** I'm really not sure. I certainly did not.

Senator **Baucus.** Was it drawn to the administration's attention? Did the administration know that potentially the Justice Department was going to lose some of its jurisdiction? Why didn't the administration back up the Justice Department?

Ms. **Babcock.** I am not sure they were asking. I just do not remember what we did at that point.

Again, it was the Associate Attorney General, though I was doing the day-to-day negotiations. The decision that we had to enter these negotiations was made by him and who he consulted with I really do not know——

Senator **Baucus.** I take it the Civil Division impressed upon the Associate Attorney General, or the Attorney General, himself, the importance of keeping litigation authority.

Ms. **Babcock.** Yes.

Senator **Baucus.** You pulled another one of your hysterical woman acts?

Ms. **Babcock.** No. I really had become a zealot on the thing and was horrified at the course that this was taking.

Senator **Baucus.** I take it nobody disagreed with your position. In view of your strong advocacy that Justice have litigation authority with respect to DOE, what in your judgment happened? Why did the administration not back you up?

I take it your pleas did not fall on deaf ears. The Attorney General heard you. I would assume the Attorney General would want to keep authority in the Justice Department.

After all, that is his department. What do you suppose happened?

Ms. **Babcock.** Again, I do think it really was the threat that this might be written into legislation and would start a landslide, and the notion that Energy was just very powerful at that time, more powerful than Justice.

The other thing is that it is a hard issue to get people to understand, because it sounds as if you are just protecting your own turf.

On the surface of it, when you say, do not give this multimillion-dollar new agency which is going to have 400 lawyers, do not let them do their own litigating because of this principle of the ideal of centralized litigating authority; it sounds like a very petty bureaucratic argument to be making. I want my own power.

I want my own turf. I want my own people.

It is just hard to get across, I think, to get people interested in it.

Senator BAUCUS. If the Department, during these negotiations, had come either to the House or Senate Judiciary Committees, do you think that would have helped?

Ms. BABCOCK. Yes; I think it would have. I think it would have been good.

Senator BAUCUS. Why did the Department not do that?

Ms. BABCOCK. I really do not know.

Senator BAUCUS. Did it occur to anybody?

Ms. BABCOCK. I am not even sure that it did occur to anybody.

Senator BAUCUS. What was your experience with the memorandum with the Department of Energy?

How did it work?

Ms. BABCOCK. I do not know how it is working today.

While I was there, it worked as badly as I would have predicted that it would work. First of all, in terms of the thing itself are built the seeds of dissension. Because it arose out of very difficult negotiations in which bad feeling on both sides was already built up over the course of negotiations, and we continued after the memorandum went into effect to litigate the terms of the memorandum with the lawyers, even though I think a real effort was made on both sides, but necessarily the lawyers arguing.

Senator BAUCUS. Can you give us some specific examples of the difficulties the Civil Division had with the Department of Energy?

Ms. BABCOCK. I think that you have—the example that comes to mind is the one that is in the memorandum which I believe the committee has, which I wrote to the Associate Attorney General suggesting that the memorandum be rescinded.

But there was a situation in which the Department of Energy wanted to bring a large number of very, very complex cases. We did not think— we in the Justice Department, did not think that these cases should be brought directly to court, although the statute would allow them to be brought directly to court.

We thought they ought to go first through the administrative process. Energy disagreed. We said, OK, we will have a lot of negotiation. We will bring them to court, but we will assume primary litigation responsibilities for them.

We, in Justice, under agreement, think that these are kinds of cases in which we should retain litigation authority, and at that point we started preparing to bring these cases—we could not get any information at all out of the Department of Energy, any preparation of cases from them, and then we learned some months after we had started on the cases, and said we were going to take primary litigation authority, and in fact, got the Department to allocate a number of new positions to the Civil Division in order to bring these cases, that Energy had decided to go the administrative route, and not to file the cases.

Senator **Baucus**. Does that mean their case was delayed?

Ms. **Babcock**. I do not know what has happened to them at this point.

Senator **Baucus**. But there was delay at the time?

Ms. **Babcock**. Of course there was.

Senator **Baucus**. How long was there?

Ms. **Babcock**. At least 1 month, maybe 6 weeks.

Senator **Baucus**. What is involved in terms of the size of cases, and what are the amounts involved?

Ms. **Babcock**. Major enforcement cases involving millions of dollars.

Senator **Baucus**. Were they ever brought?

Ms. **Babcock**. I do not know. That was toward the end of my stay. But that is just an example of the difficulties of working with these memoranda, especially memoranda like this, in which the terms are vague.

Senator **Baucus**. What are some of the specific cases?

Give me specific references. What are the names?

Ms. **Babcock**. No; I could not at this point, although I think they are better identified in the memorandum that you have. I cannot from memory say.

Again, I do not know what has really happened to these cases. The other aspect that happened very much under the Department of Energy memorandum, that has happened under other memoranda, but I think was most clearly presented here, was that the agency really does not play its formal role when it has some cases that it is directly litigating.

Naturally, its interests are in the ones it is handling itself. The vital support services that are needed in terms of getting cases together, getting witnesses together, responding to discovery, the support only that agency can provide, was just not forthcoming from the Department of Energy for the cases that the Department of Justice was handling.

Senator **Baucus**. I am trying to get at the heart of your reason why Justice should have more litigating authority. Is it because you as a person wanted to have control over these cases? Or is it because you felt that potential violators would be left off the hook, that is, cases would not be enforced, and if enforced, enforced improperly?

What is the root reason why you feel Justice improperly gave up litigation authority?

Ms. **Babcock**. Because I think the way to litigate is to have the people that are in court litigating for the Government be people who have a specialty in litigation, and people, second, who can look at the whole picture of the position that the Government is taking, not is it in the interest of the Department of Energy, but it is in the interest of this administration, this Government. Is it in the public interest to have people with litigation skill, who can take a broad view, speaking for Government in court?

And then there is a very natural role then for the agency to play, which is to provide the expertise and backup service to that litigation.

That is just the logical way to run litigation.

Senator **Baucus**. I take it, your analogy would be a very large law firm, even though they have experts like tax attorneys, still have litigation experts?

Ms. **Babcock.** Exactly. Another analogy from the private sector, for instance, is large corporations who have their in-house counsel. They have their in-house counsel but those are not the counsels who litigate for them in court.

Senator **Baucus.** In your view, does the Attorney General have power to rescind either that particular memorandum or memoranda of understanding generally?

Ms. **Babcock.** Sure. I do not have any doubt about it.

Senator **Baucus.** Why did not the Associate Attorney General, Mr. Egan, or the Attorney General himself rescind this particular memorandum?

Ms. **Babcock.** I hope it is still under consideration.

Again, I think that was in February; I think that I recommended that it be rescinded. Then I left a few months later and no action was taken. So did Mr. Egan, who was Associate Attorney General.

Senator **Baucus.** Do you feel you gave him enough evidence in your memorandum, or in any other additional comments, as to why they should rescind?

Ms. **Babcock.** I do, yes.

Senator **Baucus.** I think you did, too. I think it is a good memorandum. I read it.

Why did they not decide to rescind, then?

Ms. **Babcock.** Again, I think they may have entered negotiations, but I do not know what came of it.

Senator **Baucus.** Would you please tell us what the specific consequences of the problems with the Department of Energy were?

Did the conflict between Justice and the Department of Energy result in cases not being brought in addition to the delays?

Ms. **Babcock.** I really do not think—no, I do not think that is the case. I think prime concomitant is delay.

I also think, and again you may have to discount some of what I say for the bias that I said earlier that no lawyer ever thinks another lawyer does a good job, but I would be very highly critical of the way the Department of Energy handled the cases that it handled directly.

Senator **Baucus.** Give us some examples.

Ms. **Babcock.** I really cannot. Not that I would not, but I just do not remember.

Senator **Baucus.** You remembered at the time?

Ms. **Babcock.** I remember at the time thinking that a certain lack of judgment and basic litigation skill was evident in the cases that were handled directly, and I thought we could have done them better.

Senator **Baucus.** With the result that they were simply delayed, or was the recovery less?

Ms. **Babcock.** Not as well handled.

Senator **Baucus.** With what concrete results?

Ms. **Babcock.** I doubt that these cases have even come to any fruition, any of them, at this point.

Senator **Baucus.** Is this issue between Justice Department and the Department of Energy simply a case of bureaucratic bickering or is it a problem that has very direct significant consequences on the public, on American citizens?

Ms. **Babcock.** As I was saying, I really do not know, though on the surface of it, it may look like bureaucratic bickering, but I do not think it is at all. I think the notion of how the Government presents itself in court and what is the very best way to do that is an issue of great consequence and has direct results in terms of whether the programs are enforced or successfully enforced, and whether the Government is successfully defended.

There is a direct correlation between the skill of the advocacy and the reasonableness of the positions that are taken and the results in court.

Senator **Baucus**. I take it you feel that short of rescission of the memorandum, a new one could be negotiated or an addendum agreed to. Is a new agreement whereby Justice would have lead responsibility or certainly more responsibility or exclusive responsibility in many of these areas a solution you could support?

Ms. **Babcock**. That is probably true. I had not thought about it. I am sure that there is room for negotiation and improvement in the terms of the memorandum.

Senator **Baucus**. Did you make any suggestions regarding this memorandum, either rescission or improvement, to your successor, Alice Daniel?

Ms. **Babcock**. I am not sure that is one of the issues. She, of course, had all the files and papers on it. I may have advised her that that is one of the problem areas she would face right away.

Senator **Baucus**. You do not recall advising her, discussing this problem with her?

Ms. **Babcock**. No, I do not. I discussed a whole range of things with her as she came in. I do not remember that this was one.

Senator **Baucus**. What is the most consequential and important matter you discussed with her as it affects the efficacy and worth of the Civil Division?

Ms. **Babcock**. I think again that the main thing that I had to pass on to her were matters of the use of the resources that we had, the reorganization and the importance of it and keeping it on track and then, third, really personnel issues. Whom she should look to within the Division for leadership, and for help coming in.

Senator **Baucus**. I note she is sitting in the audience right now. Do you have any advice to give her regarding this memorandum?

Ms. **Babcock**. She has my original memorandum, and I stand behind that.

I hope very much that she does not get into the position of ever having to negotiate anything similar to this with any other agency.

Senator **Baucus**. You strongly advise her to recommend rescission, and short of that, change the memorandum?

Ms. **Babcock**. Yes.

Senator **Baucus**. To regain some litigation authority?

Ms. **Babcock**. Yes.

Senator **Baucus**. She is coming up soon.

Ms. **Babcock**. Again, Senator Baucus, it is quite different being I than being she, in terms of she has to go back and deal with the Department of Energy as a client today, probably.

Senator **Baucus**. Four years from now, when she is a law professor at some university, she will probably be sitting where you are right now.

Dean Lee, I would like to ask you a few questions about a different topic.

Would you give this committee your position on whether or not, in some instances, the Department of Justice should decline to defend statutes on the ground they are unconstitutional?

Mr. **Lee**. I do have an opinion on that subject, Mr. Chairman.

It was borne out of my experience. I think there should be a very, very heavy presumption that the Justice Department should take in favor of defending the constitutionality of any congressional statute, and that it is only a truly extraordinary case, extraordinary case that the Department should decline to take on the responsibility.

During my term in office, I struggled on how to verbalize what that standard should be.

Frivolous, maybe that is the best way to express it, but clearly in most instances where the Department comes to the conclusion that it cannot, consistent with its responsibilities as an officer of the court, represent to the court that the statute is constitutional, and I suppose that is another way of saying that it should decline to defend the constitutionality only in those instances where it concludes that the statute, that the constitutional argument would be frivolous.

I can give you one example. There is only one that I know of where the Department, in my view, was justified in taking that position; that was the *United States* v. *Lovett.*

I can give you facts in that case, if you like. It came up about three decades ago.

Senator **Baucus**. What was that case?

Mr. **Lee**. It was a case that arose out of, came out of the McCarthy era historically, and roughly what happened was, there was a rider that was put on the appropriations bill providing that no part of the money that was appropriated in that bill should be used to pay the salary of five named individuals in the State Department. It was just very clearly a bill of attainer.

Anyone who is—maybe that is easier now that we have the *United States* v. *Lovett,* but I really think that any decent constitutional lawyer reading that bill would say, no, that is unconstitutional.

I think defending the constitutionality of that statute would have been tantamount to taking a frivolous position and therefore violating the obligation that any lawyer has as an officer of the court. The Justice Department, according to my recollection, did not defend the constitutionality of that statute. I think it was proper that it did not do so.

I think this is another instance of a concomitant of centralized and exclusive litigation authority. Only in the truly extraordinary case and only when the position would be frivolous should the Department decline to defend constitutionality of congressional statutes.

Senator **Baucus**. I take it when you were in the Civil Division, you do not recall any instances where the Justice Department refused to defend a statute on the grounds it was unconstitutional?

Mr. **Lee**. The technical answer to that question is that, no, I do not recall. There was one kind of halfway.

Senator **Baucus**. That is nontechnical.

Mr. **Lee**. I mean, the narrow technical answer is, there was one that came close, *Buckley* v. *Valeo.* What happened was, the Solicitor General Bork did not put his name on the pleadings, but the Department as a department did defend its constitutionality.

Senator **Baucus**. Your very, very, very strong presumption?

Mr. **Lee**. Yes.

Senator **Baucus**. I suppose one example where perhaps the Department is justified in not defending the statute on the grounds it is unconstitutional would be where Congress has passed the statute, the Supreme Court unanimously and strongly and vigorously ruled it unconstitutional, and Congress goes back and passes the same statute again.

Mr. **Lee**. That would be a clear example.

I repeat that I think that the Department did the right thing in *Lovett*. I do not know of another instance.

Senator **Baucus**. What is the responsibility of the Department to the Congress in this area?

Should the Department inform Congress in advance of a tentative decision not to defend?

Mr. **Lee**. In this extraordinary case——

Senator **Baucus**. Yes, in an extraordinary case.

Mr. **Lee**. I think you should inform Congress in advance.

One on the consequences, of course, coming back to *Buckley*, given the holding in *Buckley*, that is separation of powers, article 2 function, one of the consequences of such a decision in such an extraordinary case is that its constitutionality would not be defended by the Government at all. It would have to be done by private parties. That is one of the reasons I think it should only be applied in extraordinary situations.

Senator **Baucus**. I want to thank you both very, very much for appearing today.

It has been extremely helpful.

Thank you very, very much.

Ms. **Babcock**. Thank you.

Mr. **Lee**. Thank you.

[The prepared statements of Ms. Babcock and Mr. Lee follow:]

Prepared Statement of Barbara Allen Babcock

Senator Baucus, members of the Committee, I am delighted to be here today to address the issues that the Committee is considering in the appropriations authorization process. The first question is to what extent the Department of Justice should control litigation conducted by the Federal Government. Allow me to open on a personal note. When I arrived in February 1977 to be Assistant Attorney General, I had not thought at all about the question. I was the classic blank slate upon which anything might be written. Also, coming from academia and not having been on the inside of the federal bureaucracy before, I did not have ingrained turf protection habits or insti[illegible] Quite the opposite, my training was to look to the most analytically correct and reasonable solution. Within months of my arrival on the job I found myself in what I learned was a cyclical battle between the Department and the agencies over litigation authority. History tells us that the dispute has sharpened and come to the fore every 10 to 15 years since 1870 when central authority was given to the Attorney General.

In the course of seemingly endless meetings with general counsels and their people, with lawyers in the Civil Division, with the staff of the Presidents Reorganization Project, on public forums and at hearings before Congress, I not only became convinced that central litigation authority should be reposed in the Department of Justice, but also became in my own mind, something of a zealot on the issue.

Although it is not useful to recount horror stories in detail, and though every horror story I could tell could undoubtedly be countered by one from an agency whose interests were not properly served, I was startled over a 2½ year period to see not once, but many, many times, agency counsel demanding that untenable, or unreasonable positions be taken in court because the case must be won. It was also common to find agencies totally unconcerned with how some position taken for them in court could adversely affect another agency, or the litigation posture of the Government as a whole.

The reasons for this are fully comprehensible. The agency lawyers are under pressure from their program people to produce, and they themselves are in many instances, intellectually and emotionally invested in the programs and policies which are being challenged. There is not, and probably should not be, anything in the agency counsels' job descriptions that requires them to take a broad view of the federal government as a litigator. Baldly stated, the agencies do not have the mind-set to litigate for themselves.

The principal reason that the Department of Justice should have central litigating authority is that there is an essential difference between the role of a government lawyer and that of a private lawyer representing a client. The private lawyer is totally client-bound: his professional duty is to achieve the best result for his client within the bounds of the law and ethics. Not so, the government lawyer, who represents three interests at once. First, the government lawyer has clients, of course, who behave much like clients in the private sector. They need counselling, hand-holding, and expect miracles from their lawyers. But secondly, the government lawyer has to take into account the public interest: his client is also the people of the United States and their concern that justice be done, which is not always the same as the government's winning its case. Finally, the government lawyer has an interest in the overall consistency of positions taken in court. These roles are sometimes in conflict, and when there is added the special force with which the government speaks in court, it should be apparent that a special outlook and skill is required to exercise the government's litigation authority. Let me elaborate the last point. Courts on all levels are simply more responsive to the arguments of the government than to those of private litigants.*

Courts assume that the government's position is in fact an amalgam of the resolution of internal policy disputes, and that when the government speaks in litigation, it is doing so because of an interest in fair resolution of the issue and not solely in the interest of winning a dispute. This extra aura that goes with saying "I represent the United States" brings with it a heavy responsibility for having actually engaged the processes of reconciliation of competing views, that the courts assume has taken place. An agency concerned with the success of its programs is simply not equipped for the process.

The model of centralized litigating authority is an excellent one. The agencies through their general counsel investigate and prepare the cases, select the ones that are best for enforcement purposes, work with their lawyers in Justice in the discovery and formulation stage, and generally provide the expertness that is needed to litigate complex matters. The Justice Department lawyers provide a broad view, consistency with other government positions, familiarity with the courts and the tactical skills and elements of judgment that are necessary to litigation. The old rhubarb that lawyers who represent themselves have a fool for a client applies very well to general counsels of agencies when they are in courts. The saying is based in the fact that the client himself is too involved in the case to explain it to the judge or jury. This is entirely true of agencies to whom the arcane terms, and intricacies of their regulations are second nature.

One of the criticisms of the Justice Department lawyers is that they don't understand these complexities. Yet the job of the litigator is to master the details and in effect translate them for a judge skilled in the law but without the background in the agency's work. This is a job that is far more easily done by a person who has some distance from the area—who knows what she does not know—and is thus more likely to be able to explain to a judge what he or she does not understand.

Now, I would be the first to admit that the model does not always work as outlined, and that in answer to your second question there have been many instances in which the government has not adequately coordinated its litigation policies. One reason for this is the obverse of the fact that no good lawyer would

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*An interesting, but not a typical statistic on the power of the government lawyer appears in NOTE: The Solicitor General and Intragovernmental Conflict, 76 *Mich. L. Rev.*, 93, n. 4. "In the 1975 Term, the government participated, either as a party or through the submission of amicus curiae briefs, in 121 of the 179 cases in which the Court heard argument. The government participated in 175 cases decided on the merits, and the Court decided in favor of the government's position in 139 of them. [1976] Atty. Gen. Ann. Rep. 34."

represent himself: no good lawyer ever thinks another lawyer does the job as well as he could. Lawyers are very difficult clients; the basic situation of lawyers in the Department of Justice is that they must work with, through and for lawyers in the agencies. In this sense, the problem is intractable. There will always be a good deal of mutual criticism on both sides of this laywer relationship.

The fundamental reason, however, that the Department of Justice has not always been able to do the job well of representing agencies and carrying out what I think most people would agree is the ideal model of litigating for the government, is the lack of resources in the Department. In the Civil Division particularly, the caseload, and the significance of the cases has increased dramatically in the last decade without a corresponding increase in the numbers of lawyers, and equally important for modern litigation, support staff in terms of paralegals, computer capacities, and modern information production and retrieval systems of all kinds. A telling statistic which this committee may have heard before is that between 1965–1977, the Civil Division experienced a caseload increase from 11,544 to 24,195 cases (over 109 percent) while the authorized number of attorneys grew from 198 to 282, an increase of only 42 percent. The day to day business of defending the government and enforcing its programs, although involving millions of dollars and matters of great moment and principle, is not glamorous. No Congressman or Senator gets any votes for seeing that this work is done adequately. I witnessed more than once the anomaly of new departments being created with broad new statutes that would inevitably engender litigation. These departments were awarded huge numbers of lawyers in first rate offices with all that one could ask in terms of support, while the Civil Division still with the litigation authority, struggled along with incremental increases.

So many of the problems about which the agencies complain are directly attributable to the ridiculous lack of resources: terrifically overworked lawyers do not respond promptly to telephone calls, do not have time for the ideal of counselling and cajoling which is a major part of dealing well with a client; often must do things at the last minute without adequate time for agency review; may act preemptorily out of desperation. The lack of adequate resources problem is also related to one of the most general complaints of the agencies; that the Justice Department attorneys are often young and inexperienced. It is true that Justice has a turnover rate, at least in the Civil Division, that is undesireable. This comes from a burnout factor that is inevitable when a lawyer bears heavy burdens without adequate support. The lawyers usually manage to do an excellent job in the face of inadequate resources, but they do it by working inhumanly hard. And this inevitably makes the pastures of private practice, to which they are constantly exposed, look very green indeed. The Civil Division's ability to train and keep experienced lawyers would be greatly increased by a budget appropriate to its responsibilities.

The third question that I was asked to address is whether the memoranda of understanding with agencies have been useful in solving problems of litigation authority. To that I give a resounding "no." Again, we have the problem of lawyers dealing with lawyers, and the first thing that happens is that the lawyers spend more time litigating with each other over the terms of the "contract" than they do on the government's litigation. Even more troublesome is that these "contracts" are designed as they must be statutorily to leave some nominal supervisory power in the Department of Justice for cases which it gives for direct handling to the agency. But any lawyer worth her salt with a large caseload is going to give her major attention to the cases in which she herself is appearing in court. Thus, the supervised cases fall by the wayside. And the same thing happens with the agency lawyers. If they have some cases they are handling directly under a memorandum of understanding, they put the cases where they are doing preparatory and investigative work on the back burner. The memoranda of understanding also exacerbate the basic resources problem of the Civil Division. An agency which manages, usually by holding a gun at the head of the Civil Division, to negotiate a memorandum, then uses its increased responsibilities to gain more and more lawyers and eventually the difference in capability to handle the cases becomes such that, while on paper it looks as if ultimate decisionmaking authority is retained by Justice, in fact, the agency is on its own as to litigation.

The paradigmatic example is the memorandum of understanding with the Labor Department first negotiated in 1939, which over the years has resulted in that agency's practically total litigating independence, without the Attorney General or the Congress ever reviewing or intending the result. In short, I believe the whole notion of memoranda of understanding is anathema to good decisionmaking and management. Their ad hoc nature under the stress of an agency's pressure on Justice, and their lack of uniformity and specificity, are exactly the wrong way to go about resolving the issue of how the government should litigate.

An ideal that has been presented as a counter to the present one is that of the agencies each litigating their own cases, but the lawyers in Justice would have overall supervisory control. This fails for pragmatic reasons. Justice could not continue to attract first rate lawyers if all they were to do was review and give advice to the actual litigators in the agencies. Soon, the quality of personnel in Justice would be such that they wouldn't be capable of giving good advice. The opposite isn't true of the agencies who have been able to attract and keep excellent lawyers even though they do not often litigate directly. Lawyers are drawn to the agencies not because of an interest in litigation, but because of an interest in the programs of the agency over which they can have great influence while gaining a marketable knowledge of their intricacies. All Justice has to offer is the litigation skill. Take that away and there will no longer be good lawyers at Justice.

A second pragmatic reason is that in order to give good advice on litigation policy and tactics, one needs to have done it or to be doing it. Finally, the realities of the courtroom and the adversary system are such, that giving advice or even direction on how things are to be handled is of little avail. In the pressure and heat of the moment anything can happen. The only way to control litigation and assure that all responsibilities are met is to handle it directly.

You have asked me to comment on a bill and a proposed executive order. Basically, these both provide for better access to information by the Congress and throughout the government as to the handling of litigation. As to the Bill, S. 2401, I could not take exception to it, although it does not provide for more than what should be done already as a matter of course. But perhaps it is a good idea to put into statutory language the obligations that good management would dictate. More important, however, than that the Attorney General report regularly on the status of the handling of the government's litigation, is that Congress respond to what it hears. And that, I suppose cannot be written into a statute. I was gratified when I learned of these hearings and of this Committee's interest in what had seemed to me a lonely and misunderstood struggle by the Civil Division to maintain the ideal of centralized authority. I hope that whether or not the statute passes, the Committee will continue to take an interest in the management of the government's litigation and the philosophical underpinnings of the Civil Division's work.

As to the Executive Order, I understand that a Federal Legal Council such as that contemplated is in place. Such an organization can't hurt the government's litigating effort, and perhaps will be of some help. But it cannot be seen as a replacement for the policy coordination that is a regular part of the Department of Justice's role in specific cases. Lawyers throughout the Civil Division spend many hours with agency counsel on these issues. The Assistant Attorney General and her deputies hold frequent meetings with agencies to resolve conflicts and develop consistent litigation policy positions. This is where the major work must and should be done. And the bottom line is, again, that the Department must have the resources to do it better.

PREPARED STATEMENT OF DEAN REX E. LEE

My name is Rex E. Lee and I presently serve as Dean of the Brigham Young University J. Reuben Clark Law School. During the period from May of 1975 through January of 1977 I served as Assistant Attorney General in charge of the Civil Division of the United States Department of Justice.

The question that I would like to discuss today is whether the interests of the United States are best served by assigning the responsibility for representation of the United States in litigated cases in which the United States, or one of its agencies, is a party, exclusively in one department, the Department of Justice, or by spreading that responsibility among the various departments and agencies whose substantive policies are affected by the particular case.

In my view, this is not a close question.

It is clear to me that the interests of the United States would be best served by vesting the exclusive responsibility for courtroom lawyering on behalf of the United States in the Department of Justice. There should be no exceptions. There should be a concomitant sensitivity on the part of Justice Department lawyers and administrators to the client agencies' needs and interests. Moreover, the litigational representation should be a joint, cooperative effort, combining the courtroom expertise of Department of Justice lawyers with the substantive expertise of the agency lawyers and other experts. But the "lead counsel" responsibility should always be vested with the litigating divisions of the Department of Justice.

The competing considerations can be fairly simply stated. The arguments in favor of dispersing litigation authority among the agencies affected are:

1. It is the individual agency whose policies are at stake in the litigation. Lawyers in another department are neither as sensitive nor as responsive to the needs and interests of the affected agency as are lawyers who are part of that agency.

2. There are certain inefficiencies in having to educate a new set of lawyers in each case concerning the facts, the law, the general background policy issues, and why the particular litigation is important to the client agency's policies.

3. Most of the evidence, including both documents and witnesses, are found within the client agency.

The matter of expertise and familiarity with evidence is perhaps most poignant with respect to appellate court review of administrative decisions, where the administrative record is lengthy, complex, and technical. Agency lawyers who participated in the administrative proceedings in which that record was created obviously have the greatest familiarity with the record's contents.

Some of the arguments in favor of exclusivity of Justice Department litigational authority consist of rebuttal to the foregoing arguments. Thus:

1. While it is true that expertise is important, subject matter expertise is less important than courtroom expertise. Traditional wisdom teaches that it is easier for a good trial or appellate lawyer to learn the substantive aspects of a new case than it is for a lawyer well schooled in substance to develop litigational skills.

2. My own experience in government left me firmly convinced that the slight diseconomies associated with separating litigating authority from policymaking authority are far outweighed by the advantages of such a separation. One of the attributes of an experienced litigator is his ability to determine whether proceeding with the litigation is really in the client's interest. In most instances, an experienced litigator can make that judgment more effectively than the client. In the case of litigation involving the United States, there should be another policy layer involved: the question should be not only, "is it in the interest of X Department to bring (or defend) this lawsuit, or to take this particular position?" but even more important, "is it in the interest of the United States?" In the great majority of instances, it is unrealistic to expect that a policymaker whose policies are directly affected can make those judgments objectively. Accordingly, the United States has a litigation advantage not available to clients in the private sphere: Independent, objective judgment by lawyers whose sole responsibility is to protect the interest of the United States, rather than the interests of particular agencies. It is an advantage that should not be forfeited.

3. There are two responses to the argument that in cases involving appeals from administrative determinations, agency lawyers have a greater familiarity with the record. First, and most important, to the extent that familiarity exists, it can and should be used by the lawyer in charge of the case. It makes no difference whether that lawyer is located in the Department of Justice or anywhere else. In any litigational setting, the prudent lawyer will use the best resources available, including other lawyers. If relevant expertise is found among the agency lawyers, they should be part of the lawyering team. The agency expert should be on the field, playing the position that he plays best, but he should not be the captain. Second, experience with most agencies shows that the lawyer who participated in building the record is usually not the lawyer who handles the case on appeal, where appeals are handled by the agency. Thus, the same kind of division between substantive expertise and litigating expertise occurs within the agency itself.

The reasons that it is clear to me that exclusivity of litigating authority in the Justice Department is in the national interest are two. First, on the balance scale that belongs to this lawyer and taxpayer, the competing considerations discussed above favor such exclusivity. Long before I ever came to government, I developed a view that it is easier to develop a substantive expertise in a particular case than to develop a litigating expertise.

By far the more important reason, however—and one for which there is no counterbalancing consideration—is the interest in having the United States speak with one voice when it appears in the United States Courts. It is an interest shared by all three branches of government, Congress, the Executive Branch, and the Courts. Consider the issue first from the vantage point of Congress' responsibility to make national policy, and the President's responsibility to enforce that policy. The Department of Transportation is charged with the implementation of sound national transportation policy as set by Congress. National labor policy within the confines of Congressional statutes is the stewardship of the Department of Labor. From time to time there will be inconsistencies between the two, and the potential for inconsistency exists among any two of our national government's departments, agencies, bureaus, and commissions. Left to pursue their own objectives through the courts, each agency will naturally take the position that serves its own policy interests, regardless of the conflict with others. It is in the interests of sound policy making and implementation that some effort be made short of litigation to reconcile those differences. The most important considerations, however, do not relate to efficiency and avoidance of needless litigation. Rather, they relate to the respect that the legislative and executive branches owe to the courts through their adoption and implemenation of litigation policy. The courts are entitled to know not only the position of the various departments and agencies, but also the position of government as a whole. In many instances, it may be appropriate for the Department of Justice to present the contrasting views of two agencies.

This can be done, it has been done, and is completely compatible with exclusive authority. It is not sufficient, however, for the courts simply to be advised as to these conflicting views. They are also entitled to be advised concerning the position of the United States.

The letter I received from Chairman Kennedy and Senator Baucus requesting that I appear and testify also inquires into my views concerning (1) S. 2401, (2) Executive Order 12146, and (3) memoranda of understanding between the Justice Department and other agencies. I will express briefly my views on each of those matters.

In my view, S. 2401 is legislation that would be in the public interest. My only suggestion is that it ought to go one step further and declare that without exception all authority to litigate on behalf of the United States is vested in the Department of Justice.

Executive Order 12146 demonstrates some of the reasons that this entire problem should be handled by definitive legislation. The coordinating function that the Executive Order attempts to accomplish is generally a good idea, though I think it could be more effectively accomplished at the working lawyer level, rather than the agency head level. In my experience, coordination that needs to be achieved at the Presidential appointee level was usually handled at that level on a case to case basis without the need of a formal structure. The most serious deficiency of Executive Order 12146 is that it purports to deal with the general problem of courtroom representation of the United States without attacking the most serious aspect of that issue: Justice Department exclusivity.

My experience with interagency memoranda of understanding was limited. I remember dealing with only one such document, which attempted to delineate litigating authority between the Justice Department and the Department of Labor. My only recollection is that in one or two instances it was frustrating and time-consuming to attempt to determine on a case to case basis which cases fall on one side of the line and which fall on the other. At both Departments, that time could have been used to better advantage.

In my view, the only proper role for a memorandum of understanding might be to identify in advance those respects in which the client department or agency can best support the Department of Justice in carrying out its litigative responsibility. Even in that respect, I think that the matter is better handled on a case to case basis.

Mr. Chairman, my final comment is than it will take more than philosophical agreement with the wisdom of exclusivity of Justice Department's litigating authority to make it a reality. In this, as in other respects, history is instructive. Early in his administration, President Franklin D. Roosevelt centralized control of all litigation in the Justice Department. From that highwater mark of sound federal ligitation policy, there has been a gradual erosion as different agencies have persuaded Congress, or the White House, or high officials in the Department of Justice that their situation was different, and an exception ought to be made. I believe that frequently this erosion process has been an unintended by-product of Congressional budgetary decisions. All too often, there is a de facto transfer of litigating authority because the Department of Justice does not have the lawyers to handle the work. Let me give you two prototype examples. First, Congress sometimes passes statutes that impose additional burdens on the Department of Justice without adequate consideration being given to the legislation's effect on the Department's resources. In this respect, it would be helfpul to require that all legislation having such a potential effect be assigned to this committee rather than some other congressional committee.

There is a second budgetary reality that contributes to the de facto erosion of exclusive litigating authority. In the multi-billion dollar budget of a Department whose principal responsibility relates to something other than litigation, annual applications for a few additional lawyering positions are not nearly so important as in the case of the client-oriented divisions of the Justice Department, whose only responsibility is the representation of the government in court. As a result, the growth of the lawyer components of the Department of Justice's client agencies has been much more rapid than the growth of the client-serving divisions of the Department. This has resulted in inevitable pressures to transfer more of Justice's litigating responsibilities.

Senator **Baucus**. The next witness is Alice Daniel, Assistant Attorney General, Civil Division. I'm going to turn the hearing over to Senator Simpson, and I will be back in about 15 or 20 minutes.

Senator **Simpson**. We will proceed if Senator Baucus will return after a floor statement.

Our witness is Alice Daniel.

What is your name, sir?

PANEL OF CIVIL DIVISION OFFICIALS:

STATEMENT OF ALICE DANIEL, ASSISTANT ATTORNEY GENERAL, ACCOMPANIED BY DENNIS LINDER, DIRECTOR, FEDERAL PROGRAMS BRANCH; AND JAMES J. FARLEY, ASSISTANT DIRECTOR, TORTS BRANCH

Mr. **Linder**. Senator, my name is Dennis Linder. I am Director of the Federal Programs Branch of the Civil Division.

Senator **Simpson**. Thank you very much. I appreciate your being here.

I am interested in a particular piece of legislation. I think Senator Thurmond asked you some questions about that last time. I would like to direct a few questions on the same subject, if I might.

The legislation is S. 1858, which is a bill to bring the National Guard under coverage of the Federal Tort Claims Act.

I understand the Department of Justice has an opinion or commentary that no liability should exist in this situation because the traditional test, a master-servant relationship does not exist because direct Federal control does not exist. At the present time, the National Guard is covered only when specifically called up by the President and not during the crucial training period.

Under current law, the Federal Tort Claims Act covers all civilian Federal employees and all active and reserve military personnel. That is the scorecard today. I would like you to give me a bit more of your rationale for that decision.

Ms. **Daniel**. I should start by saying that the Department of Justice does not oppose the principle of Federal compensation to people who have been injured by National Guardsmen in their training or other activities.

We do not oppose the principle of indemnification. What we do oppose is the amendment of the Federal Tort Claims Act as a means of bringing about that result. We think the result would be a sound one and we do not oppose it. In the past, we did not oppose the statute passed by Congress in 1976, now found at 32 U.S.C. 334, which provides that the Federal Government will indemnify doctors employed by the National Guard if there should be any judgments rendered against them for negligence in their official capacity.

Our concern is with preserving the integrity and consistency of the term "employee" within the meaning of the Federal Tort Claims Act.

As you so rightly pointed out, the theory of liability is that of respondent superior where a master is made liable for the torts of his servant. The theory there is that the master had both the obligation and the opportunity to supervise the work of the employee, to impose safeguard measures if needed when there were changing conditions, and generally to maintain a safe working place.

The U.S. Government does not have that degree of control over activities of National Guardsmen in training. I recognize that there is a great deal of Federal funding that goes to National Guardsmen, and I also know that there are regulations that have to be observed during training. Neither of those is sufficient, in our view, to amount to Federal control.

We would not want to find, I think, that State employees had become Federal employees merely because the State was the recipient of funds under the Federal grant program.

Senator **Simpson**. I suppose that the distinction and the problem is that the National Guard constitutes a vitally important part of the Nation's military establishment, and that when in training, the members are really performing or preparing for a basically national function, that is, national mobilization.

I think under those circumstances they should be treated as if they were employees of the Federal Government and granted the protection enjoyed by Federal employees against liability, because when they are acting in the line of duty, which is the rule which is now used for regular forces, active and reserve—I guess that is where I have trouble. To me it seems a purely technical view that these National Guardsmen are State employees. If you use your commonsense and practicality, they might well fit into the other category. I guess that is my problem.

Ms. **Daniel**. I think the term that is used with respect to regular Army people and so on is scope of employment. Use of that term imports the notion of control that has been traditionally a common law basis and, under Federal Tort Claims Act, the basis for imposing liability. It is applicable to the true Federal employee, because the Federal Government has immediate power to supervise, to correct, to discipline, to reward, to do all those things that have to do with the daily supervision, and therefore the ability to prevent accidents.

I do want to emphasize again that we do not oppose the notion of compensation for reasons you have suggested. We think it sounds quite equitable. We are concerned that if the definition of employee within Federal Tort Claims Act is changed, we may find that we have entered upon a slippery slope where all kinds of other categories of individuals will be deemed to be employees, even though the Federal Government lacks the authority to control their behavior.

Senator **Simpson**. It might be like adding to the definition of hazardous employment under the old workmen's compensation laws.

We started with a rather succinct group, and now we have bartending and other extraordinary ventures in hazardous employment.

I can understand that concern. I guess as a lawyer, having practiced for some 20 years, I think that if that is the sole argument, then I have this haunting feeling that it is legalistic in the negative sense. I guess that is where I come from.

Do you have any idea as to the possible cost if this bill were to become law?

I ask that sincerely.

I get differing figures on that.

Ms. Daniel. Personally, I do not. Whether other people in Justice considered it, I do not know either. It is my understanding that our objection is not fiscal, but legal.

Senator Simpson. I do not believe that the cost of the program would severely strain resources. I am trying to think of the number involved in the National Guard, the number involved in actual training, and not other functions in the Guard that would not be included. I think you would have limited application, frankly.

I was interested in the comment of Major General Greenleaf in his statement. He said the essential ingredient is no longer presence or absence of Federal master-servant relationship, but rather whether there is an important and substantial Federal interest in the end product, be it atomic energy, swine flu immunization, or training of the National Guard.

I think Congress is going to have to make those determinations on a case-by-case basis. I have no intention indiscriminately to open that door.

I think that this is a case where interest and involvement of the Federal Government is strong and clear and, indeed, I think there should be assumption of tort liability.

Is there any other commentary that the Department would wish to share with the committee on that legislation other than the particular issue of the master-servant concern?

Ms. Daniel. At this point, Senator, I would like to ask my colleague, Jack Farley, to join us at the table. He is one of the people in the Civil Division who has principal responsibility for work under the Federal Tort Claims Act.

He has testified on this issue before.

Senator Simpson. Thank you so much. I would appreciate that.

Mr. Farley. Good morning, Senator.

I just left the hearing, in fact, just finished my testimony before Senator Bayh about a half hour ago.

Senator Simpson. I was headed there and ended up here and decided I would take my shot in here rather than over there.

I was scheduled for seven places at the same time.

Mr. Farley. You ended up with both of us, I guess.

Senator Simpson. I appreciate that. The other committee was discussing this same thing, and I intended to get there.

Mr. Farley. As the Assistant Attorney General who made the decision in this matter has testified, our primary reason is expanding the definition of Federal employee.

As I testified over there, we are not in a position, for example, at training, on the way for training, to say who shall drive a jeep, to say who shall go where. The discipline, the court marshal authority, that is all in the hands of the State.

Senator Thurmond came in the hearings over there and in effect posed the question and indicated deep reservations with S. 1858 and indicated he intends to look at it very carefully, but then he pointed out that he is reluctant to let the Federal Government get into more control, even hint that the Federal Government might have control over this thing.

I am relating the point Senator Thurmond made. Another issue that has come up is the question of constitutionality in view of article 1, section 8, clause 16, which reserves training and appointment of officers on the National Guard or militia in the Constitution to States. The Department of Justice does not believe that S. 1858 would be unconstitutional. The Senate and the Congress, indeed, could assume liability on behalf of the United States for almost any group of people. We do not say that.

It is our view it would be anomalous, almost inconsistent with the Constitution. Where you have a system of State control over their employees, and indeed it is a very strong point with the Guard, Senator, that they do control their employees, to then under the Tort Claims Act declare that because of Federal funding, or because of regulations, and because of national interest we are going to go against a number of years of classic tort law and declare them Federal employees—well, I might refer to, Senator, the best statement of common law definition of employee is the 1975 case before the Supreme Court, *United States* v. *Orleans*, looked into the federally totally funded program, community action program, where we gave the funds, the stringent regulations.

Indeed, at one point we withheld funds to get somebody fired from the program. The Supreme Court said we recognize all that, but that is not detailed day-to-day—that is the Supreme Court's phrase—nuts and bolts control that would subject the master to liability for the servant.

That is all I would add to what Ms. Daniel has said.

I will be pleased to answer any questions you might have.

Senator SIMPSON. Do you have any thoughts about cost of this expansion of definition?

Mr. FARLEY. This issue was before the Congress in 1960. As a compromise, the National Guard Claims Act was passed, whereby there is Federal Government administrative remedy for claims against the National Guard; there is no judicial remedy, and last fiscal year there were 395 claims paid by the Army, some by Air National Guard as well. I do not have those figures, but in excess of $1 million

We are paying that already, I guess your question, Senator, would be, what would be incremental increase, because some States pay their own. I think there are eight States, for example, that just assume liability for the National Guard. They have waived sovereign immunity; they recognize it. New York is one, and we have to look at those States, and there are also sharing arrangements between the United States and between such States.

We have to compile those statistics. I guess the short answer, Senator, is, you know, do not have a particular thing. Again, our objection is not fiscal; it is legal.

Senator SIMPSON. I know. Ms. Daniel states that, too. I personally feel that the cost of the program would not be excessive. It would have limited application, a limited budgetary impact. I guess the question is: Should we change that particular concept of the law that you have just described? Obviously, that is where we are, should we make an exception in this one instance, in view of what I see as substantial Federal interest and involvement in seeing that the National Guard is properly trained to fill the national role that it's required to do?

The only time it is brought into force or into its mission is by the Federal Government.

I suppose there is another purpose, such as the Governor calling out the National Guard for certain activities, but the Federal mission works into Federal employment——

Mr. FARLEY. When it comes, you are correct. They are covered. Our objection, Senator, is first of all the legislative will. We indicate we see nothing that would constitutionally prohibit Congress from enacting such a law, but when this was considered in 1975, the exact provision, the Senate Armed Forces Committee in their final report used the phrase, to do that would be to engage in legal fiction.

It would be legal fiction if you legislatively determined they would be employees. In 1975 they said we have all goals you are referencing now, and they went with the identification group, with respect to the issue, and vary with the doctors. Congress could do that; it is not saying you could not do it, Senator. We are saying it would be a legal fiction. We do not think it is wise to go that far.

Senator SIMPSON. It is my understanding the courts have found that control was not enough, just the word control was not enough, under traditional principles, to find the members of the Guard would be Federal employees; is that correct?

Mr. FARLEY. The case is in 1965, a 1965 case, where the court actually looked at that and went down the whole list the Senator has brought forward this morning—Federal funding, training requirements, regulations and what have you—but it also points out that appointments of guardsmen is by the State, promotion of guardsmen is by the State, the discharge of the Guard by the State, or by regulation, discipline by the State.

It said detailed day-to-day control is in the hands of the State. Therefore, even though there is Federal funding and even though it is Federal mission, that is not enough to create master-servant.

I am repeating myself.

Senator SIMPSON. If I go much further, I will be doing the same thing.

I will quit. Let me state, Mr. Chairman, now that you have returned, that Senator Hatch and Senator Cochran have certain questions to be submitted in writing. Would you respond to those, please?

Thank you very much for your testimony. It is helpful to me on a piece of legislation that piques my interest greatly.

Thank you very much.

[The material is on file with the committee.]

Mr. FARLEY. Thank you.

Senator BAUCUS. Thank you, Senator Simpson.

At this point, I will include in the record a statement by Senator Thurmond. It is short and I will read it.

> I welcome the witnesses who appear before us today on S. 2377. It has been my position and is now position that the litigating authority for the Executive Departments of the Federal government and the agencies should be left with the Department of Justice. To take a stand that all Executive Departments and the agencies should be permitted to litigate on their own in the Federal courts would amount to many litigating policies with inconsistencies and ineffectiveness.

Ms. Daniel, I am very happy to have you here today. I am concerned with what Ms. Babcock has told us about the relationship between the Department of Energy and Justice, particularly with respect to this memorandum of understanding.

Fundamentally it looks like something is wrong here. I have before me a copy of the February 23, 1979, statement of then Associate Attorney General Mike Egan before the House Energy and Power Subcommittee. He stated, "Several weeks ago we contacted the Energy Department with the suggestion that now was appropriate time to review our experience and make changes in the memorandum if necessary." He goes on to list the needed changes.

Also, I have the March 14, 1979 letter from Mr. Egan to Lynn Coleman, General Counsel at DOE, which states:

> It is my understanding that several requests by the Civil Division attorneys assigned to these cases for opportunity to meet with auditors for purposes of clarifying some of the allegations made in complaint made by the Office of Special General Counsel earlier had been denied. Indeed, I understand that attorneys from your Department cancelled an audit briefing for Civil Division attorneys scheduled for last Wednesday, and refused to reschedule the session.

He goes on to state in the same letter:

> The Department of Energy cooperation on other aspects of litigation has been less than satisfactory and in some instances inexplicable. I have learned, for example, that representatives of your Department have refused to forward redrafts of the proposed complaints prepared in your office and refused to provide automatic typewriter mag cards for various complaints which would greatly facilitate our preparation operations for filing.
>
> The foregoing examples of non-cooperation, and others, have stymied the efforts of this Department to press forward with the proposed litigation.

Finally, I have an August 2, 1979, memorandum entitled "Agency Negotiation" from Thomas Martin, Deputy Assistant Attorney General, Civil Division, for Mr. Egan.

Mr. Martin states:

> Department of Energy: As a result of the dismal history of litigation under the memorandum of understanding, Barbara Babcock recommended to you that we terminate that agreement. We understand that no final decision has yet been made regarding the future of DOE litigation.

Ms. Daniel, are these bureaucratic battles still going on? What is the present status of this longstanding dissatisfaction that the Department of Justice has had with the Department of Energy with regard to the memorandum of understanding?

Ms. Daniel. Many of the problems described in Mr. Martin's memorandum, Ms. Babcock's memorandum, and Mike Egan's letter continue today. I think the one thing that seems to have improved is the battle over interpretation of the memorandum. Partly that is so because there are fewer cases at the moment to fight about. That is, the cases that were the subject of dispute last year were very large innovative cases involving very basic interpretations of the statutes and of the statute assigned to DOE for implementation.

Most of those cases are, of course, still pending.

My staff reports to me that they still find that they do not get satisfactory cooperation from DOE lawyers or from DOE staff, generally, on the cases in which we have primary responsibilities.

As you can imagine, with an agency as large as DOE, it is really essential to us that someone who is part of the agency and familiar with it be available as a contact person for us, as someone who can obtain agency documents and memoranda for us, tell us whom to talk to, identify witnesses, help us to discover what the facts are, prepare draft answers to interrogatories, and in other ways help in discovery and pretrial preparation. We have not had satisfactory cooperation from DOE in this matter.

Senator **Baucus**. Give us some specific examples. I know you are in a somewhat difficult position. After all, you are the present head of the Civil Division. You are the focal point for this controversy with respect to the Department of Justice.

What are some of the specific cases, specific examples, of problems that you are presently encountering with the Department of Energy?

Ms. **Daniel**. I can talk about examples, but not with respect to any particular case; that is, examples of lack of cooperation or problems. I have indicated the problems we have in the area in which we have primary litigating authority. There are other problems in the cases in which DOE has primary litigating authority, too, and the problems remain very much the same as those described in Barbara Babcock's memorandum.

The cases are far too complex for us to be able to carry out intensive review that is really necessary if we are to fulfill our statutory responsibility for all litigation carried on by the Government.

Anything less than intensive review is really too superficial to give us the assurance we need.

Senator **Baucus**. Are you telling me you do not have resources, or are you telling me you do not have the cooperation?

Ms. **Daniel**. There is a systemic problem in attempting to review cases that are carried on outside the Department of Justice.

It would involve great duplication of effort for our lawyers to attempt to become familiar enough with the cases to truly evaluate the judgments made by DOE lawyers. I think even if we had the opportunity, that it would not be an efficient way of going about things. In fact, we generally receive things from DOE too late for us to carry on substantive review.

Senator **Baucus**. I understand that you cannot and should not discuss open cases at this point. Are there any closed cases that were problems?

Ms. **Daniel**. At this point I would like to introduce my colleague, Dennis Linder, who is the Branch Director principally responsible for litigation of energy cases in the Civil Division.

He has the advantage of a historical perspective I do not have, since he was here all through the period described by Ms. Babcock, and is still with us today. He may be able to give you some examples.

Mr. **Linder**. I think the primary example would be the one that is set forth in some of the papers that you have received in dealing with the referral of the very large crude oil pricing enforcement cases by the Department of Energy to the Civil Division, and then the ultimate decision to bring those cases in the administrative forum as opposed to judicial forum, and return to the Department of Energy. You read in your statement, prior to beginning this phase of the testimony, Mr. Egan's letter which demonstrated some of that difficulty that we had in those cases.

Senator BAUCUS. How much is involved in those cases? What are we talking about here?

Mr. LINDER. We are talking about over $1 billion.

Senator BAUCUS. Over $1 billion in potential recovery?

Mr. LINDER. I believe that is correct.

Senator BAUCUS. What is your judgment about the handling of those cases administratively rather than in the courts?

Mr. LINDER. I do not think there is necessarily a problem in handling those cases administratively, as opposed to handling them in court. In fact, I think there may be advantages of doing that.

Senator BAUCUS. What is your problem with the way DOE is handling the litigation?

Mr. LINDER. We are not so concerned with the way DOE will be handling litigation in administrative forum. The concern was upon making the decision, that decision being communication by the Associate Attorney General, that we would honor the Department of Energy's request that they be brought in the judicial forum, that we then did not receive the extent of cooperation that we thought we needed to prepare those very large, complex, and important cases for filing in the courts.

Senator BAUCUS. Why did you not receive sufficient cooperation? Was it inability? Was it incompetence? Was it reluctance or evil intent? What was the nature of the lack of cooperation?

Mr. LINDER. I am not sure I could ascribe any one or more of those reasons. I think it may be instructive to note that the cases were some months after that decision had been made by the Associate Attorney General that the Civil Division would handle those cases, that the Department of Energy changed its mind and decided to bring those cases administratively where it has the sole right to represent the agency before the administrative trier.

Senator BAUCUS. I am sorry; what was the change in the decision? I missed that.

Mr. LINDER. There was referral to the Department of Justice of those cases for litigation in the courts of the overpricing violations. Under the statute that DOE operates under, there are two method by which overpricing violations can be adjudicated. One would be t go through the administrative forum first with judicial review. Another option that the Department of Energy has under statute is to bring cases directly in the Federal district courts and try them there and bypass administrative routes. The decision was made by the Associate Attorney General, upon referral from the Department of Energy, to bring them in the Federal district courts with the Civil Division exerting primary litigation responsibility.

It was thereafter, as Mr. Egan's letter notes, that we ran into difficulties in dealing with the Department of Energy in trying to gear up for those cases and draft the papers and get necessary information, and it was thereafter that the Department of Energy determined to bring the cases administratively as opposed to having the Civil Division handle them in Federal courts.

Senator **Baucus**. By bringing them administratively, does that necessarily limit the Civil Division's involvement?

Mr. **Linder**. It does. The Civil Division has no involvement in administrative forum at all.

Senator **Baucus**. I take it Justice had no power to override that decision?

Mr. **Linder**. The referral was withdrawn.

Senator **Baucus**. Ms. Daniel, even though you cannot describe open cases, can you describe additional cases, if there are additional cases, presenting problems with the Department of Energy?

Ms. **Daniel**. I am not sure we would say that problems exist with respect to any particular category of cases. I think the problems are the overall ones that were described by Ms. Babcock and I alluded to earlier, that it is important to know who is in charge of any lawsuit, perhaps of any human endeavor, to assure there is accountability and responsibility.

Senator **Baucus**. I take it you are not satisfied with the memorandum as it is presently drawn?

Ms. **Daniel**. That is correct, Senator Baucus.

Senator **Baucus**. How would you change it?

Would you rescind it?

Ms. **Daniel**. I have not reached the point yet where I would be able to recommend rescission. I have not had that much experience under it. I think my staff would advise me to make that recommendation.

Senator **Baucus**. My staff would, too.

Ms. **Daniel**. I may be optimistic, but I still retain the hope that we may be able to work out some of the problems.

However, I think it would be very desirable to amend it in a way that made clear that the Civil Division basically had primary authority in any cases in which it chose to exercise it, so that we would have discretion about what matters we felt appropriate for delegation or for sharing with the Department of Energy. We would also have the ability, then, to insist on getting the cooperation we need from the Department of Energy because if we did not receive it in those cases in which we had primary responsibility, we would not give them any other—we would not give them additional cases that would distract their resources from the aid we needed.

Senator **Baucus**. Do you agree with Dean Lee's position that Justice should have the lead authority in all litigation matters?

Ms. **Daniel**. Yes.

Senator **Baucus**. As a general proposition?

Ms. **Daniel**. Yes, with application to any agency.

Senator **Baucus**. Including FOIA cases, standing cases, discovery, Sunshine?

Ms. **Daniel**. Absolutely.

Senator **Baucus**. All of that?

Ms. **Daniel**. Yes.

Senator **Baucus**. I take it your staff is recommending you rescind this memorandum; is that correct?

Ms. **Daniel**. Yes.

Senator **Baucus**. Strongly, like Ms. Babcock strongly recommended her positions?

Ms. **Daniel**. Enthusiastically.

Senator **Baucus**. When will you come to the conclusion whether or not to rescind? How long is it going to take?

Ms. **Daniel**. It is hard to put a date on that, obviously.

It depends on achieving a certain amount of experience. I would need to feel that I had a firm grasp of the overall operation of the memorandum and that I personally was not able to improve things through further negotiation.

Senator **Baucus**. I frankly will be watching, as I am sure you will be, also.

Can you describe what the consequences of this bureaucratic infighting is, consequence to the American public? I asked Ms. Babcock whether this is simply bureaucratic infighting or whether it, in her judgment, had significant consequential effects on the public, and certainly the country's perception of Government. She felt it was very consequential and gave her reasons why.

Do you share her belief?

Ms. **Daniel**. Yes.

Senator **Baucus**. Why do you share that belief?

Ms. **Daniel**. First of all, I would not accept the label that this is bureaucratic infighting. I think it is related very fundamentally to the whole reason that I believe that litigating authority should be lodged exclusively in the Department of Justice. We are, after all, one government. Although we refer to each agency as a client, the client really is the U.S. Government. Almost every case has potential for having governmentwide impact. An agency may be most aware of the programmatic impact and view it as one agency case, but that is one of the reasons why it is not wise to let agencies do their own litigation. There is usually a lack of sensitivity to how other agencies would be affected, not necessarily by the result in the case, but by decisions made along the way in which a court deals with questions such as standing, exhaustion of administrative remedies, application of Administrative Procedure Act, discovery, privilege, constitutional issues.

Senator **Baucus**. Let me get at that same question perhaps a little differently.

What is involved here in terms of dollars; that is, in the controversy between Justice and DOE?

Your associate mentioned $1 billion with respect to one certain case. What is the total amount involved here?

Ms. **Daniel**. Total amount for all pending cases?

Mr. **Linder**. It would be very difficult to quantify that.

Senator **Baucus**. Give me a high-low estimate.

Mr. **Linder**. You have the case I referred to, over a billion, and you have a series of cases now that are in Federal district court here involving natural gas liquids that are over a billion.

If I had to make an estimate right off the top of my head, I would say you—how you are involving at least $10 billion in all energy cases pending at the present time, and that may be conservative.

Ms. **Daniel**. In our view, the principal cost is not the risk that a case may be lost by DOE when it could be won by the Civil Division.

I do not think we are really in a position to say that. I think the costs are, first the intangible ones that I have discussed, the importance of having one Government position in the courts, maintaining the Government's credibility, insuring that there is fairness to individuals, to citizens litigating with the Government, so they can be assured of uniform treatment regardless of what agency they happen to be litigating with.

I think there are also costs in terms of efficiency, inefficiency resulting from duplication, overlapping, lack of cooperation.

I also think there are staff morale problems that come from that type of thing.

Senator **Baucus**. Ms. Babcock seemed to indicate that according to her recollection she had some problems with the way the Department of Energy was conducting some litigation. That is, she had some reservations that go to the question of the quality of the Government's participation. You do not share that belief; you think there is no question of quality?

I thought all lawyers—I agree with Ms. Babcock—feel they can do a better job than some other lawyer.

Ms. **Daniel**. I feel that way, too, but——

Senator **Baucus**. In addition to that systemic problem.

Ms. **Daniel**. I think the quality of the lawyers within the Civil Division is far better with respect to litigation than the quality of lawyers in any of the agencies. Our lawyers have an enormous amount of expertise in litigation. They have a career commitment to remaining with the Justice Department, whereas in agencies, and particularly in the DOE, there is a very large turnover rate.

Senator **Baucus**. What has the Civil Division's record been in energy cases?

Ms. **Daniel**. The only figures I have are with respect to 1979 decisions in the Temporary Emergency Court of Appeals. The Civil Division handled eight cases and won all eight.

Senator **Baucus**. Do you know what the Department of Energy's record has been in energy cases?

Ms. **Daniel**. The Department of Energy also handled eight cases. It lost five and won three.

Senator **Baucus**. Could you describe those five that are lost, just generally categorize them or generalize the nature of those five?

You say DOE lost five and won three.

Ms. **Daniel**. What are the five it lost?

Mr. **Linder**. If I can speak to them broadly, Mr. Chairman. The Department of Energy lost a madamus petition brought before the Temporary Emergency Court of Appeals, Federal District Court in Kansas, hearing a number of cases, the so-called stripper well cases, with regard to certain discovery matters and so on. The Department of Energy also handled a case in the Temporary Emergency Court of Appeals involving use by Tenneco of oil at its production facilities and whether or not that was a sale for purposes of calculating a base period control level, the effect of which would be the question of whether it would then have more lower tier or lower priced oil in its base period control level for purposes of the application of the regulations.

It handled the case of *Mobil Oil Corp.* v. *The Department of Energy*, which dealt with very complicated amendment to the so-called V factor, which dealt with apportionment of costs, not only to control relatively high-priced market products, but also to those byproducts which are derived from the refining process, and whether or not they also had to have allocated to them additional costs that were being incurred.

Senator **Baucus**. I wonder if you could, for the record, indicate the nature of those five cases.

We do not have time to go into the details of the cases now. I am more concerned if, in your own judgment, these five cases which the Department of Energy lost are big cases?

Are they inconsequential? Difficult cases? Easy cases? I am obviously trying to get at the question of the quality of the Department of Energy's handling of these cases.

Mr. **Linder**. There are few, very few, energy cases that I do not classify as big cases. They are also, for the main, programmatically very complex cases, as we have talked about today so far, and they usually involve huge sums of money.

Senator **Baucus**. That includes eight cases the Civil Division brought and won?

Mr. **Linder**. It does.

Senator **Baucus**. Same magnitude, same complexity?

Mr. **Linder**. In my view, yes, at least. The cases are complex. Some of the cases that I described to you were very difficult cases from a legal standpoint.

Senator **Baucus**. If you won eight and DOE lost five, what happened?

Mr. **Linder**. We gave them excellent legal service.

Senator **Baucus**. Why did they lose if you gave them excellent legal service?

Mr. **Linder**. On the cases we handled, we did very well.

Senator **Baucus**. Why did the Department of Energy lose five cases?

Do you have any views, other than describing the result that they lost, do you have any feelings of what happened?

Ms. **Daniel**. We have not analyzed those cases in order to make a judgment: Should they have been lost? Could they have been won? I also think this is too small a sample to draw the conclusion that—obviously, it would be flattering to us; we are very proud of our statistics—but despite the problems that we have had with DOE, we do not feel, on the basis of these numbers alone, we can say that DOE is not competent in the cases they are handling.

When you are talking about 16 cases, you have to figure some will be winners and some will be losers.

Senator **Baucus**. Do you have any sense, any feel, if you had to put your finger on a reason, what would it be? Even though you have not sufficiently analyzed them, you must have some sense.

Ms. **Daniel**. No. I was not here then, either.

Mr. **Linder**. I cannot draw any conclusions that would lead me to make a statement about legal competency of the Department of Energy as opposed to the Department of Justice, based upon these figures, Mr. Chairman.

Senator **Baucus**. Do you have sufficient information of the five cases to have any feeling, as tenuous as it might be, whether the legal positions taken by the Department of Energy cases were a little shaky?

Mr. **Linder.** You put me in a difficult position because some of those cases are still in litigation and are open cases and one of them is pending on petition for certiori.

Senator **Baucus.** Let us exclude that one. Those not in litigation right now.

Ms. **Daniel.** In addressing the question of weakness of legal position, I think we have to distinguish between litigation strategy and the position which the lawyers had to defend initially.

There have been a number of situations in which DOE regulations, for example, have not passed scrutiny by the courts. That has often been on procedural rather than substantive grounds. The agency is only 2 years old. It is huge. It has a complicated statute with inconsistent and conflicting sections in it.

Initially, the agency enacted a very large number of emergency regulations declaring there was good cause for bypassing the requirements of the Administrative Procedure Act for formal rulemaking that gives an opportunity for public participation.

In many of these cases, when they came before the courts, the court ruled there was not good cause for avoiding in those procedures. Whether any of these five included that type of issue, I cannot say at this time. There certainly have been energy cases that would have been difficult for anyone to defend, either Civil Division or the Department itself.

Senator **Baucus.** Can you provide more information on the degree of inadequate support services that you get from DOE?

Ms. **Daniel.** Well, as I said earlier, DOE does not provide us with litigation reports, which every other agency does.

Senator **Baucus.** Why does DOE not do it?

I assume you have complained?

Ms. **Daniel.** Yes.

Senator **Baucus.** What response do you get? What is the reason why they do not now provide litigation reports?

Ms. **Daniel.** They do not seem to feel they have to explain. I think partly it is because the same lawyers who have primary litigation responsibility in some cases are assigned secondary litigation responsibility in our cases and, quite naturally for a lawyer, they prefer to put their time in on their own cases, and they neglect ours.

Even before the memorandum of understanding was entered into, I have been told, there was insufficient and ineffective support from DOE.

Senator **Baucus.** Is that because it is disorganized or is it because of inadequate resources or because of incompetence, or is it because they do not want to help?

Again, do you have any sense of what the reason might be?

Ms. **Daniel.** I do not have the feeling that there is a shortage of resources.

Senator **Baucus.** How many attorneys does DOE have?

Mr. **Linder.** I am sorry. I do not know the authorized strength.

Senator **Baucus.** You have dealt with them. Do you have the sense they have more litigating resources than you or less than you?

Ms. **Daniel.** I think it is important to recognize that not all legal resources are litigative resources. Most agency lawyers may have a high degree of expertise in drafting contracts or regulations or advising clients, but do not have litigation expertise.

In terms of litigation, I have no doubt that we have a greater amount of expertise. With respect to the number of lawyers, I believe DOE has more lawyers than we have in the entire Civil Division.

Mr. **Linder**. That is right.

I believe in the Office of Special Counsel of DOE there are at least 200, if not more, attorneys assigned to that organization.

Senator **Baucus**. Office of General Counsel?

Mr. **Linder**. Office of Special Counsel.

Senator **Baucus**. That is litigating——

Mr. **Linder**. No; Office of General Counsel. The Office of Special Counsel, administrative cases, crude cases in particular——

Senator **Baucus**. If Civil were to bring those cases, how many attorneys would you be able to assign?

Mr. **Linder**. When we were contemplating bringing crude oil cases, we had assigned approximately 15 attorneys, which for us was unprecedented expenditure of resources. In fact, we obtained some additional attorney positions from other components of the Department of Justice to try to staff those cases.

Senator **Baucus**. Can you, Ms. Daniel, give me a little sense here of what is involved, getting again at the question of how consequential this issue is?

Obviously, if it is not of significant consequence to the public, we should not be wasting our time here, and we can go back to our offices and get some work done. On the other hand, if it is, we should be spending time or this issue.

How many dollars are at stake here? You mentioned up to $10 billion. How many dollars are at stake in the sense that there is sufficient possibility of inadequate representation on the part of the Government because of the controversy so that we are losing a significant portion of that $10 billion?

Is it fair to say the Government may lose, or reasonably be expected to not recover, a portion of that $10 billion, or are we just spinning our wheels here?

Ms. **Daniel**. I have no basis for making any estimate of how much money, if any, would be lost because of representation by DOE.

Senator **Baucus**. Is it possible DOE is confused and does not have the procedural litigating expertise and therefore is losing—after all, you have indicated they lost five cases. I know it is a small sample, but nevertheless, five out of eight is not as good as eight out of eight.

Ms. **Daniel**. I would like to be able to answer your question, but any answer would be pure speculation.

Senator **Baucus**. That is why I am asking to speculate.

Ms. **Daniel**. I cannot put a dollar value on it. I do not know.

Senator **Baucus**. Excuse me?

Ms. **Daniel**. I cannot put a dollar value on the cases that may be lost because they are not being handled by the Civil Division. I do not know whether this is——

Senator **Baucus**. I am asking for your own personal view, not Department of Justice view.

Ms. **Daniel**. I have no personal view. I try avoiding making them without any information.

Senator Baucus. I encourage you to have a personal view, to push the process along more quickly.

Is DOE the only agency that does not provide you with litigation reports?

Ms. Daniel. I believe that is correct.

We do not have a single uniform format for litigation reports, and they vary from department to department.

Senator Baucus. Is DOE the most difficult agency you have to deal with of your hundred client agencies?

Ms. Daniel. On the basis of the anecdotal evidence from our attorneys, yes.

Senator Baucus. Do you get on the phone and call up Mr. Duncan and say, hey, we have got a problem here?

Ms. Daniel. I have never called Mr. Duncan, but I have spoken to Lynn Coleman, DOE's General Counsel.

Senator Baucus. What does he say? You say, hi, Lynn, this can't go on like this any more; we are wasting time and effort and so forth. What does he say?

Ms. Daniel. He agrees we need better cooperation and we try to work it out.

Senator Baucus. Does he work it out?

Ms. Daniel. We are trying to.

Senator Baucus. When did you last speak to him about this?

This has been going on for some time. This is April 3.

Ms. Daniel. There has been a delay in response.

Senator Baucus. Excuse me?

Ms. Daniel. There has been a delay in response. I do not think the situation has changed since I have been here, despite the conversations that Mr. Coleman and I have had.

Senator Baucus. Let me ask a few questions in another area. Basically, it revolves around your decision not to defend the constitutionality of section 399(a) of the Public Broadcasting Act of 1967.

I know you are aware, the decision not to defend a statute enacted by Congress, that is, decision not to defend based upon the constitutionality of the statute, is a very serious question.

Who made the decision in this case, not to defend?

Ms. Daniel. Ultimately, the decision was made by the Attorney General, but it was my recommendation that we not defend.

Senator Baucus. Was the administration involved, that is, the White House involved in this decision?

Ms. Daniel. No, it was not.

Senator Baucus. Is this an Executive order or some——

Ms. Daniel. Excuse me 1 minute.

The White House was not involved, but, of course, the FCC itself was involved.

Senator Baucus. Is there some Executive order or some other public or private notice delegating from the President to the Attorney General the authority not to defend statutes?

Ms. Daniel. The Attorney General has statutory responsibility to represent the United States and its agencies in all litigation. As a lawyer, the Attorney General and all of us who work for him have ethical responsibilities and an obligation under the Code of Professional Responsibility not to take positions in court that we believe cannot reasonably be defended.

Senator BAUCUS. And has the White House made any comment about the constitutionality of this section?

Ms. DANIEL. Pardon?

Senator BAUCUS. Has the White House made any comment about the constitutionality of section 399(a)?

Ms. DANIEL. Not to my knowledge.

Senator BAUCUS. I understand they suggested legislation to amend the statute; is that correct?

Ms. DANIEL. I understand there is legislation pending in Congress at this time to amend—it is an overall amendment of the statute, and that package excludes the section that is now here; that is, if the package passes, the section that was not defended here will no longer be part of the statute.

Senator BAUCUS. Are you aware that a previous Attorney General stated, and I quote:

> Save in exceptional cases, it has been the practice of Attorneys General to refrain from rendering opinions as to constitutionality of enactment of Congress after their approval or disapproval by the President.

And the quote goes on.

> Should the Attorney General now vouchsafe his opinion holding legislation unconstitutional, he would set himself up as a judge of the Acts of Congress and the President.

That is a statement by Attorney General Homer Cummings, 1937. Do you agree with that statement?

Ms. DANIEL. I think that that statement has to do with rendering advisory opinions about legislation, and it does not deal with the question whether to defend statutes once litigation has begun.

Once litigation has begun, the Attorney General cannot avoid responsibility of formulating the Government's legal position. In doing so, he has to carry out his own oath of office to uphold the Constitution, and he has to abide by his own professional obligation not to present frivolous arguments to a court.

At that point the Attorney General does have an obligation to evaluate the constitutionality of the statute, but not before that.

So I agree with Mr. Cummings' statement. I also agree with the statement made by Mr. Lee earlier today, that enormous self-restraint should be used by the Department, and it should be only in the rarest of circumstances that the Department would decline to defend the statute.

Senator BAUCUS. Why did you not use enormous self-restraint in this case?

Ms. DANIEL. Why did we not?

Senator BAUCUS. Why did you not.

Ms. DANIEL. There were a number of factors that led to the decision here, but basically it was because we believe that the statute is unconstitutional, that it violates the first amendment rights of public broadcasters, that it does not have an adequate justification for this inroad, because it applies to all noncommercial broadcasters, even though only 26 percent of them receive Federal funds, so that 74 percent of public broadcasting stations that receive no Federal funds would still be prohibited from editorializing or supporting a political candidate.

Senator **Baucus**. You are in effect saying only a narrow part of the statute is unconstitutional?

Ms. **Daniel**. No, because the statute did not distinguish between stations that receive Federal funds and those that do not. If we were to attempt to carve out portions of the statute that might be constitutional as applied to certain circumstances and others not, we would have been rewriting the legislation for Congress.

Senator **Baucus**. Was this the unanimous view within the Department?

Ms. **Daniel**. As you are aware, after the time that the Attorney General informed the Congress of his decision, a dissenting view was entered by the Office of Legal Counsel. Prior to the time the Congress was informed, there had been intensive discussion and many memoranda prepared within the Civil Division.

The Attorney General received and evaluated all of those and subsequently decided, after he received the dissenting views of the Office of Legal Counsel, that he believed that the Civil Division was right and that he stood by his decision not to defend the statute.

Senator **Baucus**. Does it not on the face of it seem that where there is a difference of opinion, by definition that would not be an exceptional case?

Ms. **Daniel**. I appreciate what you are saying. I am reminded of the history of a case that made its way through the New York courts, first decided by one judge at trial, three judges in the intermediate court of appeals, seven in the court of appeals, and finally reversed five to four by the Supreme Court of the United States.

At that point, the vote was 11 judges had affirmed along the way and 9 had voted to reverse. The Supreme Court majority said no reasonable man could decide any other way.

So it may be hard sometimes to say what is a reasonable view. I have seen all memoranda prepared by the Office of Legal Counsel and I stand by our original view that the constitutionality of the statute should not be defended.

Senator **Baucus**. Should Congress be notified prior to a final decision by the Department not to defend the statute, based upon its belief that the statute is unconstitutional?

Ms. **Daniel**. Title 7 of the Ethics in Government Act and the rider to the Justice Department's Appropriation Act require us to notify both Houses of Congress prior to notifying a court that we will not defend a statute. We did that in this instance and, as required by the statute, we did it with sufficient notice to the Congress so there was an opportunity for the Senate Legal Counsel to attempt to change our minds, and when he was unsuccessful in that, to obtain authorization from the Senate to make an amicus appearance in the case.

I think the procedures required by title 7 and by the Appropriations Act are working well.

Senator **Baucus**. As you know, often the Supreme Court refuses to reach the constitutional issues and often dismisses a case on procedural grounds. Why did you not recommend handling this on a procedural basis rather than going to the merits of the constitutionality of the statute?

Ms. **Daniel**. The only issue, threshold issue, not a procedural one, would have been the one on which the district court ultimately dismissed the case. The court found that the case was not ripe, was premature, and therefore there was lack of jurisdiction. We considered making such an argument, but we found we were in a difficult position.

Senator Baucus. You found that unreasonable, yet the district court found it reasonable?

Ms. Daniel. In terms of our decision not to defend the constitutionality, it would have been inconsistent, because in the first amendment area, the damage done by an unconstitutional statute is frequently the chilling effect it has on those who would like to excercise first amendment rights. If this statute had that chilling effect, as we believe it did, then by definition a ripe case would never occur.

Senator Baucus. Is that not up to the courts to decide whether or not there is improper chilling effect?

That is why we have three branches of Government.

Ms. Daniel. It certainly is the job of the courts.

I would say in well over 99 percent of the cases, it is the courts exclusively, but every now and then there is the rare case in which a lawyer really has to search his or her soul——

Senator Baucus. What bothers me a little bit is, I agree with your formulation of general proposition; I find your interpretation of that general proposition a bit strained. If in this particular case you view it was proper for you to recommend the Government not defend its statute, based upon alleged infirmity, you have gone pretty far out; you are not talking about the easiest case. The first time you recommended the Government not defend is a very strained example; I guess that is my problem here. If it were a kind of problem that Mr. Lee discussed or a hypothetical that I presented, I would have an easier time.

When this is, I take it, a case of first impression, it appears like you just are somewhat setting yourself up as the Supreme Court in just making ipso facto, and all those nice words we used to learn in law school, your own decision here.

That is my problem here.

Ms. Daniel. In the case referred to by Mr. Lee, the Justice Department actually went much further than declining to defend the statute. It went into court and argued that the statute was unconstitutional. We did not do that here. Obviously, it is a judgment call. Each lawyer really has to consider his or her own ethical obligations and view of the law. I think the presumption is overwhelmingly in favor of the constitutionality and of defending the statute. Here it was my judgment that the presumption was overcome.

Senator Baucus. It is one of those questions we could get into forever.

I want to thank you for your testimony this morning.

Ms. Daniel. Thank you.

Senator Baucus. The next witness is Mr. Alan Parker.

We are delighted to have you here this morning, not only because of the key position that you hold in Justice, but also because of your prior experience as chief counsel for the House Judiciary Committee.

If you have any remarks, Alan, please proceed.

STATEMENT OF ALAN PARKER, ASSISTANT ATTORNEY GENERAL FOR LEGISLATIVE AFFAIRS

Mr. **Parker**. Good morning, Mr. Chairman. It's a pleasure to be with you. I have no statement.

Senator **Baucus**. Are you aware of H.R. 2726, legislation introduced by Congressman Beard, which would create a Federal Boxing Board and give that Board its own litigation authority?

Mr. **Parker**. Yes, I am.

Senator **Baucus**. What is the Department's position on that bill?

Mr. **Parker**. H.R. 2726 is the Federal Boxing Control Act. Section 9 of that act would give the Federal Boxing Board direct access to the Federal courts.

We have not been asked to make an official comment on that as yet. I assume if we were, we would be against any litigating authority.

Senator **Baucus**. Is that not a body blow to the Department's traditional historical jurisdiction?

Mr. **Parker**. If passed, it would be.

Senator **Baucus**. Is the Department going to stand by idly and let this go through? Is it going to affirmatively try to protect itself?

Are you going to wait and be asked for a position by somebody?

Mr. **Parker**. Traditionally, all agencies wait until they are asked to comment with respect to legislation. There are some 17,000 bills introduced each year, and it is a little difficult for us to comment affirmatively on them. However, in these cases here we see action or movement; we obviously then bring it to the attention of the appropriate people within the Department.

Senator **Baucus**. That raises another question.

Do you think by statute the Justice Department should be given a limited amount of time to comment to the House and Senate Judiciary Committees on legislation affecting its litigation authority?

Does that kind of procedure make sense to you? Would it help address this problem or not?

Mr. **Parker**. There are a number of ways that we do address the problems now. We are given an opportunity to comment, when bills are first proposed by various agencies; they are circulated within the Government.

The Department of Justice gets an opportunity to comment at that time. It is known as OMB clearance process. We again get a chance at the bill when we are asked to comment by various committees. We are not, however, always asked to comment.

There is a lot of legislation which goes to committees other than the Judiciary Committee and which we have to ferret out to see whether or not there is some incursion on litigation authority of the Department of Justice.

Senator **Baucus**. If that bill moves, let us say the House Commerce Committee has a hearing, and it looks like they are going to mark it up in the full committee, then what would you do?

Mr. **Parker**. We try to get involved to see that that does not happen.

Senator **Baucus**. For my own information, how would you get involved if you were not asked?

Mr. **Parker**. We do get asked by some Member of the Senate or House.

Senator BAUCUS. If no Member asks you, what do you do?

Mr. PARKER. We would probably bring it to the attention of the Judiciary Committee if we could.

Senator BAUCUS. Would you bring it to the attention of the Commerce Committee?

Mr. PARKER. Probably not, if we were not directly asked.

Senator BAUCUS. You would probably bring it to the attention of the Judiciary Committee, even if not directly asked?

Mr. PARKER. Yes.

Senator BAUCUS. Are there any examples where you have done that; that is, where bills proposed to delegate litigation authority, and where no Member of Congress has complained to that committee?

Mr. PARKER. A recent example is the trucking deregulation bill. Senator Heflin did offer correcting amendments, and litigating provisions were eliminated in that bill. That was just this past month.

Senator BAUCUS. Do you think this procedure we are outlining is a sufficient procedure?

Mr. PARKER. No. I think there are a lot of things that hopefully could be done to assist in this regard.

Senator BAUCUS. Such as?

Mr. PARKER. Well, I have spent a little bit of time thinking about it. Obviously, it would be very helpful to us if any bill which had litigation authority in it was referred to the Judiciary Committee for review.

They can all be sequentially referred for some period of time, so your committee would have an opportunity to have a crack at it. That would be very helpful to us.

Absent that, the only people I know that look at most bills are the legislative counsels of the two Houses. If they could be instructed to at least notify the Judiciary Committee when they are drafting bills and asked to put in litigation authority provisions, that, too, would be helpful.

We try to comment, as I say, whenever we are asked.

Senator BAUCUS. I wonder if it is politically feasible to require referral to the judiciary of provisions of bills that affect litigation authority?

The leadership likes to move legislation and not delay it.

Mr. PARKER. I understand that.

Senator BAUCUS. What is the Department's position on the House EMB bil. which gives EMB independent litigation authority?

Mr. PARKER. The bill is still in conference.

I know the Civil Division strongly opposes the grant of that litigating authority. We will be shortly sending through the clearance process a letter which we hope to get cleared, which we will then be able to send to the conferees, which would be in opposition to that provision.

That provision, I might add, was not in the bill to begin with. It was added on the floor.

Senator BAUCUS. That position——

Mr. PARKER. Which happens quite frequently, I might add.

Senator BAUCUS. Through amendments on the floor?

Mr. PARKER. Yes; they are not in legislation to begin with, but they get added on in the committee or on the floor.

Senator BAUCUS. Will the position that you hope to have cleared be the position of the Department or the position of the administration?

Mr. **Parker**. Well, if it is cleared, it would then be the position of the administration.

Senator **Baucus**. You will seek to get administration——

Mr. **Parker**. Seek to get administration support.

Senator **Baucus**. Support for the Department's position?

Mr. **Parker**. That is correct.

Senator **Baucus**. When do you expect the Department or the administration to reach a decision on this point?

Mr. **Parker**. Shortly, I hope.

Senator **Baucus**. Is it not a bit late already? We are in conference.

Mr. **Parker**. They are in conference; that is correct. Time is of the essence for us.

Senator **Baucus**. When did Civil make its decision known on this? How soon after the Santini amendment was passed on the floor?

Mr. **Parker**. It was passed on the floor on October 31. The bill then went to conference. It has been struggling through conference ever since.

Senator **Baucus**. This is April 3. Is that letter still winding its way up?

Mr. **Parker**. No. The knowledge of that litigating authority provision came to us somewhat late.

Senator **Baucus**. Nobody at Justice watches the legislation?

Mr. **Parker**. We try to. There are bills which are fashioned by the administration on which Justice makes its position known earlier.

Senator **Baucus**. When was Justice first aware of the Santini amendment?

Mr. **Parker**. Shortly after it was put on——

Senator **Baucus**. How soon?

Mr. **Parker**. I do not know exactly.

Senator **Baucus**. How soon did anybody in Civil Division or your office know of the Santini amendment?

Mr. **Parker**. I do not know precisely.

Senator **Baucus**. For my information, do you have a staff here which covers floor action?

Mr. **Parker**. We try to, yes. We have a small staff.

Senator **Baucus**. Does the Justice Department have any congressional relations staff on the Hill?

Mr. **Parker**. Yes.

Senator **Baucus**. How many?

Mr. **Parker**. My office has a total population of 23 at the moment. Those are not all lawyers, that is, but lawyers and support.

However, each of the offices, bureaus, boards, and divisions has people within them that are assigned to legislative tasks.

Senator **Baucus**. You do not have to be a lawyer to know that the Santini amendment had adversely affected the Justice Department?

Mr. **Parker**. That is true.

Senator **Baucus**. For my information, do you have insufficient resources to cover matters on the Hill, or did that just slip by?

Mr. **Parker**. Everybody can always use additional resources.

It may be a matter of coordination of resources which is more a problem than total number.

Senator **Baucus**. When were you first aware of the Santini amendment?

Mr. Parker. I, personally?

I do not remember the exact date.

Senator Baucus. Was it in a month, 5 months?

Mr. Parker. It was probably late last year.

Senator Baucus. Late last year; and this letter is still winding its way up?

Mr. Parker. No. The letter has only been proposed in the recent past.

Senator Baucus. Why has it only recently been proposed?

Mr. Parker. Well, Energy Mobilization Board legislation is not our prime responsibility. We are not the lead agency.

Senator Baucus. But energy is a big matter these days.

Mr. Parker. I know.

Senator Baucus. And to delegate litigation authority on energy issues to another Department would seem to be a pretty big matter. Maybe I am wrong.

Mr. Parker. It is, but I think in context of these hearings, our interests in litigation authority is an enormous matter of great importance to us. In the context of the individual bills, sometimes it is not of great importance. It is a small portion of that bill in the Commerce Committee.

Senator Baucus. EMB is a big bill.

Mr. Parker. That is right. Litigation authority is not to proponents of that bill as major an issue as it is to us. The decisions on the Energy Mobilization Board bill are being handled by the Department of Energy, as the lead agency, and the White House.

Senator Baucus. On the substance of the bill, I would expect that to be the case.

Mr. Parker. This is part of the substance of the bill.

Senator Baucus. On litigation authority, I would expect Justice to (a) be aware of potential losses and (b) once it is aware, do something about it.

Mr. Parker. We are trying.

Senator Baucus. Based upon prior testimony, every witness from the Justice Department feels litigation authority should be centralized in the Department.

I take it you agree with that?

Mr. Parker. I agree with that.

Senator Baucus. I am frankly a bit perplexed as to why the Justice Department is not protecting itself a little more strenuously, aggressively.

Mr. Parker. I feel we are, Senator.

Senator Baucus. I think there is room for improvement here, do you not?

Mr. Parker. There is always room for improvement.

Senator Baucus. Here, too?

Mr. Parker. Here, too.

Senator Baucus. What about the bill that would give the Energy Security Corporation litigation authority?

Would it not give that corporation more litigation authority than other Federal corporations?

Mr. Parker. I do not know that that is true. I am not an expert in litigating authority, and I do not propose to be able to comment on that. I do not know that authority granted to that corporation is any different than that has been normally granted to other Federal corporations. As I say, that is just not an area I am an expert in.

Senator **Baucus**. The President has three major energy bills: windfall profits, EMB, and ESC. Three major bills.

We hear this all the time. Yet, two of the three give away litigation authority. Two of the major bills that this Congress is going to pass give away litigation authority. Is that not something we should be concerned with?

Mr. **Parker**. We are.

Senator **Baucus**. Is it not something we should be so concerned with that we should be more aggressive about it?

Mr. **Parker**. Well, as I indicated previously, Senator, the decisions with respect to those bills and their legislative posture are not being made by the Department of Justice. We have made our feelings known, and those kinds of decisions are not ours to make.

Senator **Baucus**. Can you tell us when you made your feeclings known. When did the Department make its feelings known?

Mr. **Parker**. I do not know precisely.

I suspect our feelings were being made known while the bills were being drafted.

Senator **Baucus**. In any written form?

Mr. **Parker**. I assume so. I do not know that to be accurate.

Senator **Baucus**. Could you supply this committee with a copy of all written——

Mr. **Parker**. If there were written recommendations, I do not know that I could supply them. They would probably be the comments that go from the Department to the Office of Management and Budget. I do not know that they are releasable by us.

Senator **Baucus**. I will ask you to do the best you can.

Mr. **Parker**. I will certainly supply them if I can.

Senator **Baucus**. To the degree they exist and are available.

Mr. **Parker**. Be happy to.

Senator **Baucus**. Is it not true that H.R. 79 would have the effect of giving litigation authority to the Postal Rate Commission?

Mr. **Parker**. H.R. 79?

Senator **Baucus**. To the Postal Rate Commission.

Mr. **Parker**. Yes.

Senator **Baucus**. What are we doing about this?

Mr. **Parker**. We have opposed that in two different communications which we have sent the Office of Management and Budget.

Senator **Baucus**. Excuse me. I missed that. Would you repeat it?

Mr. **Parker**. We have opposed it in two different communications we have sent to the Office of Management and Budget. I do not think the Postal Rate Commission will get a favorable report on that bill cleared by OMB.

Senator **Baucus**. Has there been any decision within the administration with respect to litigation authority?

Mr. **Parker**. That is one of the issues. They will come down on the side of the Department of Justice, it is my understanding.

Senator **Baucus**. What is the reason for this large number of bills which propose separate independent litigation authority in some agency other than the Department of Justice?

Why are all of these bills being proposed either in the bill or by amendment, markup, or on the floor?

What is the cause of this? Why is it happening?

Mr. PARKER. I cannot answer that definitively. I would assume it sounds very attractive to each of the agencies and to each of the other committees who handle this question. When the proposition is put to them, we ought to be able to represent ourselves, it sounds attractive. We know the terrain and we know the territory better than the Justice Department, and we ought to be able to handle our own litigation authority.

On its surface, it sounds attractive. I think that many legislators who sit on other committees, other than Judiciary, and are familiar with the agencies over which they have supervision and authority, think that it is attractive as well.

Senator BAUCUS. Is it not true that perhaps this is partly attributable to client agencies' dissatisfaction with its relations with Justice?

Mr. PARKER. I do not know.

Senator BAUCUS. What could the Justice Department do to prevent this erosion of litigation authority?

Mr. PARKER. Beyond that which we are doing now?

Senator BAUCUS. Yes; beyond what you are doing now, because you are losing it.

Mr. PARKER. Again, this is not an area in which I am really expert or can comment on, but I suspect you try to provide the best services you can within limits of your resources to your client agencies.

Senator BAUCUS. I do not mean to be critical, but I would think it would be an area you should be an expert on. After all, you are the Assistant Attorney General for Legislative Affairs, and you are not Assistant Attorney General for the Civil Division or the Antitrust Division. It seems to me this general question of litigation authority would be an area that you should be familiar with and be the point person on.

Mr. PARKER. I have knowledge in a great many areas and master of none, because of the nature of the Office of Legislative Affairs.

I do not want to make statements on behalf of the Department with respect to an area that I am really not——

Senator BAUCUS. I am asking these questions of you not only as a Department representative, but as you, Alan Parker. Do you have any personal views on this?

Mr. PARKER. I understand.

Senator BAUCUS. What about the Bureau of the Budget Circular A99, which requires all departments to oppose legislation which would have the effect of giving those departments litigation authority? What is the status of that circular?

Mr. PARKER. I assume it is honored in the breach rather than being honored in the observance.

Senator BAUCUS. Is there any way you can use that circular to help prevent the loss of litigation authority?

Mr. PARKER. Along with a number of other things, yes. We would think this circular ought to be carefully adhered to.

Senator BAUCUS. Are you doing anything about it? Are you recirculating it?

Mr. PARKER. It is not for us to recirculate.

Senator **Baucus**. Are you recommending, in fact, insisting that it be recirculated in red print, big block, 60-point type?

Mr. **Parker**. No.

Senator **Baucus**. With a transcript of these hearings?

Mr. **Parker**. The executive branch did look into the area of litigation authority, as part of the President's reorganization project.

Senator **Baucus**. Speak up a little. I am having trouble hearing you.

Mr. **Parker**. I said the executive branch did look into the subject matter of litigation authority—I forget the dates; I think it was 1978—the result of which was the creation of the Federal Legal Counsel and promulgation of a Presidential Executive order.

Senator **Baucus**. And the legal council does not address this issue?

Mr. **Parker**. It has not; that is correct.

Senator **Baucus**. It doesn't, so that is not going to advance the proper resolution of the problem here. Do you think the Senate and House Judiciary Committees should become more involved in trying to remove those provisions from pending legislation?

Mr. **Parker**. Absolutely.

Senator **Baucus**. Apart from the trucking deregulation——

Mr. **Parker**. There are other areas as well, if you have a little extra time, and it strikes your fancy, such as judicial review provisions, which crop up in bills all the time. The Judiciary Committee never gets a look at them. Expedited hearings is a problem, I think, for courts and departments. There are a number of areas besides litigation authority that we would like the Judiciary Committee to take a look at.

Senator **Baucus**. Could you, for the record, list those, please?

Mr. **Parker**. Those are first examples that come to my mind. There are probably others.

Senator **Bacus**. I would appreciate that.

Mr. **Parker**. Yes, I would be happy to.

Senator **Baucus**. Do not hesitate to be candid and frank. Apart from the trucking deregulation bill, have you or any member of your staff approached either or both the House and Senate Judiciary Committees asking that certain provisions prescribing litigation authority be removed?

Mr. **Parker**. Yes. I do not have any specific examples that come to mind, but my feeling and recollection is that we have done so on a number of occasions, that we are alerting people to problems that exist in other pieces of legislation.

Senator **Baucus**. Could you provide information about those instances for the record?

Mr. **Parker**. Yes.

Senator **Baucus**. You are familiar with S. 2401?

Mr. **Parker**. Yes.

Senator **Baucus** In your view, what provisions in this bill would be most helpful in dealing with this litigation authority problem? What is the most helpful part of the bill?

Mr. **Parker**. Well, I do not know if I can single out any one part of it that would be the most helpful.

Senator **Baucus**. Do you agree with the bill, or the main provisions?

Mr. **Parker**. Yes. I certainly agree with it, and am very sympathetic to its purposes.

Senator **Baucus**. Do you have any suggestions to improve it?

Mr. **Parker**. Yes. As a matter of fact, I would have some.

These, by the way, would be classed as purely technical or practical problems and/or suggestions. They are not meant to be any kind of substantive suggestions with respect to the bill.

Senator **Baucus**. Outline one or two that seem significant. We can deal with the other suggestions later.

Mr. **Parker**. I feel the date might well be shortened in section 2B. Sixty days is a fairly lengthy period of time. If some of these arrangements need to be entered into, there are cases that are pending that need to be worked on, and I am not sure 60 days is a fair period. Thirty days may be more effective for both the legislative and the executive branch.

I have some problem with the terminology "any agreement." I am not sure whether it means oral as well as written. As I understand it, the Department enters into full-blown memorandums of understanding, that have been negotiated, but it also enters into arrangements or agreements which are done by exchange of letters on a rather ad hoc and quick basis.

Senator **Baucus**. Would "written agreement" provision address your concern?

Mr. **Parker**. I think it would.

It may be that you would want to define whether you are actually after every agreement that is entered into in terms—some of the quick letter agreement or some of the large memorandum of understanding.

In section C, I cannot imagine any problem with that. That is already incorporated into the Presidential Executive order. I would imagine the administration and the Department would be happy to support that. It does use the phrase, "all legal disputes." I do not know exactly what that encompasses.

Senator **Baucus**. Would you submit your suggestions to this committee?

Mr. **Parker**. I will be happy to.

I have others.

Senator **Baucus**. All that you have.

Do you agree with the assessment that we heard earlier that many of the memoranda of understanding the Department enters into are the results of a gun being placed at the head of the Department?

Mr. **Parker**. Well, I was not with the Department then, so I do not have the past experience.

I do seem to have recollection that there was legislation pending at the time, for instance, we were about to enter into a memorandum of understanding with the Department of Energy, and there was enormous thrust on the Hill in favor of the Department of Energy, and I think that carried over into granting them litigation authority.

There also was a kind of generic bill which would have given all agencies litigation authority, and I think that was in fact a major threat and would have very likely had a great amount to do with whether or not there was that memorandum of understanding with the Department of Energy.

Senator **Baucus**. I guess it comes down to the basic question of power and clout. Why does not the Department have more power and therefore a stronger negotiating position?

Mr. PARKER. I think all agencies, in a sense, have power and clout with the committees they deal with. There are some 22 standing committees, all with some interest in the agencies over which they authorize, observe, and oversee.

We have one, the Judiciary Committee, and we do not deal with that many committees other than the Judiciary Committee and the select Intelligence Committees, and some of these major pieces of legislation have other impetus to them. I think that it is a matter of ebb and flow. Sometimes our power and clout flows and sometimes it ebbs.

Senator BAUCUS. Do you think it is ebbing more?

Mr. PARKER. Well, I think you have to judge it on each of the factual situations.

Senator BAUCUS. It seems to me the Department is losing. These bills we have discussed regarding the placement of litigation authority in other agencies are greater in number; would you not agree?

Mr. PARKER. I think that is true.

I think the whole issue of litigation authority has its own ebb and flow.

I think it was a matter of concern to Judge Bell, and is to Attorney General Civiletti, and perhaps the trend will now be reversed with the interest of your subcommittee and of the Judiciary Committee.

Senator BAUCUS. Do you recall last year during these authorization hearings we discovered there were insufficient resources in the Lands Division to enforce certain new environmental statutes passed by the Congress?

Why were not more resources added to the Lands Division to accommodate those additional enforcement requirements?

Mr. PARKER. I cannot answer that. I am not involved in the budget process at all.

Senator BAUCUS. Are you now trying to anticipate the needs created by Lands or other divisions in Justice as a result of new substantive legislation that the Congress is passing?

Mr. PARKER. I say that in the affirmative because I think it is true that our Justice Management Division does, in fact, on the basis of information from the various divisions, offices, bureaus, and boards, try to anticipate those things.

Senator BAUCUS. I am wondering what your office is doing to help alleviate these potential future problems?

Mr. PARKER. Our avenue to that is obviously through the authorization process.

Senator BAUCUS. I understand that. I understand the avenue. I wonder if you have some procedure within your Office?

Mr. PARKER. Not in the Office of Legislative Affairs.

Senator BAUCUS. What office does, if any?

Mr. PARKER. Justice Management Division.

Senator BAUCUS. Are they?

Mr. PARKER. I would assume so. I cannot answer that.

Senator BAUCUS. Do you have any responsibility in this area? After all, it is legislation that is the cause of the problem.

Mr. PARKER. Are you talking now about which bill?

Senator BAUCUS. Generally, like the new environmental statutes that will impose additional enforcement responsibilities on the Lands Division, for example.

Mr. **Parker.** I think that happens in a variety of ways. People within a certain division, who have operating jurisdiction, try to keep track of those things. We try to advise them of legislation within their area—would have some effect on their resources. That is factored into the fiscal year budget analysis.

Senator **Baucus.** In conversations with attorneys at the Civil Division, we have found that many attorneys there have some suggestions as to how to improve statutes. That is, they have found flaws in wording of many of the statutes that they deal with. They have some good suggestions to make to the division head, to the Attorney General, and to Congress on how to remedy these flaws that exist in statutes.

What are you doing to take advantage of this untapped resource? Are we reviewing their ideas to determine if their judgments are correct?

Mr. **Parker.** Whether or not their judgment is correct would be weighed principally and primarily throughout their own——

Senator **Baucus.** I understand; but are we taking advantage of the opportunity to ask their views?

Mr. **Parker.** We ask for the views on legislation of every division that is affected, yes.

Senator **Baucus.** What about legislation that is already on the books, that was passed years ago? That is where they would have great experience.

Mr. **Parker.** Indeed. They do communciate within their division and then to the Office of Legislative Affairs with suggestions or changes.

Senator **Baucus.** I raise the issue because it is my understanding that a lot of attorneys that are at Justice feel that they are not sufficiently asked. They have lots of ideas and working familiarity with some provisions and they want an outlet.

Mr. **Parker.** I think that is something that is easily—if that is the case—that is something easily remedied. We would be happy to hear from them.

Senator **Baucus.** I would appreciate it if you would look into that and do what you can.

Mr. **Parker.** All right.

Senator **Baucus.** Almost all of these issues underscore the need for greater communication and cooperation between Justice Department and the Senate and House Judiciary Committees.

What are you doing to help increase communication and cooperation between the Justice Department and the House and Senate Judiciary Committees?

Mr. **Parker.** We maintain fairly close communication, Senator, with each of the Judiciary Committees, both members and staffs. I do not know that we could be in any closer communication.

Senator **Baucus.** You agree one key here is increasing communication and cooperation between Justice and the committee?

Mr. **Parker.** Absolutely.

Senator **Baucus.** Does the Department need more supergrade positions to retain senior trial attorneys?

Mr. **Parker.** Well, again, I have a very small office, and I do not know the problems that the other divisions have, but just as a personal view, I would assume it does need additional supergrades.

Senator Baucus. Could you provide that information for the record and identify what areas?

[The material referred to above is on file with the committee.]

Mr. Parker. Be happy to.

Senator Baucus. What authority, either legal or institutional, do you personally have in your present position to stop transmittal of formally requested information and documents of the Department to the Senate and House Judiciary Committees?

Mr. Parker. My Office and I are the focal point for transmission of all material to the Hill. In order to have some kind of cohesive policy, we do look at it all and screen it. There are questions that arise, that go back to the division from whence they came, and decisions as to what comes up here are either made by me or, in some cases, by the Associate Attorney General or Deputy Attorney General or the Attorney General himself.

Senator Baucus. So if I understand your answer correctly, you in your present capacity have the authority to decide not to transmit a document, that is, the Attorney General who may represent the Civil Division or some other division does not have that authority; you have the authority to overrule their decision; is that correct?

Mr. Parker. I would not say overrule. We deal in a more collegial fashion——

Senator Baucus. Where there is a difference of opinion?

Mr. Parker. I would not overrule. I would send to either the Associate Attorney General, if it was on the Civil side of the Department, or the Deputy Attorney General if it was on the criminal side of the Department.

Senator Baucus. In those cases where there is a difference of opinion between yourself——

Mr. Parker. It goes up to the deputy.

Senator Baucus. You would not unilaterally make the decision, but would buck it upstairs?

Mr. Parker. That is correct.

Senator Baucus. Have there been requests for information or documents from Congress and/or from the Senate and House Judiciary Committees that you personally have denied?

Mr. Parker. I cannot think of any that I have denied. There are some which I have questioned, and then a decision has been made either the Associate's or the Deputy's level.

Senator Baucus. And the aswer to the question is no, there have been none?

Mr. Parker. Yes; I am not entirely sure of that, but I think that is accurate.

Senator Baucus. According to your best recollection?

Mr. Parker. Best recollection.

Senator Baucus. Do you review all information prepared and gathered at the request of the Judiciary Committee?

Mr. Parker. I am supposed to.

I'm not sure that that is always the case. I think there are probably cases of direct transmission from the Department.

Senator Baucus. All requests for transmission are supposed to go through your office?

Mr. Parker. Yes. In the best of all worlds, we would like requests in writing to come to our Office and then go to the divisions involved and then come back through that same route. When it does not happen, I put on my hysterical man act.

Senator BAUCUS. When request is made, another division goes through your Office, do you have authority to refuse to transmit that information to the Judiciary Committee?

Mr. PARKER. I did not hear the first part of your question.

Senator BAUCUS. When request goes, for example, to another division of Justice, and because it is an institutional matter, those requests are supposed to flow through your Office, do you have authority to refuse to transmit that information to the committee, even where appropriate department or appropriate division has no problem?

Mr. PARKER. I am not sure I understand the fact of the situation that you are outlining. In other words, a request is made for the committee, say——

Senator BAUCUS. Make the request——

Mr. PARKER. It goes directly to the Antitrust Division?

Senator BAUCUS. Yes.

Mr. PARKER. Hopefully, if the system works, that does not happen, but if it did, I would not have any authority to stop it; but that does not happen. If it did, no, I would not have any authority to stop it.

Senator BAUCUS. This committee requested weekly status reports prepared by the Civil Division, and we are told that you decided not to give them to us; is that correct?

Mr. PARKER. As an initial matter, that is correct.

There was an issue as to their content and how it affected other divisions' weekly reports, which had to be clarified before we transmitted them to you.

Senator BAUCUS. My understanding, though, is that the Civil Division disagreed with your position. The Civil Division had no problem in transmitting them.

Mr. PARKER. That is correct. That decision was eventually made by the Associate's Office.

Senator BAUCUS. Do you believe the Senate and House Judiciary Committees have legal authority and, in fact, an obligation to conduct oversight of the Department?

Mr. PARKER. Clearly.

Senator BAUCUS. Do you believe that those same committees have legal authority and oversight obligation to review decisions and decisionmaking processes at the Department?

Mr. PARKER. Clearly.

Senator BAUCUS. Do you believe the Senate and House Judiciary Committees have the legal authority and oversight obligations to obtain copies of necessary documents in performance of their oversight work?

Mr. PARKER. Not so clearly.

For the most part, yes. I think there are exceptions.

Senator BAUCUS. What would those exceptions be?

Mr. PARKER. I think the exceptions which were stated to you the other day by the Attorney General. There are ongoing cases, certain criminal matters, investigatory matters, matters of predecisional memorandum which would chill the openness and candor of staff attorneys to write memos.

There are some exceptions, I think.

Senator **Baucus**. You recall, though, the Attorney General Office said at that time that on a case-by-case basis he would bend over backward to make information available.

Mr. **Parker**. That is correct. We try to.

Senator **Baucus**. Therefore, that policy, looking at cases on a case-by-case basis and bending over backward to make them available, should be a hallmark in trying to decide that the——

Mr. **Parker**. Absolutely.

Senator **Baucus**. Whether or not any request by this committee should be honored.

Mr. **Parker**. Absolutely.

Senator **Baucus**. Do you believe the public has the right to know and understand the workings of the Justice Department?

Mr. **Parker**. Absolutely.

Senator **Baucus**. Do you in your present position have a legal right to unilaterally inform an agency head that he should not comply with a newly voted, authorized, issued, and delivered subpena from the Judiciary Committee?

Mr. **Parker**. Do you want to run that by me one more time?

Senator. **Baucus**. Do you have legal right to unilaterally inform agency heads not to comply with a subpena issued by this committee?

Mr. **Parker**. No.

Senator **Baucus**. Have you ever done so?

Mr. **Parker**. I have not.

Senator **Baucus**. It is my understanding, just asking this question for my own edification, that you notified the Commodity Future Trading Commission not to comply.

Mr. **Parker**. That is not true, Senator.

Senator **Baucus**. What happened there?

Mr. **Parker**. I will give you a copy of that letter, which has already been supplied to you. I did not ask them not to comply. I indicated to them that the Department of Justice had some problems, and we were responding to a letter which you had written to us, and that we needed some additional time to get together with your staff and review and discuss problems. They were not told not to comply with that subpena.

[The material referred to above is on file with the committee.]

Senator **Baucus**. Did you recommend they not comply?

Mr. **Parker**. I did not.

Senator **Baucus**. I just wanted to know. That is why I asked.

I have no further questions, Mr. Parker.

Thank you very much.

Mr. **Parker**. Thank you very much.

Senator **Baucus**. I appreciate it very much.

That concludes the hearings.

[Whereupon, at 12:44 p.m., the committee was adjourned, subject to the call of the Chair.]

APPENDIX

Questions of Senator Baucus and Responses of Attorney General Civiletti.

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, D.C. 20510

June 25, 1980

Honorable Benjamin Civiletti
Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

At the April 3, 1980, authorization hearing of the Civil Division, I asked several questions concerning the occasional practice of the Department of Justice of refusing to defend the constitutionality of certain Acts of Congress. In view of the importance of the constitutional issues involved, I asked Senate Legal Counsel to respond to several questions relating to this area. The questions and the Senate Legal Counsel's responses are attached.

In order to obtain a clear understanding of the position of the Department of Justice on this issue, I would appreciate your specific response to each question submitted to Senate Legal Counsel. Please note that this request does not include those situations where the Acts themselves touch on constitutional separation of powers between Executive and Legislative Branches, such as Acts involving the legislative veto and appointment and removal power.

Since your answers will most likely be published as part of the official hearing record, please answer each question separately.

Thank you for your prompt attention to this matter. I would appreciate receiving your response by July 21, 1980.

Sincerely,

Max Baucus

Max Baucus, Chairman
Subcommittee on Limitations of
Contracted and Delegated Authority

attachments

Office of the Attorney General
Washington, D.C. 20530

July 30, 1980

Honorable Max Baucus
United States Senate
Chairman
Subcommittee on Limitations of
Contracted and Delegated Authority
1107 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

In your letter of June 25, 1980, you asked that I answer eleven questions posed by you concerning the legal "authority" supporting "the Justice Department's assertion that it can deny the validity of Acts of Congress." I am pleased to respond. I have taken the liberty of setting these eleven questions out verbatim so the context in which my answers are given will be clear. My answers follow several preliminary observations about the form of the questions asked and the general nature of the Department's "assertion" in this matter.

The Attorney General has a duty to defend and enforce the Acts of Congress. He also has a duty to defend and enforce the Constitution. If he is to perform these duties faithfully, he must exercise conscientious judgment. He must examine the Acts of Congress and the Constitution and determine what they require of him; and if he finds in a given case that there is a conflict between the requirements of the one and the requirements of the other, he must acknowledge his dilemma and decide how to deal with it. That task is inescapably his.

I concur fully in the view expressed by nearly all of my predecessors that when the Attorney General is confronted with such a choice, it is almost always the case that he can best discharge the responsibilities of his office by defending and enforcing the Act of Congress. That view is supported by compelling constitutional considerations. Within their respective spheres of action the three branches of Government can and do exercise judgment with respect to constitutional questions, and the Judicial Branch is ordinarily in a position to protect both the Government and the citizenry from unconstitutional action, legislative and executive; but only the Executive Branch can execute the statutes of the United States. For that reason alone, if executive officers were to adopt a policy of ignoring or attacking Acts of Congress whenever they believed them to be in conflict with the provisions of the Constitution, their conduct in office could jeopardize the equilibrium established within our constitutional system.

At the same time, I believe that if Congress were to enact a law requiring, for example, that the Attorney General arrest and imprison all members of the opposition party without trial, the Attorney General could lawfully decline to enforce such a law; and he could lawfully decline to defend it in court. Indeed, he would be untrue to his office if he were to do otherwise. This is not because he has authority to "deny the validity of Acts of Congress." It is because everything in our constitutional jurisprudence inescapably establishes that neither he nor any other executive officer can be given authority to enforce such a law. The "assertion" of the Department of Justice is nothing more, nor less, than this. */

I have one further observation. In your letter you state that your request "does not include those situations where the Acts themselves touch on constitutional separation of powers between Executive and Legislative Branches . . . ." Since almost all of the legal authority dealing with this question, from the trial of Andrew Johnson to the arguments of Attorney General Levi in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), deal with separation of powers issues, your limitation is stringent. I will not discuss all the pertinent authorities if you will permit me to note that in this field the historical

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*/ I note that an analogous situation is presented where an individual subject to a court injunction believes that injunction to be unconstitutional or legally invalid. The well-established rule is that such an injunction must be obeyed until it is dissolved or modified on appeal in order to preserve the integrity of the judicial process. *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). The Court in *Walker*, however, was careful to emphasize that it did not have before it a case in which "the injunction was transparently invalid." *Id.*, at 315. If an Act of Congress directs or authorizes the Executive to take action which is "transparently invalid" when viewed in light of established constitutional law, I believe it is the Executive's constitutional duty to decline to execute that power.

predominance of separation of powers issues is no accident. I have said that the Executive can rarely defy an Act of Congress without upsetting the equilibrium established within our constitutional system; but if that equilibrium has already been placed in jeopardy by the Act of Congress itself, the case is much more likely to fall within that narrow class.

The traditional debate over the nature and extent of the President's supervisory authority as Chief Executive provides a good illustration of the phenomenon to which I have just referred. From time to time Congress has attempted to limit the President's power to remove, and thereby control, the officers of the United States. Some of these attempts have been consistent with the Constitution; others have not. In every one of these instances, however, it was the Act of Congress itself that altered the balance of forces between the Executive and Legislative Branches; and if the Executive had invariably honored the Act, our constitutional system would have been changed by *fait accompli*. Accordingly, in some of the cases in which the constitutionality of the Act was in doubt, the Executive determined that it could best preserve our constitutional system by refusing to honor the limitation imposed by the Act, thereby creating, through opposition, an opportunity for change and correction that would not have existed had the Executive acquiesced. *See Myers* v. *United States*, 272 U.S. 52 (1926). Inter-branch disputes over other separation-of-powers issues can follow a similar course.

I now turn to your specific questions.

Question 1: What is the specific authority (if any) deriving from English constitutional history which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

As I have suggested, the Department's "assertion" depends entirely upon the proposition that there are fundamental limitations on the authority of the Legislative and Executive Branches of our Government. This, in fact, is the central legal principle in our constitutional system -- our system of "limited" government -- and it is a principle that the English have *rejected*. Accordingly, English constitutional history is important for our purposes, not because it supports my view that in a system of "limited" government there are powers and duties that cannot be imposed upon executive officers, but because it illustrates how constitutional government can develop towards a radically different model -- a model in which there is no fundamental limitation upon legislative power. It is true that there are early English cases that I could cite in my behalf. I am reminded in particular of Coke's judgment in Calvin's Case, 7 Co. Rep. 1 (immutable natural law prevents Parliament from separating a subject from the protection of his king). But even though these early precedents enjoyed some vitality on this side of the Atlantic as late as the time of the American Revolution (consider, for example, James Otis' classic attack on the writs of assistance, February 24, 1761, printed in Commager, Documents of American History 45 (5th ed. 1949)), they did not carry the day in their own country.

I should add that I consider the seventeenth century dispute between Parliament and the Stuart kings over the so-called "dispensing power" to be directly relevant to the questions you have raised. The history of that dispute was well-known to the Framers of the Constitution, and it is clear that they intended to deny our President any discretionary power of the sort that the Stuarts claimed. We must remember, however, that it was largely as a result of Parliament's victory in that matter that the English came to abandon any notion that "fundamental law" limited the powers of the legislative sovereign. This is the very notion upon which our Constitution, and the Department's view of this question, depends. In our system of limited government, unlike the English system, there are some things that the legislature and the officers of the Government cannot lawfully do.

Question 2: What is the specific authority (if any) deriving from the Constitutional Convention and other expressions of the Framers which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

The available evidence concerning the intentions of the Framers lends no specific support to the proposition that the Executive has a constitutional privilege to disregard statutes that are deemed by it to be inconsistent with the Constitution. The Framers gave the President a veto for the purpose, among others, of enabling him to defend his constitutional position. They also provided that his veto could be overriden by extraordinary majority in both Houses. That being so, an argument can be made that the Framers assumed that the President would not be free to ignore, on constitutional grounds or otherwise, an Act of Congress that he had been unwilling to veto */ or had been enacted over his veto.

At the same time, I believe that there is relatively little direct evidence of what the Framers thought, or might have thought, about the Executive's obligations with regard to Acts of Congress that were transparently inconsistent with the Constitution; and, indeed, the question remained open for some time after the Constitution was adopted. President Jefferson, for example, writing of the Alien and Sedition Acts in 1804, concluded that each Branch had power to exercise independent judgment on constitutional questions and that this was an important element in the system of checks and balances:

> "The judges believing the [Sedition law] constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. The instrument meant that its coordinate branches should be checks on each other." [8 Writings of Thomas Jefferson 310 (1897).]

President Jefferson's view was not to prevail, although other early Presidents, including Andrew Jackson, were to express similar sentiments from time to time.

As I have said, I do not believe that the prerogative of the Executive is to exercise free and independent judgment on constitutional questions presented by Acts of Congress. At the same time, I think that in rare cases the Executive's duty to the constitutional system may require that a statute be challenged; and if that happens, executive action in defiance of the statute is authorized and lawful if the statute is unconstitutional. That brings me to your next question.

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*/ The President's failure to veto an unconstitutional Act of Congress does not in itself estop the Executive from challenging the Act in court at a future date, nor does it cure the constitutional defect where the question is one of separation of powers. See Myers v. United States, 272 U.S. 52 (1926); National League of Cities v. Usery, 426 U.S. 833, 841 n.12 (1976).

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Question 3: What is the specific authority (if any) deriving from Supreme Court or other judicial opinions which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

In Myers v. United States, 272 U.S. 52 (1926), the Supreme Court was asked to decide whether the President had acted lawfully in removing a postmaster from office in contravention of an Act of Congress. The Act provided that postmasters were not to be removed by the President without the advice and consent of the Senate. The case involved a claim for back salary filed by the heirs of the postmaster who had been removed. The action was brought in the Court of Claims under a statute that gives that court jurisdiction to hear cases not sounding in tort arising out of conduct by executive officers alleged to be unlawful under the Constitution or Acts of Congress.

When the case came before the Supreme Court, the Solicitor General, appearing for the United State, assailed the attempt to limit the removal power. He argued that the statute imposed an unconstitutional burden upon the President's supervisory authority over subordinate officers in the Executive Branch. Senator Pepper made an amicus curiae appearance and argued that the statute was constitutional. The Court ruled that the statute was unconstitutional. More to the point, the Court ruled that the President's action in defiance of the statute had been lawful. It gave rise to no actionable claim for damages under the Constitution or any Act of Congress in the Court of Claims.

In my view, Myers is very nearly decisive of the issue you have raised. Myers holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts: He cannot be required by statute to retain postmasters against his will unless and until a court says that he may lawfully let them go. If the statute is unconstitutional, it is unconstitutional from the start.

I wish to add a cautionary note. The President has no "dispensing power." If he or his subordinates, acting at his direction, defy an Act of Congress, their action will be condemned if the Act is ultimately upheld. Their own views regarding the legality or desirability of the statute do not suspend its operation and do not immunize their conduct from judicial control. They may not lawfully defy an Act of Congress if the Act is constitutional. This was the teaching of a near sequel of Myers, Humphrey's Executor v. United States, 295 U.S. 602 (1935); and it is a proposition that was implicit in many prior holdings. In those rare instances in which the Executive may lawfully act in contravention of a statute, it is the Constitution that dispenses with the operation of the statute. The Executive cannot.

Question 4: What is the specific authority (if any) deriving from opinions of the Attorneys General which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

The formal opinions of my predecessors in this Office establish with clarity the general principles upon which this Department continues to rely in dealing with real or apparent conflicts between Acts of Congress and the Constitution. See, e.g., 40 Op. Att'y Gen. 158, 160, and opinions cited therein. As I have already said, I support those opinions fully. All of them emphasize our paramount obligation to the Acts of Congress. None of them concludes that the Executive must enforce and defend every Act of Congress in every conceivable case, the requirements of the Constitution notwithstanding.

Question 5: What is the specific authority (if any) deriving from express language in statutes or their legislative history which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

The statutes that define the Office of the Attorney General require him to render opinions upon questions of law, and they require him to conduct litigation in which the United States is interested. None of the statutes either requires or forbids him to inquire into the constitutionality of statutes. */ As I have said, the tradi-

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*/ Quite apart from the provisions of any statute prescribing the duties or the authority of the Attorney General, the Constitution itself provides that the President "may require the Opinion in Writing, of the principal Officer in each of the executive Departments upon any subject relating to the Duties of their respective Offices." U.S. Const. Art. II, § 2, clause 1.

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tional opinion has been that the Attorney General, in the due performance of his constitutional function as an Officer of the United States, must ordinarily defend the Acts of Congress. As I have said, I subscribe fully that position.

Question 6: What is the specific authority (if any) deriving from historic practice prior to the current Administration which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

Marbury v. Madison, 1 Cranch 137 (1803), was probably the first case in which the Executive made no effort to defend an Act of Congress on a constitutional point. President Jefferson was strongly of the view that Congress had no power to give the Supreme Court (or any other court) authority to control executive officers through the issuance of writs of mandamus. See 1 Warren, The Supreme Court in United States History 232, 242-43 (1922). When Mr. Marbury and the other "midnight judges" initiated an original action in the Supreme Court to compel delivery of their commissions, President Jefferson's Attorney General, Levi Lincoln, made no appearance in the case except as a reluctant witness. See 1 Cranch 143-44. No attorney appeared on behalf of Secretary Madison. The Court ultimately resolved the case by agreeing and disagreeing with President Jefferson. The Court held that the relevant statute was unconstitutional to the extent that it attempted to give the Supreme Court power to issue writs of mandamus against executive officers, but that there was no general principle of law that would prevent Congress from giving that power to the lower courts.

A second significant historical incident involving a refusal by the Executive to execute or defend the Acts of Congress on constitutional grounds arose during the Administration of Andrew Johnson. In defiance of the Tenure in Office Act. which he deemed to be unconstitutional, President Johnson removed his Secretary of War. This action provided the legal basis for one of the charges that was lodged against him by his opponents in the House; and during his subsequent trial in the Senate, the arguments offered by counsel on both sides provided an illuminating discussion of the responsibilities of the Executive in our constitutional system. See 2 Trial of Andrew Johnson 200 (Washington 1868). President Johnson was acquitted . . . by one vote.

I will mention a third incident that illustrates an interesting variation on the historical practice. In the midst of World War II, as a result of the work of the House Committee on Un-American Activities, Congress provided, in a deficiency appropriations act, that no salary or compensation could be paid to certain named government employees. These individuals had been branded in the House as "irresponsible, unrepresentative, crackpot, radical bureaucrats." The Executive responded to the statute by taking two courses at once. The Executive enforced the letter of the statute (by not paying the salary of the employees in question), but joined with the employees in a legal attack upon the constitutionality of the relevant provision. When the case came before the Supreme Court, an attorney was permitted to appear on behalf of Congress, as amicus curiae, to defend the statute against the combined assault. The Court struck the relevant provision, holding that it was a bill of attainder, and allowed the employees to recover. United States v. Lovett, 328 U.S. 303 (1946).

Altogether, there have been very few occasions in our history when Presidents or Attorneys General have undertaken to defy, or to refuse to defend, an Act of Congress. Most of the relevant cases are cited either in the foregoing discussion or in the answers that the Senate Legal Counsel has provided to you in response to these same questions.

Question 7: **What is the specific support (if any) expressed in any scholarly article or book for the Justice Department's assertion that it can deny the validity of Acts of Congress?**

A helpful scholarly discussion of this problem, together with citations to other works, may be found in Edward Corwin's book on the Presidency. Taking full advantage of his scholarly prerogative, Corwin ignores the teaching and, indeed, the holding of Myers and concludes that the President, even though he may doubt the constitutionality of a statute, "must promote its enforcement by all the powers constitutionally at his disposal unless and until enforcement is prevented by regular judicial process." 2 E. Corwin, The President, Office and Powers, 1887-1957, 66 (4th rev'd ed. 1957).

Question 8: What is the specific authority (if any) deriving from ethical pronouncements which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

The "ethical" obligations that devolve upon the Attorney General as a member of the legal profession cannot enlarge or contract his duties as an Officer of the United States. There is nothing in my obligation to my profession or to the courts that prevents me from discharging my duty either to defend the Acts of Congress or to question them in the rare cases in which that is appropriate.

Question 9: What specific instances are there in which a court or bar association has expressly asserted an ethical duty for government litigators to inquire into the validity of Acts of Congress?

I know of no decision by a court or a bar association that expressly asserts that government litigators have an ethical duty either to inquire into the validity of Acts of Congress or to defend them.

Question 10: Has the Justice Department ever sought from Congress legislation to deal with any asserted ethical problem in litigation concerning the validity of Acts of Congress?

No.

Question 11: Has there been any relevant change in the ethical rules in the past few years, since the Justice Department has first begun denying the validity of Acts of Congress?

I know of no recent change in any ethical rule that relates to this problem. Your question assumes that the Justice Department has some new policy in this field. From what I have said in response to your questions, and from the historical examples I have given, I hope it is clear that we have no new policy. Our policy is an old one.

Sincerely,

Ben R Civiletti

Benjamin R. Civiletti
Attorney General

Questions of Senator Baucus and Responses of Senate Legal Counsel

MICHAEL DAVIDSON
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[illegible]

United States Senate
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1980 JUN 19 AM 8 59

June 18, 1980

The Hon. Max Baucus
Chairman, Subcommittee on Limitations
of Contracted and Delegated Authority
407-A Senate Courts

Dear Senator Baucus:

In the past few weeks, the staff of your Subcommittee has posed a number of questions in discussions with my office concerning the authority of the Department of Justice to decline to defend statutes that are challenged in court. We have engaged in extensive research in order to answer those questions.

Enclosed is a copy of our answers to your questions. It is our understanding that you are not seeking a confidential opinion, but rather, that you may include those answers in your published hearing record.

Please let me know if I can be of any further assistance.

Cordially,

Michael Davidson

Michael Davidson

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

AUTHORITY OF THE DEPARTMENT OF JUSTICE TO DENY THE VALIDITY OF ACTS OF CONGRESS

Question 1: What is the specific authority (if any) deriving from English constitutional history which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

Question 2: What is the specific authority (if any) deriving from the Constitutional Convention and other expressions of the Framers which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

Question 3: What is the specific authority (if any) deriving from Supreme Court or other judicial opinions which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

Question 4: What is the specific authority (if any) deriving from opinions of the Attorneys General which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

Question 5: What is the specific authority (if any) deriving from express language in statutes or their legislative history which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

Question 6:	What is the specific authority (if any) deriving from historic practice prior to the current Administration which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?
Question 7:	What is the specific support (if any) expressed in any scholarly article or book for the Justice Department's assertion that it can deny the validity of Acts of Congress?
Question 8:	What is the specific authority (if any) deriving from ethical pronouncements which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?
Question 9:	What specific instances are there in which a court or bar association has expressly asserted an ethical duty for government litigators to inquire into the validity of Acts of Congress?
Question 10:	Has the Justice Department ever sought from Congress legislation to deal with any asserted ethical problem in litigation concerning the validity of Acts of Congress?
Question 11:	Has there been any relevant change in the ethical rules in the past few years, since the Justice Department has first begun denying the validity of Acts of Congress?

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RESPONSES TO QUESTIONNAIRE RE: AUTHORITY OF THE DEPARTMENT OF JUSTICE TO DENY THE VALIDITY OF ACTS OF CONGRESS

The Subcommittee on Limitations of Contracted and Delegated Authority has asked us to respond to a series of inquiries about the authority of the Department of Justice to deny the validity of Acts of Congress. The request does not include those situations where the Acts themselves touch on the constitutional separation of powers between the Executive and Legislative Branches, such as Acts involving the legislative veto, the appointment and removal power and the like. Our response to the questionnaire was prepared by Charles Tiefer, Assistant Senate Legal Counsel.

Question 1: What is the specific authority (if any) deriving from English constitutional history which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

Answer of Senate Legal Counsel:

In determining whether executive officers can deny, or inquire into, the validity of Acts of Congress, a power traditionally seen as reserved to the Judiciary, a critical issue is the meaning of the Constitutional requirement that the President shall "take care that the Laws be faithfully executed," U.S. Const. art. II, § 3. Analysis of the meaning of this clause begins with the struggle between the Crown and Parliament.

The relationship of the Crown to Acts of Parliament was settled during a dispute over the Crown's assertion of power to "dispense" with or "suspend" Acts of Parliament. In the key occasion for royal assertion of these powers, James II, a Catholic monarch, attempted to deny the continuing operation of the Parliamentary acts penalizing Catholics. "[I]n 1687, and again in 1688, James II published a Declaration of Indulgence declaring it to be his 'royal will and pleasure that ... the execution of all and all manners of penal laws in matters ecclesiastical ... be immediately suspended....'" Reinstein, An Early View of Executive Powers and Privilege: Trial of Smith and Ogden, 2 Hastings Con. L. Quart. 309, 321 n.50 (1975). The declaration was tested by English bishops who presented a petition disputing the efficacy of the royal declaration and were prosecuted by the Crown for seditious libel. In the famous Seven Bishops Case, 12 How. St. Tr. 183, 377 (1688), two judges of the King's Bench stated that the Crown lacked the asserted authority, and the jury so found, acquitting the defendants. See Reinstein, supra; Stewart, The Trial of the Seven Bishops, Cal. St. Bar. J. Feb., 1980 at 70 (full account of case).

Shortly thereafter, James II was forced into exile in the Glorious Revolution of 1689, and the English Bill of Rights was enacted. The first grievance stated in the Bill of Rights was that James II had attempted to subvert the English laws and liberties "[b]y Assuming and Exercising a Power of Dispensing with, and Suspending of Laws, and the Execution of Laws, without Consent of Parliament." W. & M., Sess. 2, c. 2 (1689). To lay to rest this royal assertion, the first article of the Bill of Rights declared "That the pretended Power of Suspending of Laws, or the Execution of Laws by Regal Authority, without Consent of Parliament is Illegal." The Bill of Rights requirement of royal "Execution of Laws" is considered the source of the Constitution's parallel terminology. Because "most of the provisions of the English Bill of Rights were placed in our own Constitution ... [i]t seems reasonable to conclude that the abolition of the suspending power, in section 1 of the Bill of Rights, is mirrored in our Constitution's command that the president 'shall take care that the Laws be faithfully executed.'" Reinstein, supra.

Question 2: What is the specific authority (if any) deriving from the Constitutional Convention and other expressions of the Framers which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

Answer of Senate Legal Counsel:

At the Constitutional Convention, three proposals were made for granting the Executive power to disapprove, revise, or suspend legislation. The one proposal adopted was the veto clause, Art. I, Sec. 7, Cl. 2: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it...." A second proposal that the Executive take part, together with the Judiciary, in a Council of Revision, was rejected, an action which the Supreme Court has repeatedly deemed significant as a limitation on the powers of the Judiciary to inquire into the validity of Acts of Congress. See United States v. Richardson, 418 U.S. 166, 189-91 (1974)(Powell, J., concurring); Younger v. Harris, 401 U.S. 40, 52 (1971); United States v. C.I.O., 335 U.S. 106, 124 (1948)(Frankfurter, J., concurring). (3) A third proposal right out of English history "that the national executive have a power to suspend any legislative act for the term of ------" was rejected, after Elbridge Gerry observed "that the power of suspending might do all the mischief dreaded from the negative of useful laws, without answering the salutary purpose of checking unjust or unwise ones." IV J. Elliott, Debates in the Federal Convention (2d ed. 1836).

Framers thus conferred only one specific power on the President with respect to legislation he did not approve: he could veto it. The veto power, great as it is, was carefully cabined: it could only be exercised during the period immediately after passage of legislation; it could only be applied to whole laws, not to individual items or provisions; and it could be overridden by two-thirds of both Houses. Other specific proposals for additional Executive authority to effectuate disapproval of legislation, either immediately after passage or at a later date, were considered and rejected. It was expressly decided not to let the Executive revise laws together with the Judiciary, and it was expressly decided not to let the Executive suspend laws.

No evidence has been presented that the division of powers between Congress and the President thus established depended on whether the latter linked Acts of Congress to the law's constitutionality. The Framers were familiar with the idea that the constitutionality of laws could be disputed. In the Federalist No. 78, Alexander Hamilton discussed in detail the authority of the Judiciary to deny the validity of unconstitutional statutes. In contrast to the judicial authority in this context, no executive authority is suggested. Executive authority was provided through the veto, and only through the veto. See, e.g., The Federalist No. 73 (A. Hamilton)(discussing only the veto as an Executive "security against the enaction of improper laws"). James Wilson, a former delegate to the Constitutional Convention, wrote while he was a Justice of the Supreme Court that the veto was "a guard to protect [the President's] powers against [Congress's] encroachment. Such power and such a guard he ought to possess: but a just distribution of the powers of government requires that he should possess no more." 1 J. Wilson, Works 319 (R. G. McCloskey ed. 1967)(emphasis added). The Constitution, of course, also requires the President to take an oath to "preserve, protect and defend the Constitution of the United States," Art II, sec. 3, cl. 7. This oath has not been viewed as a grant by the Framers of power to deny the validity of Acts of Congress, insofar as even the most minor officials swear similar allegiance to the Constitution.

Question 3: What is the specific authority (if any) deriving from Supreme Court or other judicial opinions which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

Answer of Senate Legal Counsel:

Three times the Supreme Court has spoken on the authority of the President to deny or impair the validity of Acts of Congress, and each time it has unqualifiedly ruled that there is no such authority. In Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), the Court rejected the view that the President's obligation "to take care that the laws be faithfully executed" allowed executive officials to refuse to accept the validity of legislation. "To contend, that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." 38 U.S. at 613. The Court construed argument to that effect as "vesting in the President a dispensing power, which has no countenance for its support, in any part of the constitution; [such an argument is] asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice." Id.

This ruling accorded with the early ruling in United States v. Smith and Ogden, 27 F. Cas. 1192 (C.C.D.N.Y. 1806), where the federal court had rejected a suggestion that the President could direct action in disobedience to the Neutrality Acts. "The President of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government." 27 Fed. Cas. at 1230. The Court summed up the limitation of the Executive's power to deny the validity of an enacted law by saying "In this particular, the law is paramount. Who has dominion over it? None but the legislature...." Id.

United States v. Smith and Ogden, like Kendall v. United States, ties the language requiring the President to "take care that the laws be faithfully executed," 27 Fed. Cas. at 1229, into the nonexistence of a Presidential "dispensing power," echoing the dispute resolved in England by the Seven Bishops Case. By so doing, the courts drew a direct line from the powers denied to the Crown by the English Bill of Rights, through the Constitution, to a permanent restriction on the President that he could not impair the continuing operation of a statute.

Two subsequent Supreme Court cases summarily dismissed any suggestion that the President could impugn the validity of Acts of Congress. In The Confiscation Cases, 87 U.S. (20 Wall.) 92 (1874), the Court dealt with an exercise of one of the most unqualified powers conferred on the Executive, the pardon power, see U.S. Const., Art. II, § 2, cl. 1. It was argued before the court that President Johnson's proclamations of amnesty "amounted to a repeal of the Confiscation Act. To this we cannot assent. No power was ever vested in the President to repeal an act of Congress." Most recently, in District of Columbia v. John R. Thompson Co., Inc., 346 U.S. 100 (1953), it was argued that the absence of prosecutions by the Executive under two criminal laws for a hundred years meant that "these laws were abandoned or repealed as a result of non-use and administrative practice.... We do not agree. The failure of the executive branch to enforce a law does not result in its modification or repeal****The repeal of laws is as much a legislative function as their enactment." 347 U.S. at 100.

These three Supreme Court cases arose in varied contexts: Executive refusals to carry out a postal contract; Executive exercise of the pardon power; and Executive prosecutorial decisions. Each time, however, the Supreme Court analogized the claim of Executive power to deny the validity of legislation, to a claim of power to dispense with, suspend, or repeal laws. These powers, the Court held, had been permanently denied to the Executive by the Constitution.

Question 4: What is the specific authority (if any) deriving from opinions of the Attorneys General which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

Answer of Senate Legal Counsel:

At least four times, Attorney Generals have addressed the issue of whether they can express a position denying the validity of an Act of Congress. Each time, the Attorney General has taken the same position: he cannot. In the opinion of May 6, 1919 (31 Op. Atty. Gen. 475, 476), the Attorney General stated that "Ordinarily, I would be content to say that it is not within the province of the Attorney General to declare an act of Congress unconstitutional -- at least, where it does not involve any conflict between the prerogatives of the legislative department and those of the executive department...." The Attorney General went on to link his position with the general duty to execute the laws. "[W]hen an act, like this, of general application, is passed it is the duty of the executive department to administer it until it is declared unconstitutional by the courts."

In the opinion of August 16, 1935 (38 Op. Atty. Gen. 252, 253), a similar position was taken. "Ordinarily, I think, it does not lie within the province of a ministerial officer to question the validity of a statute which, insofar as he is concerned, merely imposes upon him a proper duty and has no bearing upon his constitutional rights." Like the 1919 opinion, this opinion excluded the special case where constitutional rights of the officer (i.e. an issue of the Executive's constitutional authority vis-a-vis the Congress) is at issue. No reservation was made for the common case where the constitutional claim is one of a private citizen, who can protect himself in the courts. The position established in 1919 was reaffirmed by direct citation and quotation in the Opinions of March 26, 1937 (39 Op. Atty. Gen. 11, 16) and February 3, 1942 (40 Op. Atty. Gen. 148, 160).

Opinions of the Attorneys General serve an important function as a restraint on arbitrary action by the Justice Department, particularly when, as here, they express disavowals of authority. At a minimum, they impose a duty on the Justice Department to make formal expressions at equivalent levels of visibility and responsibility before officers below the rank of Attorney General depart from past tradition. Beyond that, such disavowals constitute persuasive evidence of lack of authority, for when even an Attorney General, a partisan of the interests of the Executive Branch, finds no authority, then the arguments against authority must be weighty. Such a position, reiterated over time by successive Attorneys General, creates a tradition against which an assertion of new-found authority appears to be novel and questionable.

There is no intimation in any of these opinions that the conclusion "it is not within the province of the Attorney General to declare an Act of Congress unconstitutional" applied only in the context of giving opinions and not in the context of litigation. Indeed, three times the Attorney General said that the Executive's duty to administer the questioned statute lasts "until it is declared unconstitutional by the courts." Those three Attorneys General could have said, "until litigation to declare unconstitutionality is in the courts," but they perceived no reason why the mere filing, as opposed to the resolution, of litigation would mark a change in the Executive's duty. Moreover, the context in which those opinions were sought makes it clear that Executive officials anticipated litigation and sought, not some abstract legal view, but a real expression of whether they would be defended by the Justice Department if sued for administering the acts. It is thus crucial that there was no reservation by the Attorney General that he would take a second look, and perhaps deny the validity of a statute, after litigation was brought, and that instead it was the official legal position of the Justice Department that it would defend officers enforcing challenged acts until "the statute is declared unconstitutional by the courts."

Question 5: What is the specific authority (if any) deriving from express language in statutes or their legislative history which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

Answer of Senate Legal Counsel:

The statutes addressing the authority of the Justice Department to conduct litigation appear not to intimate, at any point, that the presumption of constitutionality which binds other executive officers is removed for the Justice Department when it engages in litigation. The Justice Department derives its litigating authority from 28 U.S.C. § 516, which provides that "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." Related authority is provided by 28 U.S.C. § 517, 518, and 519. No legislative history or case law under these statutes has been brought to our attention indicating that they were intended in any way to give the Justice Department in litigation the authority to deny the validity of statutes that other executive officers lack.

When Congress has intended to work a change in the presumption of constitutionality, it has done so in express terms. For example, the usual rule is that quasi-judicial executive officers, unlike judges, are bound by the presumption of constitutionality. However, during World War II, Congress wished to channel all litigation under the defense contract renegotiation acts through the Tax Court, which notwithstanding its judicial name, was an "independent agency in the Executive Branch of the Government." 26 U.S.C. § 1100 (Supp. V 1946), quoted in Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752, 768 n.27 (1947). To achieve its goal of consolidating litigation in the Tax Court, Congress expressly authorized that executive agency to inquire into issues of constitutionality. See, 331 U.S. at 769 n.30 (quoting legislative history).

Absent such an express delegation of authority, normal rules of statutory construction would hardly support an inference from the bland terms of 28 U.S.C. § 516 of grants of power to the Department of Justice of authority to deny the validity of statutes. As the preceding discussion suggests, major constitutional issues are raised by an executive assertion of authority to deny the validity of acts of Congress. A clear statement in the statute delegating authority to an executive officer is required before it will be inferred that he may act in a way that raises such major constitutional issues. See National Cable Television Association v. United States, 415 U.S. 336 (1974); Greene v. McElroy, 360 U.S. 474, 507 (1959); Kent v. Dulles, 357 U.S. 116 (1958).

Moreover, a similar rules applies to delegation of authority within the Executive Branch; a clear statement, such as an Executive Order, will be required before it is inferred that an executive officer can act in a way that raises major constitutional issues. See Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). At the Subcommittee hearing on April 3, 1980, the Assistant Attorney General for the Civil Division was asked if there was an Executive Order or some other notice delegating from the President to the Attorney General the authority not to defend statutes. The Assistant Attorney General cited none. Transcript of Hearing of April 3, 1980 at 81-82.

Question 6: What is the specific authority (if any) deriving from historic practice prior to the current Administration which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

Answer of Senate Legal Counsel:

The authority of the courts to set aside the presumption of constitutionality and inquire into the validity of Acts of Congress has been established for 177 years, since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In contrast, assertions of authority for the Justice Department to deny the validity of Acts of Congress have a short history.

Leaving aside prior cases over statutes indisputably involving the separation of powers, it is sometimes said by Justice Department officials that the first case in which the Department declined to defend a statute was United States v. Lovett, 328 U.S. 303 (1946). However, on closer examination the Department's position in United States v. Lovett was simply another case in which the separation of powers was at issue. In Lovett, Congress passed an appropriations act cutting off the salaries of three Executive officers. The officers sued in the Court of Claims to void the statute. Their first claim was that the act "shows a congressional purpose to exercise the power to remove executive employees, a power not entrusted to Congress but to the Executive Branch of Government under Article II, §§ 1, 2, 3 and 4 of the Constitution." 328 U.S. at 306. The Court of Claims ruled for the plaintiffs in a set of opinions which did not stress the Executive's removal power, whereupon the Attorney General petitioned for certiorari in the Supreme Court. Because the Supreme Court decided the case on the bill of attainder clause, it did "not decide whether § 304 is an unconstitutional encroachment on executive power," 328 U.S. at 307.

As the leading commentator on the case has written, besides the individual officers, the "other party challenging the statute was the executive branch. Its interest was in maintaining executive control over appointment and removal."

Ely, United States v. Lovett: Litigating the Separation of Powers, 10 Harv. Civ. Rights-Civ. Lib. L. Rev. 1, 11 (1975). Indeed, in the Court of Claims, the Attorney General made the concession that if no removal were involved, the statute was valid. Id. at 24. Despite this concession, in the Supreme Court the Attorney General argued both the issue of removal and the issue of bill of attainder, but his brief emphasized removal, devoting 47 pages to it while devoting only 15 pages to the bill of attainder argument. Id. at 28.

A second case sometimes mentioned as an example of the authority of the Justice Department to deny the validity of Acts of Congress is Simkins v. Moses H. Cone Memorial Hospital, 211 F.Supp. 628 (M.D. N. Car. 1962), rev'd 323 F.2d 959 (4th Cir. 1963)(en banc), cert. denied, 376 U.S. 938 (1964). In that case the Department intervened under 28 U.S.C. § 2403, asserting the unconstitutionality of a statutory holdover from the Jim Crow era which allocated hospital construction funds on a separate-but-equal basis. The case was overwhelming concerned, not with the statute, but with the issue of state action; an eleven page majority opinion in the Court of Appeals devotes one conclusory sentence and a footnote to the "issue" of constitutionality. See 323 F.2d at 969 n.21. The case occurred after a time when the Supreme Court had released all officials, federal and state, litigators and administrators, at all levels, from the binding effect of segregative laws. See Cooper v. Aaron, 358 U.S. 1 (1958).

Besides these cases, and others bearing solely on separation of powers, no case prior to the current Administration has been brought to our attention in which the Justice Department asserted authority to deny the constitutionality of statutes.

Question 7: What is the specific support (if any) expressed in any scholarly article or book for the Justice Department's assertion that it can deny the validity of Acts of Congress?

Answer of Senate Legal Counsel:

In a recent article, the authority of the Attorney General to deny the validity of Acts of Congress has been discussed at length. In Miller & Bowman, Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem, 40 Ohio St. L.J. 51 (1979), the history of assertions of such authority is reviewed. Id. at 55-59. An elaborate analysis is presented, id. at 59-70, that the Attorney General cannot represent in litigation the position that an Act of Congress is unconstitutional, because he can only defend the position of the United States, not that of the Executive branch alone, a different matter. This argument is strongly supported by the concurring opinion in Clark v.

Valeo, 559 F.2d 642, 653-57 (D.C. Cir.), aff'd sub nom, Clark v. Kimmitt, 431 U.S. 950 (1977). It is further argued that the asserted power is improper because it flies in the face of the President's duty to execute the laws; that such authority would give the Executive an item veto; and that such authority derives no support from the undefined term "executive power" at the beginning of Article II of the Constitution, so that when the President disapproves of a law, he should employ his political remedies rather than engage in litigation, 40 Ohio St. L.J. at 70-75.

No other scholarly view than that expressed by Professor Miller's article has been brought to our attention.

Question 8: What is the specific authority (if any) deriving from ethical pronouncements which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

Answer of Senate Legal Counsel:

The canons of ethics include provisions concerning representation of clients in litigation, which the Justice Department's Civil Division has cited as authority for refusing to defend the validity of Acts of Congress. Disciplinary Rule 7-102(A)(2) provides that "In his representation of a client, a lawyer shall not: (2) knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law." American Bar Association, Code of Professional Responsibility 36 (1975).

In ordinary private practice, this rule operates to release an attorney from his duty to zealously advance his client's interest, allowing and directing him not to defend a position he evaluates as insufficiently justified. Even in private practice, however, this evaluation is an extremely limited one. Ethical Consideration 7-4 provides that "The advocate may urge any permissible construction of law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail." The code cites with approval ABA Opinion 280 (1949), which holds that "The lawyer ... is not an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its apparent soundness.... His personal belief in the soundness of his cause of the authorities supporting it, is irrelevant."

In government practice, an additional duty is present besides that of advancing the client's interest. The Constitutional allocation of authority endows legislation with a presumption of validity binding on executive officers, insofar as the Framers conceived it to be the job of the accountable representatives of the people in Congress, not the Executive, to enact legislation, and the job of the independent Judiciary, not the Executive, to inquire into its validity. There is no intimation in the ethical rules that they were drafted in contemplation of circumstances where independent duties of constitutional dimensions created a binding presumption that precluded subjective evaluation by litigators of the position being taken.

Indeed, the ethical rules completely belie any contention that the Attorney General's traditional position, that in giving opinions he will not deny the validity of Acts of Congress, could somehow be altered once litigation challenging an Act has been filed. The canons of ethics address the two roles of adviser and advocate, and they make clear that if a lawyer will not give an opinion denying the validity of a client's defense, then he surely cannot refuse to advocate in court the validity of a client's defense. Ethical Consideration 7-3 addresses situations in which "the action of a lawyer may depend on whether he is serving as advocate or adviser." It provides that an advice-giver has the scope to express opinions against the validity of a client's defense. "In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law." Id. In contrast, an advocate has less scope than an adviser to express opinions against the validity of a client's defense. "While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law." Id. As previously described, the Attorneys General have repeatedly declared that they cannot deny the validity of an Act of Congress. It is thus inconsistent with the roles staked out in the canons of ethics for an Attorney General, as advocate, to deny the validity of an Act of Congress.

If the canons of ethics unavoidably conflicted with the allocation of authority in the Constitution, then they would be unconstitutional and invalid. See, e.g., United Mine Workers of America v. Illinois State Bar Association, 389 U.S. 217 (1968); Railroad Trainmen v. Virginia Bar, 377 U.S. 1 (1964). Fortunately, it is apparent that the canons in no way conflict with the constitutional allocation of authority, particularly when they are construed narrowly to avoid raising a constitutional issue, see, e.g., Lynch v. Overholser, 369 U.S. 705, 710-11 (1962); Crowell v. Benson, 285 U.S. 22 (1932). The Attorneys General take the position that they cannot deny the validity of an Act of Congress. In so doing, they recognize that for the Executive, a law is valid as Congress enacts it, until after the courts declare otherwise. Under the canons, the Attorneys General are even more constrained as advocates than as advisers not to deny the validity of an Act of Congress. For them, under the Constitution, as advocates or advisers, the ethical inquiry as to whether the defense is "warranted under existing law," DR 7-102(A)(2), is resolved by whether there is a duly enacted Act of Congress whose presumption of validity has not been rebutted by a judicial declaration of unconstitutionality. This in no way requires unfair, dilatory, or improper conduct of litigation by government litigators, but only that they make a straightforward presentation to the courts which leaves to them the evaluation of the validity of Acts of Congress.

Since the ethical rules can be most sensibly construed in a fashion that does not create constitutional problems clearly not in the contemplation of the draftsmen of the rules, it must be asked what support there is for construing these rules in a fashion that creates constitutional problems.

Question 9: What specific instances are there in which a court or bar association has expressly asserted an ethical duty for government litigators to inquire into the validity of Acts of Congress?

Answer of Senate Legal Counsel:

None that we know.

Question 10: Has the Justice Department ever sought from Congress legislation to deal with any asserted ethical problem in litigation concerning the validity of Acts of Congress?

Answer of Senate Legal Counsel:

Not that we know of.

Question 11: Has there been any relevant change in the ethical rules in the past few years, since the Justice Department has first begun denying the validity of Acts of Congress?

Answer of Senate Legal Counsel:

Not that we know of.

DEPARTMENT OF JUSTICE AUTHORIZATION DRUG ENFORCEMENT ADMINISTRATION

WEDNESDAY, APRIL 16, 1980

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 10 a.m. in room 2228 Dirksen Senate Office Building, Hon. Joseph Biden presiding.

Present: Senator Biden.

OPENING STATEMENT OF SENATOR BIDEN

Senator BIDEN. Good morning, the hearing will please come to order. Our first and sole witness today is a familiar witness and good friend, Peter Bensinger, Director of the Drug Enforcement Administration.

Peter, if you would come forward along with anybody that you would like. I have a relatively brief opening statement, and then if you would proceed with your statement, we can get on to the matter of flushing out areas of concern and interest.

I understand that it may at some point be advisable for us to go into executive session.

If you would just let me know during my questioning or during your presentation when that is, we will clear the adjoining room and move into executive session with as few staff personnel as you think advisable.

Today the Department of Justice authorization hearing will focus on the programs of the Drug Enforcement Administration to identify and disrupt organized crime elements of the international narcotics traffic. Since you brought to our attention the burgeoning Middle East heroin threat almost a year ago, we've been focusing our energies in the Criminal Justice Subcommittee on overseeing the efforts of DEA, the State Department, and the Intelligence Committee to thwart a potential heroin epidemic in this country.

You and I have worked together and I have worked with the State Department to attempt to sell a multilateral program to our NATO allies. I've been conducting a study in the intelligence community to beef up our international intelligence collection capabilities. And I have been working through the State Department to attempt to develop bilateral arrangements with producing countries, especially Pakistan, to stop this epidemic or at least impact on this epidemic before it is underway.

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I must say at the outset, unlike the success we enjoyed through the leadership of your Department in the early 1970's in both Turkey and Mexico, my prognosis is that the situation is extremely grave.

I do not believe that we will be as successful in keeping this flood of opium from leaving Pakistan, Afghanistan, and Iran, as past efforts have been in source eradication. And I should note parenthetically that it has nothing to do with the capability or incapability of your agency or the State Department or any other governmental agency. It has to do with the international situation which no one could have foreseen.

I have met with over two dozen officials at all levels of these three governments—Turkey, Italy, and Greece—which are three prime train shipment and processing countries. Even when those countries give their best efforts, together with your people in Italy, they are becoming painfully aware of the need for even greater efforts.

I met with the new Prime Minister of Italy and the Interior Minister with primary jurisdiction over narcotics matters and both of those men are fully aware and cognizant of the problem. They are, I believe, committed to move, although they are faced with a difficult problem of forming a new government, so they have their hands full apart from the drug problem.

But even if all these countries, and I picked Italy because that was the focus of my recent trip, do all their best efforts, we may still have only a marginal affect on stopping heroin from reaching our shores. And that brings us to the subject of today's hearings.

How effective is DEA in identifying major international organized crime traffic networks? And how effective is DEA in disrupting efforts to convert opium and morphine in sophisticated laboratories and transshipping large quantities of heroin for distribution through the organized crime chain in the United States.

We appropriately focused on this critical law enforcement function of DEA because the prior focus for success in stopping the heroin wave was in crop eradication in the producing country like Turkey and Mexico. That focus, in my humble opinion, may not be available to us now. Again, I should note parenthetically that I'm not suggesting that we should not try. I'm not suggesting that we should not attempt to deal with eradication. I'm not suggesting we should not try to keep communications open with countries like Pakistan and Afghanistan.

If we are able, although you wouldn't say it and probably may not agree with me, I think covert means are not inappropriate for dealing with the problem. Nontheless, even if we do all we can do as well as it can be done, it is a more difficult problem than your agency successfully faced in the past.

I want you to know that I'm not being critical. I am very sympathetic and I'm here today to help begin to flush out how we deal with what I think both of us would agree is going to be a greater difficulty in source eradication than we thought even a year ago.

This brings us to the subject of today's hearings which will focus on identifying international organized crime traffic networks, and how efficient we are in penetrating and disrupting them. We will focus on this critical law enforcement function of DEA, because source eradication is not likely to be very successful, in my opinion, so we are going to have our hands full.

Today's hearing will focus on how DEA plans to meet the challenges of the changes in drug traffic. It's administration policies and procedures will also be explored. However, my greatest concern is whether DEA plans will have a dirsct measurable effect on organized-crime drug trafficking in the United States. I should again note parenthetically, that in my meetings with German leaders and even French leaders and British leaders, there is a growing awareness that what was the drug problem of the United States is now the drug problem of Europe. The most serious of those countries affected are Germany and Italy and it is growing.

So while we have a down side of having an eradication problem in terms of difficulty in dealing with some source countries, we are finally getting unanimity of opinion and a willingness to look to the leadership of our country and your agency to provide models for appropriate and comparable agencies in the host countries.

This is a time for action. Every minute law enforcement reaches are spent on intricate data gathering and discussing vague, generalized objectives, connections are being formed to spread southwest Asian heroin throughout this country. Those connections must be stopped before they become more firmly entrenched.

Mr. Bensinger has indicated that organized crime is increasingly involved in trafficking southwestern Asian heroin to the United States. Today we will examine the nature and extent of organized crime's involvement with a focus on DEA's intelligence gathering, its ability to target the organized crime network and to permanently disrupt those networks through arrest, imprisonment, and seizures. I have many questions. I am also anxious to hear your statement, Mr. Bensinger, and you may proceed in any way you think most appropriate.

Thank you for being here this morning.

STATEMENT OF PETER B. BENSINGER, ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION, ACCOMPANIED BY MARION HAMBRICK AND GORDON FINK

Mr. Bensinger. Thank you, Chairman Biden. I am going to depart from the statement and ask that it be included in the record and respond if I can to your opening statement, which could well have been given by me in terms of perspective and agreement with the preliminary conclusions you drew.

I want to say at the outset on behalf of DEA I am grateful for your most recent trip as well as your past efforts in this field. I mean that sincerely, not as a matter of facilitating our dialog.

Your meeting with the leaders of Turkey, Italy, Greece, and Germany raises the level of awareness on the part of their Governments and reinforces the commitment of the U.S. Government to encourage their attention. And while I can try to do that—or Mike Antonelli or Terry Dunne—they have to work within the Embassy through the Ambassador. A more visible representation from the chairman of a Senate committee was most welcomed.

I agree with your prognosis, I'm sad to say. I think we are in a different ball game then we were with our neighbor to our south who we could help through training and forms, State Department funds, provide facilitation and catalytic efforts to enable them to embark on an eradication program which destroyed 80,000 poppy fields in several years.

I agree with your conclusion that it is unlikely to happen in Iran, Afghanistan, and Pakistan. I also agree with your conclusion that as a consequence the most effective way to stop the heroin is unlikely to occur. That is stopping it at the source.

The second area that it could be interrupted is at the laboratory locations. If I could, Mr. Chairman, show you two charts that you are familiar with, having personally in many respects been briefed in detail, this is a growing area of Afghanistan, Pakistan, and Iran that is confronting us today. In the last 6 months, laboratories—heroin laboratory seizures—have been made.

And if I can ask Dave to kind of put that over and keep the growing areas separate. We've got opium poppies being produced here and there and lab activity also in Pakistan, Afghanistan, in Iran and in Turkey.

In France and northern Italy we have laboratory activity that we have documented and which local police have seized. In the principal growing areas the Pakistan Government may offer us of the three—Iran, Pakistan, and Afghanistan—the greatest return on controlling opium. I commend Turkey in the good job they do in preventing the legal poppies which they grow in their country from being diverted.

We think that the Southwest Asian heroin that is being converted in laboratories in Turkey, which the Turkish police have seized in Hamadan, in Gaziantep, Turkey, and Van Province and the Elazis Province is basically converted from opium produced in Afghanistan and in Iran, not in Turkey.

What DEA has determined its course of action must be is threefold. To work with the State Department and the Congress in continuing bilateral and multilateral assistance programs, initiatives to reduce the incentive opportunity for opium growth to continue. I agree with you that that prognosis is a limited one—a gloomy one—at the present time.

The second is to beef up the effectiveness of national law enforcement efforts in transit and laboratory countries, and this varies. In France it is good. French National Police have disrupted a lab in La Suchere, France, on March 6. They disrupted and seized a lab in Marseilles about 6 months ago. They have had another major seizure with the Italian police in San Remo before the laboratory actually got into operation.

That type of effort is definitely needed. The type of effort in Italy is one that in some respects we could discuss more in private than in the public hearing, though I am impressed with the commitment of the Minister of Interior and all the Italian police officials. There are some ongoing cases that we could talk to you about that give us cause for concern and I could tell you how DEA responds to specific information that we are developing that leads back to heroin laboratories.

I will offer for your attention an affidavit filed by a duly sworn agent of the Drug Enforcement Administration, that was presented to the court in a case which since has resulted in the arrest of Joseph and Rosario Gambino, Paul Rizzuto, and which implicated members of the Adamita family which——

Senator **Biden**. He's not my hero is he, Phil Rizzuto?

Mr. **Bensinger**. I hope not. Not that shortstop with the New York Yankees.

Senator **Biden**. I wore his number for years.

Mr. **Bensinger**. This is Paul, not Phil.

Senator **Biden**. Oh, OK.

Mr. **Bensinger**. The affidavit reflects that information from our Milan office and the Italian police to the effect that there were 39½ kilos of a white powdery substance in a package being shipped to a distributor in Brooklyn, N.Y.

We were able to introduce information and agents working with our Italian associates identified the recipients who were to receive this 80 pounds of pure heroin and to effect arrests in both Milan and New Jersey of principal members of what would be called traditional organized crime elements, to stop this heroin before it was shipped to the United States.

Today we are pleased to report that in Chicago the U.S. Customs Service uncovered, last night, I might add, 21 cans of caviar, 20 cans of which held 10 pounds of heroin mixed with the caviar. One can was full of pure caviar. The heroin was coming from Tehran on SwissAir through Switzerland, landing at O'Hare. An increased alert at the major points of entry in the United States, which Customs and DEA have worked on, obviously motivated this particular inspector to give more than a cursory inspection to these caviar containers. The caviar is very expensive but does not approach the price of 10 pounds of heroin.

The effort that we are going to have to make will reflect an intelligence effort which Gordon Fink, our Assistant Administrator for Intelligence, can describe, but which I would, by way of introduction, provide you with an insight into our book, which we would like to keep confidential, of the families of organized crime that our foreign and domestic offices are looking at, and that we believe may be involved with directing the resurgence of this southwest Asian heroin. We do have such a document that the committee and the staff may want to review. We also have an organization chart which I would like to present in executive session as an example of the type of targeting and analytical work that we do recognizing that the opium is going to get produced and get converted into heroin and transshipped to the United States.

Senator **Biden**. At what point in your testimony do you recommend that we go into executive session? Are you able to conduct the bulk of your testimony and then retire to executive session?

Mr. **Bensinger**. Yes; I think we can and then I can answer any questions that you have.

We've embarked upon a special action program targeting at the southwestern Asian heroin threat. It is real. We have selected six target cities, where we believe due to monitoring programs at the retail level as well as intelligence both from an enforcement and health standpoint, that the heroin is most likely to arrive and be distributed from. Those target cities have been identified. We briefed the law enforcement as well as the U.S. attorneys, and allocated additional purchase of evidence and information funds. We have established special task forces within those areas with a backup of additional cities to monitor, to determine if additional southwest Asian heroin is entering into those U.S. locations.

At the same time we are staffing our European offices, particularly in Turkey, in Italy, in Germany, in France, and in Pakistan to develop increased information on lab activities and on traffic or network tying these together to develop that type of investigation that we discussed involving the Gambinos and the Adamitas in Milan.

That will depend on good cooperative information with State and local law enforcement here and foreign law enforcement overseas. We are facing a gap of intelligence in Iran, Afghanistan, and limited information from certain parts of Pakistan and eastern Turkey. The objective we have is to effectively identify major international organized crime, or criminal activity, to develop information leading to conspiracy, indictment, the establishment of CENTAC operations where appropriate as well as information leading to seizures of laboratories at host country locations. One such example is the *Restori* case in Italy which we could present at this time on a nonexecutive-session basis. We could present this case to the chairman as an example of outstanding law enforcement work by the Italian police in our Milan office that lead to an important seizure on the 10th of last month.

The general response that we feel is needed is one that will to the maximum extent possible deter heroin traffickers through investigation and interdiction. But I am candid to say that we think that this will be an effort that will blunt the flow of heroin but not stop it.

I'd be happy to answer questions, Mr. Chairman. I would also be pleased to go into detail on the total development of our overall intelligence effort and our enforcement effort in greater detail but I think perhaps that a question-and-answer forum will be more responsive to the thrust of your oversight objective.

Senator BIDEN. This photograph of a lab which I have in front of me is distinguishable from other labs that have been found in Turkey and other places in the past.

Mr. BENSINGER. Right; I would agree.

Senator BIDEN. Why is that important? What does that tell you? What does that say? What is the implication?

Mr. BENSINGER. The implication is that traditional figures involved back in the French connection days have decided to get back in the business and that they would not have to worry about availability of base. They were ready to set up an operation because they were guaranteed as you and I are unfortunately guaranteed that the supply of opium and morphine base is not going to be a problem. It implies that this is not an operation that they have to set up for 1 week or 1 month to take advantage of 10 kilos or 20 kilos of morphine base they got and to make a couple of million dollars. These people reflect to me that they are going to get morphine base on a continual basis and are going to be able to make millions of dollars. They have a source of supply locked up and they are going to go into the heroin cooking business.

That's different from the people who want to do this and occasionally may have an opportunity to buy some morphine base or some raw opium. There is no question in these traffickers' mind that there was a continuing connection that could be established and a link to the United States and a market.

That's different and worrisome.

Senator **Biden**. Was this a specific U.S. outlet? Was the market for this laboratory the United States?

Mr. **Bensinger**. I, personally, can't attest to that. Perhaps Marion Hambrick, head of Enforcement could join me. Marion, could you come up and join me as well as Gordon Fink, so that we can have access to information from both Enforcement and Intelligence as we get into individual questions.

Mr. **Hambrick**. The answer to your question, Senator Biden, is, "yes." We feel it was primarly destined for the United States because of the difference in price. The market price for the finished product or for the heroin in the United States far exceeds any market that they have in Europe at the present time because of the availability in Europe. So we feel at this particular lab almost all the heroin produced was to come here.

We feel right now that any laboratory operation that exists in Italy or the ones they are trying to start in France that the heroin is coming directly here. We fear the resurrection of the old, so-called French connection structure. We know that they still have a lot of people left and, of course, some are coming out of the penitentiary now from the French connection days and they already have an established distribution network.

But we feel that all the laboratories in that area are shipping heroin directly here. When you look at the abuse problem in Germany, we feel that that is coming directly out of the Turkish, Afghanistan area.

Senator **Biden**. Most of the processed heroin?

Mr. **Hambrick**. Yes. We have very little evidence that any of the laboratory operations in Italy or in France are going into the German area.

Mr. **Bensinger**. It would seem that the Italian laboratory activity is directed at the United States. The German heroin activity, which is enormous in terms of both kilos and addict injury, is being moved by Turkish nationals directly from southwest Asia.

Senator **Biden**. What is the potential production capability of the lab in San Remo? How much heroin are we talking about and in what quantities and what bases, assuming that they would have all the bases they needed?

Mr. **Bensinger**. They had at the time of seizure 59 kilos of morphine base.

Senator **Biden**. Any idea how long it took them to produce those 59 kilos?

Mr. **Bensinger**. It would be a matter of days rather than weeks to convert it. Generally within 3 to 4 days you can accomplish a conversion from morphine base to heroin.

It would be my guesstimate, based on what I saw of the lab—and Marion you correct me—that this is a laboratory that was capable of turning out 10 to 50 kilos of heroin on a weekly basis, which is an enormous quantity.

Senator **Biden**. Ten to fifty kilos. Please be very elementary for a moment and refresh my recollection. Start off with the poppy field in Afghanistan—how many tons or kilos of the poppy grown in the field is required to produce the 59 kilos and how do we break that down? What is the production process?

Mr. **Bensinger.** You need 10 kilos of opium to make 1 kilo of heroin.

Senator **Biden.** How many kilos of poppies—the actual poppy itself, grown in the field—do you need?

Mr. **Bensinger.** I'm getting much advice but I will try to interpret.

Senator **Biden.** Take your time.

Mr. **Bensinger.** You've got a raw production potential, we believe, of up to 1,600 tons of opium. That could convert into 160 tons of heroin. We don't think that is likely, for two reasons.

One, there is a substantial opium addiction problem within those source countries themselves. A utilization in Tehran which has the highest addict population, I believe, in the world, per population.

Senator **Biden.** Opium rather than heroin.

Mr. **Bensinger.** Opium addiction. Although there are indications, Senator Biden, that there is heroin being sold in Tehran as heroin not just as opium. And, in fact, there was one laboratory in Hamaram, Iran, that resulted in a 70-kilo heroin seizure.

We would estimate then that we could not take the total 1,600 tons of opium and reduce it to heroin but have to adjust for local consumption, destruction, seizures, and review what is really available for export out of those principal growing areas. And, in that regard we would reduce the total opium production for export down to a neighborhood of 800 tons on a conservative basis, which would be 80 tons of heroin maximum and which realistically you could estimate for consumption and export. For finished number four injectable-type heroin 40 tons. That is eight times what we require today in the United States, at least.

Senator **Biden.** What I'm trying to get is a sense of the transportation link which requires for a physical plant like in San Remo, a sophisticated one. It's not like they are required to bring in 16 wheelers filled with opium in order to produce the 10 to 50 kilos a week.

Mr. **Bensinger.** That is correct.

Senator **Biden.** It's a much smaller quantity and it doesn't require great transportation problems. It requires great problems in terms of smuggling—concealing—but not in terms of bulk transportation. Is that correct?

Mr. **Bensinger.** That's correct. The gum would be refined in the first process and could be refined in laboratories in southwest Asia, even in Turkey, Iran, and Afghanistan. Morphine base results from this first chemical process.

Senator **Biden.** That's beyond the gum.

Mr. **Bensinger.** That's beyond the gum and far less bulky. The gum is generally scraped off these opium poppy balls that are no bigger than my fist. They take latex off that and put it into a gum, it glues together because of its consistency. Then that is, in turn, cooked in the field and converted into morphine base. That could be transported in lots of 10 to 50 and maybe even up to a 100 kilos of morphine base. I doubt if traffickers would risk much larger sizes than that.

Senator **Biden.** The base product from which they began in a laboratory in San Remo is a morphine base. They do not use the opium gum. Is that correct?

Mr. **Bensinger.** That is correct. It's theoretically possible they could. We just don't believe practically—based on intelligence—that

that is the process they are using. They had the base on hand when the laboratory was seized.

Senator **Biden**. They had morphine base.

Mr. **Bensinger**. Yes, sir. Then their job would be to utilize acetic anhydride and other chemical products, the cutting agents, lactose, procaine, caffeine, that go to make up the sample or shipment of heroin. That would be the laboratory process which in San Remo they embarked upon and which we believe is also being tried in France, southern Italy, and in locations elsewhere in southwest Asia.

The question you asked was an excellent one because it ties in with what we are trying to intercept in these foreign countries. It isn't raw opium, necessarily. Raw opium is seized in Pakistan, it's in Afghanistan occasionally. It's in Turkey occasionally. Very rarely are there raw opium seizures in Western Europe or in the United States. We have had incidences however. Some Iranian traffickers have brought in opium. We saw a whole series of paintings that were done of the Ayatollah Khomeini and other religious figures that had their backing filled with opium.

But generally it's the morphine base that moves. The ratio again is what is important. You've got a 1-to-1 ratio here.

Our view is that the morphine base would be sought after by organized crime elements and major trafficking organizations. It would be sought after in southwest Asia, transported to countries in Western Europe and shipped by air or cargo possibly by sea to points of entry in North and Central America. Montreal is a point we are paying plenty of attention to and are plenty concerned about.

New York has been an airport that has been most active in terms of seizures and we've seen two major criminal organizations already identified and impacted as a result of investigation. We've seen Dallas, we've seen Los Angeles, San Francisco, and now Chicago all involved as first or secondary points of distribution receiving southwest Asian heroin. Not opium, not morphine base, heroin.

And heroin that has been produced in Europe, principally in Italy though there have been some direct shipments as the one in Chicago would suggest, out of Iran directly, because that Swiss Air flight started in Tehran and that's where that individual boarded the plane. So my guess is that he was not dealing with Italian-produced morphine base from southwest Asia that has been converted to heroin. But the heroin has been produced in Iran.

Senator **Biden**. I have questions, but do you want to make any further statement?

Mr. **Bensinger**. We are at your disposal.

Senator **Biden**. I would like to back up a little bit to the enforcement side. If everyone is in agreement that the prospects of impacting upon source production of raw material are diminished somewhat then that obviously increases the need to attempt to deal with the next stage, which is the production stage.

And the next area would be dealing with distribution network. Once you're beyond those two it's too late isn't it, I mean, we get nickel-and-dime things but we're not going to break up any major connection of anything, are we? I mean in the street, once it hits the distribution network.

Mr. **Bensinger**. Once it's hit the distribution network and passed to the retail outlet the impact of stopping the drug is minimal. It's possible to work your way back to an organization after having made some retail distributor buys, but in terms of stopping the actual substances, you are absolutely correct.

Senator **Biden**. Now, that being the case, it seems to me that brings in question the DEA's established decentralized management systems.

In the typical case the five regional offices take primary responsibility for investigation.

Mr. **Bensinger**. Domestically they are the field management units that are deployed.

Senator **Biden**. And they have responsibility to develop cases based on their own sources of information within those regions. Rather than me asking, why don't you explain to me the way it works.

Mr. **Bensinger**. The way we've established our priorities within this organization and it's evolved over a number of years, has been to establish a number of objectives and principles. We've established principles that our principal aim is to impact the highest level of distribution of traffic within the United States of organizations bringing drugs into the United States.

In concert with that we've established a G–DEP, a system of classification that reflects what is an important case and what isn't an important case. We have done this in concert with, I might add, the Congress, through our oversight hearings and with the Department of Justice, the White House, and Strategy Council. So we have class I, II, III, and IV level cases.

Class I level case would be an individual responsible for importing kilo quantities on a monthly basis of heroin with an organizational responsibility of multiperson, multistate, multijurisdiction. That is a class I.

Each office throughout the United States regardless of whether it is a three-member office or up to a hundred agents in it, has a mission statement and a work plan. We require each of the regions to prepare and send to the Office of Enforcement for review, work plans, keying the number of targets that they are going to impact on, the number of profiles they will develop, and the type of cases they will be making. Some of our offices are representational offices, for example, offices that may have one or two agents in the whole State. Others which are at distribution points in the United States will be responsible for having significant impact and containment of criminal organizations, not just with cocaine or marijuana but with heroin, PCP, methamphetamine labs, clandestine operations, and compliance in regulatory program. So we have a classification of the violators. We have a work plan for the region. We have oversight not only from the regional director and the planning staff that reviews the individual district offices operations but from the Office of Enforcement at headquarters.

The offices have designated priorities. Some of them such as Miami would have principle priorities for cocaine and marijuana investigation. They would have responsibility for monitoring and making heroin cases and they do make them but we wouldn't expect each of our offices around the United States and around the world to have an identical mission. We're not looking for identical results. We are looking to our offices also to provide intelligence and interface with other Federal agencies. That's part of their work assignment.

And we have as a guide, in terms of management, a mission statement with eight specific points. We have domestic operating guidelines which are reviewed regularly.

We have the G–DEP system which we use to evaluate cases and enforcement activities. We have regularly scheduled management conferences which give us an opportunity to assess how each of the offices is doing against the established criteria.

We have a variety of options and one of them is to follow the major violators list. We have drug specific violator lists, southeast Asian heroin, brown heroin, southwest Asian heroin, and a major violator book on that is contained here. We can discuss that with you in executive session.

We have an organized crime major violator listing which is sent to all of our offices and details the individuals we want our offices to gather intelligence on and develop for enforcement action. We have other criteria to judge which cases should be developed: Is it an international or national impact case? Is it horizontal or vertical? Is it limited simply to distribution or does it involve importation? Is it a source to a street distribution organization which if we take out we'll have greater impact on? What are the routes, the trends, the volume, the labs? What are the options, prosecutorially? Will there be 848 RICO conspiracy or financial seizure opportunities? And what are the enforcement options? It takes a lot of manpower to run a title III.

We've won some, many have been successful, some have not. We do the cost-effectiveness of such operations. What about our manpower utilization, informant utilization? And what about the individual tracking system that can tell us how each office is doing?

I review at least once a year the overall manpower deployment with each individual district office and twice a year within the region. We get a printout saying in the office of Tampa, Fla., 63 percent of all the time is spent on investigations, 10 percent on training, 6 percent on administration, 12 percent on intelligence. We track that and then we break that down by how the agents are spending their time by drug. And what level cases are they making.

So there is an indepth management. I feel we are in much better shape today in assessing how well our agency is doing against a work plan, against congressional mandates, against the targets that have been established, against the drugs that are more serious, than we have in the past. We hold our managers accountable for it and we've moved resources and we've moved managers.

We don't have the flexibility, Chairman Biden, of having the type of resources that we could solve each and every drug type problem. And the kind of problem we have now we are going to have to depend on the help of other agencies to help us with this threat.

Senator **Biden**. When you say "other agencies," what do you mean?

Mr. **Bensinger**. I mean Customs, I mean the FBI, I mean the IRS, I mean ATF, FAA in our target cities, and the military. CID in Europe has had an excellent relationship with us. The U.S. Army, U.S. Navy, and the U.S. Air Force have been fully briefed on our southwest Asian heroin program. We are running training programs with their criminal investigators. They are going to special schools. They are increasing their own efforts, attacking some of the entry into the troop level areas in Germany, get back to lab.

Senator **Biden.** Let me ask you a question. In the exceptional case involving a major drug trafficking organization which encompasses more than one region, how do you handle that kind of case?

Mr. **Bensinger.** Well, there are a number of ways in which they can be handled. We have reduced the number of regions from 18 to 8, 5 domestically. There used to be 13 regions domestically.

When I first arrived I felt that we had too many regions and excessive levels of interpretation of policy, discipline, and interface. So we are determined to go to five regions, increase the criminal investigators in the field as a result thereof and reduce the number of different interpretations of policy and provide more uniform work direction.

As a consequence these regions generally handle areas from the tip of Maine down through Pennsylvania, the entire Great Lakes section, the western part of the United States, southeastern and the south central. But there will still be overlapping of cases. When that happens the deputy regional directors in those regions communicate on the case with the U.S. attorneys involved and determine what jurisdictions would have principal avenues for prosecutorial venue.

We also establish mobile task forces which is a special funded effort out of headquarters and CENTAC operations. We can, through any one of these different operations, insure cooperation and a good flow of information.

We have also redesigned our agent evaluation form so that agents are now in a position to be evaluated on the basis of their giving up information—collateral information—which may go out of their district or group and which may not show an arrest statistic. That is very important if we are going to utilize all the information within the minds and information records of each agent. We have improved the intelligence centers. And here is where Gordon Fink's operation and those in the Office of Intelligence at headquarters and in the field play an important role. Because the information that is being gathered in the district office and the regional office is being analyzed at headquarters so that recommendations to put together two different regional teams working on the same target do take place.

Senator **Biden.** I am under the impression that the major drug trafficking case, the major drug trafficking network is directly associated with organized crime families. They do not limit themselves based on regions.

Mr. **Bensinger.** We agree. But that doesn't mean that the southeastern region in Miami can't make with the FBI, the *Black Tuna* case, and they did, or that the New York office couldn't make the *Gambino* case, which it did. The Gambinos didn't want to restrict themselves, I'm sure, to New York or New Jersey but the agents within the office; and one of them had to fly to Milan, I might add, and we provided that transportation.

They don't need permission to move out of their own district office. Many times we'll take an individual case agent from Chicago or from San Juan, P.R., and move that agent to work undercover outside his own region, on individual case situations. I guess what you're saying is if these are international organizations is your regional setup impeding their full investigation?

Senator **Biden.** If not impeding, is it confusing it?

Mr. **Bensinger**. We've got regions. For this reason we've got 2,000 criminal investigators in DEA, 1,500 of them are deployed in the field domestically in casemaking situations. Those decisions for the investigations of any case require judgment, accountability, discipline, and good direction and good supervision. You need to have the maximum results and want to hold field managers accountable.

We have over 103 domestic district offices. I don't think I could do as good a job as a manager nor DEA as an agency if all 103 of those district offices ranging from 3 agents to 140 in size, all reported into headquarters, without any regional level of supervision and accountability.

Senator **Biden**. The FBI does it pretty successfully that way, don't they?

Mr. **Bensinger**. They have 59 field offices and 450 resident offices. I'm not sure whether their system would prove under scrutiny to be better than having regional management accountability.

I say that having chatted informally with Lee Caldwell as well as with Director Webster on a wide variety of subjects. I think you couldn't necessarily assume that the missions of our agencies are identical because they are not, nor the utilization of some of the same level of PEPI, Purchase of Evidence and Information, as well as undercover operation. I think with the high degree of undercover work that is done and the high degree of financial purchase of evidence and information. The nature, both from a physical hazard standpoint and interface with other Federal agencies on cases and State and local law enforcement officers, I feel, we need the GS-15, GS-16, and GS-17 level of supervision in the field to provide the kind of consistent effort and accountability and information that is required.

It's hypothetically possible that DEA could take 103 domestic offices and 59 foreign offices and say all report to headquarters. I don't think we'd have the same level of performance, accountability, and results.

Senator **Biden**. Your CENTAC program has been very successful in getting Class I traffickers. Correct?

Mr. **Bensinger**. We think it has.

Senator **Biden**. Why is that?

Mr. **Bensinger**. CENTAC is a technique in which we recognize that there are organizations of multijurisdiction, multiregional in some cases, multinational and international.

Senator **Biden**. Isn't that exactly what we're talking about here? Aren't we talking about multinational, multiorganizational, and multifaceted operations?

Mr. **Bensinger**. Exactly. And we've made some of our most important cases utilizing CENTAC. We've got some charts showing a closed CENTAC case with one of the lead case agents. The CENTAC IX operation involved the importation of large amouts of southeast Asian heroin utilizing retired military and present military members coming out of Bangkok into the United States, being distributed through places like Fort Gordon and Langley Air Force Base and Fort Lee. That CENTAC was put together and it included a major series of indictments of the Atkinson conspiracy out of Goldsboro, N.C.

It isn't the only way to go. When we've used it, we've said we want to go with the committed resources that do nothing else but follow this organization. It gets centrally funded from headquarters. Mr. Hambrick has a full staff that devotes themselves to nothing but CENTAC and we now have 24 CENTAC operations that have been completed or are underway at DEA.

I know—in 1976, when I arrived—we just approved CENTAC IX. CENTAC's do have impact and it's not just using the 3 or 4 percent of the domestic workforce involved in a CENTAC because the CENTAC assignees task the entire organization for information. I think in the GAO study which said the CENTAC was successful, but utilized a small percentage of manpower. I would clarify that by saying that yes there was a small percentage of manpower actually identified as being members of CENTAC, but those numbers of CENTAC call on the entire group or three or four groups in Chicago.

Senator BIDEN. Let me get to my point which is different than the point GAO makes in their report, "The DEA CENTAC Program—An Effective Approach to Investigating Major Traffickers That Needs To Be Expanded."

I am not seeking to determine how to do more with fewer people. I am, quite frankly, not focusing on trying to identify the most cost-effective method to deal with the problem. The reason I have focused on the CENTAC program is that, it seems to me, after speaking with European leaders, several things come through rather clearly. The entire thrust of the No. 1 frontline effort against the reestablishment of what is referred to as the reestablishment of a French connection with ominous quantities of southwest Asian heroin has been, to date, to deal with the source.

You've made a disciple of me, you've convinced this committee. Your agency has been very effective in this regard. I have met with the State Department and my colleagues. I'm a true believer. That is the most important thing we can do, except my preliminary conclusion, in traveling abroad, meeting with both State Department people, NATO people, leaders in other countries, and your folks is that although crop eradication is the best thing to do, we aren't going to be able to do it. Flat out. You're not going to be able to significantly impact upon the source countries for the next 5 years and maybe longer.

If you can figure out for me, how are we going to impact upon the growth of the raw material in Pakistan, Iran, and Afghanistan please let me know. Because in solving that problem we may solve all the other international problems that relate to southwest Asia.

Those folks in Turkey and Pakistan have drugs as the single lowest priority because they've got to live.

Those of us who are concerned about drugs run around and among ourselves and say, God it's an important issue. We all really care about it, but most people don't care about it. They don't have the luxury of being able to care about it.

Your counterparts in other countries are good, they're committed, but they have to work with other government people in their countries. If people like me in those countries don't act, it's not because they don't care; it's because they have other priorities.

If you conclude, as I have concluded, then we're not going to have much success with eradicating the fields like you did in Mexico, or getting the host government to do the job like they did in Turkey, which was a big part of breaking up the flow of heroin into the United States. If we acknowledge that, then we move to the next step. The next step is to reach the laboratories which take the raw material.

However, you're not going to be very successful in stopping even the laboratories in many countries and my evidence is that there are not many sophisticated laboratories in Turkey.

Up to now the major flow of drugs into Germany has been by way of the millions of Turkish workers who smuggle it in the caviar and in cigarettes, bringing it in their lunch pails into Germany. That's our problem; it's a world problem, but that's not how it's getting into the United States.

What the Italian people are telling me, what the Greek people are telling me, what the Turkish people are telling me is that the big boys—organized crime—are involved in this thing now, in a big way. They are reestablishing very sophisticated organizations, charts, and facilities. We're not even sure how many facilities they have or where they are. We're just finding out. To the best of my knowledge, San Remo came as a surprise to everybody.

So now, I'm asking you if the realistic way to deal with this is to focus on the major families who appear to be getting themselves in a position to monopolize what appears to be an endless flow of raw material that's not likely to be stemmed in the near future.

If we are finding that the families are very much involved, how do regional offices best accommodate that? Doesn't that call for a centralized focus of the greater portion of your resources on the family, the laboratories, and the distribution?

I'm not suggesting that I want you to do away with the regional office system. I'm not suggesting that at all. The regional offices have utility for many other reasons, not the least of which are things like marihuana, angel dust, a whole range of things.

Mr. **Bensinger**. Let me say this, Chairman Biden, you have articulated what we believe. It isn't just preaching to the converted, it is exactly what I think. I don't need to have you replay your comments, because they're right. We're not going to have in the short term a likely impact at the source.

Clearly, despite the best will of the world, the governments there are too concerned about staying in power. You put it better as a Senator with greater perspective than certainly I could, but in terms of the individual governmental activities, much less the people trained in Afghanistan and Iran, to do that job which has already been shifted.

Our second line of defense is absolutely the labs. I want an executive session to go into the methods by which we can, in fact, identify where they are taking place and will do so with you. The effort we need to do to bolster those foreign governments to energize their parliamentarians, believe me, their police are concerned, can be done through your personal visits.

In our headquarters effort we have allocated special emphasis to the southwest Asian heroin threat. We created a special action office, we've established special funding; we've gone to the Attorney General for a supplemental, he has approved and sent that to the Office of Management and Budget. We've got an indication from Judge Renfrew, the Deputy Attorney General, of full support of our program.

We have established a group of very highly talented officers, brought them to headquarters, have them control an extra large sum of money. I'll discuss with you in private specific southwest Asian heroin investigations.

We have inventoried our agents for language capability. We have briefed Customs. We have become involved with other agencies in our target cities, and, as an example of the effectiveness, I don't think our track record is bad when you reach out and grab a couple of the Gambinos and Adamitas in a case in the first week of March before the heroin has ever left Italy.

Senator **Biden**. I don't think that's bad at all. As a matter of fact, I think it is the most troublesome aspect of the problem—you're so successful that it seems to me it could lead to a conclusion in these times of budgetary restraint that we would be better served to turn the focus of some of your existing resources away from what they've been doing and redirect them into the local areas.

For example, that GAO study you referred to shows 33 percent of your resources working on investigations in which no level I or level II traffickers were even suspected of being involved. Is there a plan to channel away money, resources, and personnel from the level III and IV cases into the level I and II cases?

Mr. **Bensinger**. Absolutely. I am delighted you raised it because we have management conferences specifically for that and have just concluded a review of all five regions and every single district office and every agent in those offices as to how many will remain in place and where do the graduates of the new agent class go.

On March 28, 38 special agents of the Drug Enforcement Administration received their credentials and badges. Fourteen of them are going to New York and New Jersey, thirteen to Florida and the southeast coast, two-thirds of them to very high, major organizational criminal money flow areas. In addition, certain readjustments in manpower away from areas where there's a low level of activity and where there is predicted to be a low level of activity will take place.

We are, however, limited in the total amount of flexibility we have by permanent change of station and money, because it takes money to move——

Senator **Biden**. What do you mean by permanent change of station?

Mr. **Bensinger**. I mean when I send a travel order that says a person has to leave Yuma or Douglas, Ariz., and go to New York City, it's going to cost the Government $8,000 to $9,000. And at times of fiscal restraint, we are being discouraged from making PCS's. I have discussed this with the Deputy Attorney General, who's assured me of attention to this area, but it isn't as though we could just move individuals and their families like pawns on a chessboard.

We have financial limitations with respect to total dollars available to move people. We are moving resources. We are looking at our priorities. We are going to continue unless we get a mandate from the Attorney General and Congress though, to have an office in each of the 50 States, even if it's one agent. There will be some offices staffed with one or two people in some States, that aren't distribution centers.

We do feel we have a responsibility to provide training and liaison and for those cases which do surface, provide the type of investigative expertise that is required.

Senator **Biden**. Do we need somebody in 50 States? We are in for a world of hurt, as they say, on the eastside of my city. I mean, what's about to come is a staggering influx of heroin and the impact of it on the social structure and the crime structure of this country is incredible.

The impact will be awesome over the next 4, 5, or 6 years. Why do you need somebody in every State? Is it because of guys like me sitting up here saying you'd better have somebody in my State? Be straight with me, is that the reason? Or does it really impact upon the situation?

Mr. **Bensinger**. I would not suggest ever, Senator Biden, that guys like you would not have an impact on guys like me.

Senator **Biden**. I'm afraid we may have too much impact in this area. Is that the reason why you have so many local offices?

Mr. **Bensinger**. No; I think, in good conscience, I could represent to you 36 or 37 agents may be deployed that would not have impact on a class I to II level in some of the States in the country. My own view is that it benefits law enforcement in those States. I mean this sincerely and whether you wanted them or not I would make the same decision; keep them.

It's the benefit of training, the benefit of assistance. You're finding planes flying in, DC–7's and fast twin-engine planes with high levels of cocaine and large amounts of marijuana to South Dakota, to Kansas. The traffickers will go where there's some vulnerability. In today's world I would not feel comfortable not having a Federal presence. At present an agent could follow up a lead in any one of the States and could impact on a redistribution point.

Senator **Biden**. In your opinion, is there a sense of the problem among law enforcement officials, local, State, and Federal? Do they realize just what is in the works in terms of the amount of and the quality of and the potential destruction of the heroin epidemic we may have visited upon us unless somehow we make some major busts?

Mr. **Bensinger**. My sense would be that most of them do and I'll tell you why. Because in Dallas last year, I was one of the major speakers in front of the International Association of Chiefs of Police meetings in September, an association that includes 12,000 police chiefs. There were maybe 1,000 in the room when I spoke, and they probably read the results in a variety of papers.

We pointed out at that time that we saw very cloudly weather on the horizon and specifically related to what you've just indicated. Second, the Attorney General and President Carter called together 150 law enforcement officials. All of the attorneys general, the major prosecutors, police chiefs, and sheriffs from major jurisdictions and the target cities most likely to be affected by southwestern Asian heroin on February 28, had a full-day seminar in Washington with us on southwest Asian heroin and on arson.

We met in the White House later that afternoon and the President personally discussed this threat with that group of national law enforcement leaders.

Next week I will be meeting with major city chiefs and narcotic unit commanders throughout the United States stretching from Hawaii to New York and Maine to Florida. I will, with Mr. Hambrick, go into detail on our operational planning. I don't think there is a lack of communications to law enforcement. But there is a lack of impact because of certain continuing areas of restrictions.

One of them which I'd like to call your attention to is some suggested amendments in the Tax Reform Act of 1976 and the right to financial privacy. That won't stop them making opium, it won't stop them cooking heroin, but it will have an impact on our ability to get information from a Federal law enforcement agency to work on criminal cases that may involve large amounts of money which will flow out of heroin.

Second, we do think the availability of the State Department to be flexible in putting DEA agents overseas will assist us in assisting the local governments to stop the labs at their source. Point of fact. Germany, major, major trafficking in heroin. Turkey, the potential lab areas you talked about in the eastern area. Greece, we've got an agent TDY there working on a "let's look and see if we should establish a permanent office in Athens." Italy, field agents for a country which could be our principal reshipment, transshipment, and laboratory source.

Candidly, with the flexibility that's needed we will need more locations, agents, and intelligence gathering in Western Europe. I sense that you and I see the same problems. I sense that we've got major investigations underway, some of which we can talk to you about, some of which we will in private.

I sense that your visit and mine, and others that the Attorney General have had with leaders in Italy have reenforced their own concern. This is no longer an American disease; they've got big problems at home.

Senator **Biden**. In the 1979 Federal Strategy for Drug Abuse and Drug Traffic Prevention it states that one of the major objectives of drug law enforcement is to achieve the highest possible level of risk for drug trafficking by investigating major drug traffic organizations and securing sufficient evidence so that successful prosecution can be brought which will lead to forfeiture of their assets.

Now DEA has recognized that goal and, in 1976 established a financial intelligence project unit within DEA's office of intelligence to develop and encourage the use of financial investigation. In your prepared statement you say that DEA is "now hitting the traffickers where it hurts most; in their wallets."

In its recent study of the performance of the five CENTAC units, the General Accounting Office found many prosecutions of high-level traffickers and substantial prison terms, which is all to your credit. The study also found those traffickers' assets were in general not forfeited to the United States. Does DEA have guidelines for the use of forfeiture statutes, and if so, can you make them available to the committee.

Can you provide this committee with a list of the cases in which money or properties was forfeited? Specifically, what happens to profits obtained from drug trafficking? What steps do agents take to insure that money or property remains intact during the investigation of the case? According to the GAO study, asset seizures were not established as a specific goal in the CENTAC operation plans and apparently to correct this omission DEA recently required that all new CENTACS make seizure and forfeiture of assets a primary goal.

What specific instructions and support are provided to insure successful implementation of this new policy and how is DEA monitoring the program? That's a big mouthful. Let me go back and ask it again. Does DEA have guidelines for forfeiture statutes?

Mr. **Bensinger**. Yes, we do; and we have a major training program for officers directing investigative efforts. A film has been specifically designed to be seen by agents in the field. We have already reached over 300 supervisors in in-depth training on financial investigation and over 1,600 agents on conspiracy investigation.

We have mobile teams going into the field to follow up the in-depth review with the financial forfeiture procedures that have been outlined.

I would add two points: One, the development of information on a forfeiture and we're running now about $3 million in cash a month in 1980, does not guarantee that those assets will be forfeited because the U.S. attorney's office sometimes have to go through very lengthy civil and criminal procedures to sequester the assets. Second, that we do have, since the passage of the forfeiture amendment in 1978, and the 881 sections, been provided with an additional tool in which forfeitures can be made which, was not available when GAO was looking at the CENTAC's, which started back in 1975, 1976, and 1977.

I review all the CENTAC's at least three times a year. During those reviews and the presentation of each CENTAC case we look at the class level of case, the agents assigned, the developmental prosecutorial jurisdictions, 880, 848, 881 as well as the money forfeiture and assets which are reflected in those investigations.

I'm convinced, Chairman Biden, that our agency is aware of the financial forfeiture opportunities and impact that are possible.

Senator **Biden**. In my meetings with your people and with other law enforcement folks, and in general conversation, the forfeiture statute is one which everyone applauds and says has great potential. Yet, very bluntly, it's one that not many people understand how to use.

People tend to go to that which they know best and to leave aside that which confuses them. According to GAO's study you initiated a 1-week course on financial investigations and by the end of 1979 three courses were held for about 100 DEA employees out of more than 2,000 agents. However, according to the folks at GAO, the 1-week course can only provide a short introduction to an extremely complex problem. The FBI approaches the problem by hiring accountants who understand the process. Why don't you do that?

Let me back up, I don't see how you think agents can understand the RICO statutes in a week.

Mr. **Bensinger**. Because I think we're doing it, Chairman Biden. I can tell you case after case as an example of it. I would also add two comments.

Senator **Biden**. Why don't you submit that for the record.

Mr. **Bensinger**. I'd like to but I can't let that impression go unresponded to in a friendly way. Yes, I think your characterization of people doing things that they're comfortable with and they know is right. It's as true of prosecutors as it is of agents. Prosecutors need as much training in forfeiture as agents.

Senator **Biden**. I absolutely agree.

Mr. **Bensinger**. That is recognized by Ben Civiletti, the Attorney General; and we had a specific program getting the prosecutors and the agents together on forfeiture. That's happened on several occasions.

In addition, we have doubled the number that was reported in the

GAO study and we did it at the top. I've made plenty of mistakes in my life. One of them may have been trying to just work at the case agent work level in giving training Where the supervisor, the group supervisor, the special agent in charge, the regional director isn't familiar with that technique, it's just as you said. The agent wants to go on a financial investigation and his boss, who isn't familiar with it, doesn't feel comfortable; thinks it will take too much time; it doesn't get supported.

So we've trained the supervisors, said this is the way we want it to go. This is the way you guys are going to be evaluated by Hambrick, Fred Roddy, and Peter Bensinger when you come in, so you've got to make this work.

That's the only way I know of handling it.

Senator **Biden.** I'm not suggesting that's not a good way and, as you can find out from your buddy, Mr. Civiletti, I have been no less kind in my characterization of the attorneys general of this Nation in dealing with this statute.

I think it is the single most underutilized, potentially powerful statute on the books, that everyone cried for and screamed for and has been on balance, a bust. Not because of the way it's written and for once in our lifetime, not because the Congress didn't do the right thing, but because there is total, across the board, from police officer, from the enforcement agent to the prosecutor, a reluctance to deal with the mechanism.

It is absolutely reprehensible that we have major busts in big dollars and cents and not major forfeitures of property.

Mr. **Bensinger.** Two months ago in San Diego and Los Angeles, the Aravjo-Avila organization was taken off. A tremendous organization responsible for national distribution of heroin and cocaine, I believe, into the United States.

At that time, $3.2 million were documented, forefeiture initiated, assets, homes, cars, money, bank accounts seized. DEA in its investigation, with excellent cooperation from the LAPD, the Sheriff's Department of San Diego and offices there as well as officials in Mexico. With IRS participation and Customs participation we have moved on a forfeiture case. We utilize accounts, we do hire lawyers, we do hire people trained in many languages and professionally in a variety of skills.

I believe the best way for the Government to work, though, is not to reduplicate the IRS or U.S. Customs, but use the expertise within the Internal Revenue Service, within the FBI, within the U.S. Customs on the money cases.

Senator **Biden.** I couldn't agree with you more. It seems to me that learning how to or coordinating the ability to take advantage of the existing statute should be as fundamental as teaching your folks what *Miranda* means and how to handle a gun.

Mr. **Bensinger.** It is included in all of our basic and continuing training programs and in some parts of the country, like the south central part, IRS has assigned two agents to each of our district offices.

Senator **Biden.** I'm not telling you anything new——

Mr. **Bensinger.** No; and your statements are very much like mine in the sense of the problems, in terms of magnitude, and in terms of scope and degree of difficulty. The Federal agencies have not utilized that RICO and 848 statutes on the books, since 1948 as well as they should. Including ours and every other agency.

Senator BIDEN. Let me read one paragraph that you've already read into the record so my colleagues and their staff who will be reading this record and digesting it will know what you and I are both talking about.

I'm reading from Roman numeral III of the General Accounting Office report to the Attorney General of the United States, dated March 27, 1980, titled, "Risk of Economic Loss Must Be Increased."

> Even though the forfeiture of drug traffickers' assets is an intregal part of the government's strategy to immobilise trafficking organizations, the Central Tactical Program has had a minimal success in this area. Although many high level drug dealers have received substantial prison sentences, in general they have been able to retain their drug related assets. The estimated annual revenues of the five criminal organizations probed by the central tactical units, GAO studied in detail totalled at least $65 million.
>
> But the government obtained very little of those revenues. Forfeiture of traffickers drug related assets were insignificant and only 10 percent of the 187 convicted traffickers received fines, which totaled $118,000. The lack of success in obtaining traffickers assets can be attributed at least in part to three interrelated causes.
>
> DEA lacks financial investigative expertise, many U.S. Attorneys are inexperienced in the use of forfeiture statutes or consider prosecution under these statutes to be too time consuming and asset seizures are not established as goals in the central tactical units operational plans.

I also would add my own observation is that there's not a great deal of encouragement, to the best of my knowledge, as there are in other areas of criminal investigation. I am not suggesting that you, the agency, are not attempting to deal with it, what I am suggesting is that I have been told over the last 3 years by law enforcement agencies about the need for this statute; why it is so important, how critical it is and, I for one, want to go on record with the U.S. attorneys across the Nation and the Attorney General that I think it has been dismally implemented in the past. It may be because of a lack of financial support from us; it may be because you've been cut off in terms of hiring experts because of budgetary restraints. If any of those things are the operational reason why we're not more successful, I want to know about it.

As you know, I will go to bat for you for money if that's what you need. But I don't want to be sitting here a year from now and read a report that says that, out of $65 million potential, we have $118,000 in fines, much of which we're not sure we're even going to collect.

Mr. BENSINGER. Two comments: (1) That report that was published by GAO was unique in one respect. You'll not find in that report a response from DEA. We were not afforded an opportunity to comment on their findings. Comments such as in their survey they neglect to include a review of CENTAC 12, in which $250,000 was frozen of the Sicilia Falcon organization.

Senator BIDEN. Frozen—are we going to get it?

Mr. BENSINGER. The Swiss now have the $250,000 and the Panamanians traced $3 million. But it was our agents that followed the financial flow and traced over $300 million. These assets, although not available for seizure, have been identified as evidence in criminal prosecutions. So we don't share that representation that there wasn't money frozen or seized, taken away from the traffickers.

DEA agents have been trained and given more priority on financial investigation. So have U.S. attorneys and forfeiture of assets is a goal for CENTAC investigation. I would like to send, to your attention, if I could, Chairman Biden, the commentary we would make on the GAO CENTAC report.

They recognize it's a good program; they recognize it's had impact. We think they should have included comments that are more recent, both in terms of training in terms of forfeiture as well as some of the specific CENTAC's that weren't studied like CENTAC 12.

Senator **Biden**. I would be anxious to have that for the record.

[The DEA comment referred to follows:]

DEA Comment on GAO Report

The Drug Enforcement Administration accepts two conclusions of this recent GAO report—the CENTAC program is an excellent means of immobilizing major drug traffickers and more efforts by the Federal Government must be made to seize and forfeit illegal drug related assets. These conclusions are closely related to GAO's two major recommendations, but before we respond to them we believe a more general critique of the GAO report will provide a framework for understanding why DEA cannot embrace the report in its entirety.

It is unfortunate that DEA did not have an opportunity to comment—either orally or in writing—on a draft of the report; many misunderstandings and misrepresentations could have been avoided by making the information in the report current and by clarifying DEA's position on the CENTAC program and on the financial aspects of drug investigations.

CENTAC PROGRAM EXPANSION

Despite acknowledging a "paucity of data" (p. 3) GAO recommends that DEA expand the CENTAC program. Their recommendation is based on the contentions that the program's results are impressive, that there is a need for more CENTAC-type investigtions, and that DEA has the flexibility to redirect resources to the program. In many ways DEA agrees with all three contentions, but they are not sufficient, in our opinion, to lead to the conclusion that the CENTAC program be expanded in the way GAO recommends.

DEA concurs with GAO's opinion that the results of the CENTAC program are impressive. If the prosecutions are successful, these impressive results are assured because of the stringent CENTAC criteria—a major inter-regional drug distributing network requiring conspiracy investigation to be immobilized. It is important to realize that a great deal of investigation is done prior to the formation of a CENTAC. This ensures that the criteria are met and the need for a CENTAC-managed investigation is required.

Secondly, DEA agrees that there is a need for more investigations that meet *some* of the criteria for forming CENTACs. DEA emphasizes the development of regionally controlled investigations which are complex, multi-defendant, conspiracy investigations designed to immobilize major drug trafficking organizations. In fact it is an important *secondary* goal of the CENTAC program to provide both a model and experienced agents to the regions, thereby increasing their expertise in the development of major conspiracy cases.

Thirdly, GAO recommends that DEA expand the CENTAC program because we have much flexibility in the way we use our investigtors. GAO argues this case by pointing out that 78 percent of DEA's investigative time is devoted to self-initiated investigations, while the other 22 percent is committed to Federal referral cases and to State and local task force referral cases. DEA does not dispute the fact that we could choose to devote more resources to the CENTAC program if we thought that would be the best choice of action. However, DEA offers the following reasons against expanding the CENTAC program:

(1) Of the vast number of investigations initiated each year, comparatively few meet the criteria for a CENTAC. Although it is DEA's intention to concentrate on major illegal drug distributing organizations, it is a cold fact of drug investigations that our special agents must begin a large number of cases at lower levels of the traffic. This so-called "bottoms-up" approach is supposedly not challenged by GAO (see p. 11). But the implication in

GAO's claim that "it contrasts sharply with the Government's approach to other criminal activity" (p. 11) is that our strategy is suspect. DEA maintains that an effective drug law enforcement strategy must continue to deploy investigative resources capable of exploring and uncovering new drug trafficking violators.

(2) The standards for our CENTAC program are deliberately set and kept very high. GAO points out that there is an advantage in investigative continuity in the CENTAC program because the agents assigned to a CENTAC are part of a dedicated (single mission) team. While this is an advantage, DEA must assure that the investigation has excellent potential for immobilizing a major national or international trafficking organization before assigning a dedicated team of agents and analysts to the investigation. By maintaining these high standards DEA managers can honestly say that high potential CENTACs have not been turned down.

(3) Although not pointed out by GAO, there has been a certain kind of expansion in the CENTAC program. The CENTAC concept has evolved over a six-year period. The most recent CENTACs, those not examined in-depth by the GAO team, involve investigations of drug trafficking organisations that are much larger and more complex than many earlier CENTACs. Thus while the total number of active CENTACs has not grown over the years, the magnitude of the current CENTACs has increased in recent years.

(4) GAO acknowledged DEA's claim that with large domestic regions and improved interregional cooperation, investigations of major traffickers has improved at the regional level. However, GAO states that this claim is "open to question." (p. 10). However, GAO fails to cite any evidence for this skepticism, and DEA maintains that many regionally controlled investigations have immobilised major trafficking groups in the United States.

There is one final clarification needed on the CENTAC expansion issue. GAO allows that DEA's contention that the CENTAC program is at its optimum level "may be correct." (p. 13). Yet they want DEA to prove this contention by "evaluating the effectiveness of the various methods used to investigate major traffickers with the aim of determining whether redirecting enforcement resources from less productive approaches is feasible." (p. 13). Strictly speaking the *methods* used to investigate major traffickers—undercover, surveillance, purchase of information/evidence, conspiracy analysis, etc.—are no different in the CENTAC program from ordinary regional investigations. No formula exists for determining the optimum level. The experienced judgment of CENTAC program management concludes that the current level of resources devoted to the program (approximately 3 percent of investigative resources) strikes the proper balance between initiation and development of cases and the total exploitation of on-going cases represented by the CENTAC effort. It is also the judgment of CENTAC management that the comparatively small, compact, and manageable CENTAC program is a major reason for its effectiveness by ensuring strict compliance with CENTAC program criteria. Because of the aforementioned reasons, DEA is reasonably certain that the resources devoted to the CENTAC program cannot be substantially increased without encountering investigative inefficiencies.

SEIZING TRAFFICKER ASSETS

DEA believes that the "Economic Incentive" chapter has been inappropriately attached to the CENTAC report. Seizing and forfeiting drug related assets is a major topic deserving separate attention; the seven and one-half pages devoted to this topic in the CENTAC report are totally inadequate to the issue. The overly brief discussion is further marred by being outdated, incomplete, and misleading.

For example, the report claims that DEA's financial intelligence unit has been understaffed since its inception by having only two people. Yet DEA reorganized this unit over a year ago. The Financial Investigations Section within the Office of Enforcement is now staffed with three special agents, two intelligence analysts, an intelligence aide and a secretary. Most of these employees had been in place for several months before the GAO study was published. Another instance of outdated information is the claim that the five CENTACs GAO studied did not "specifically provide for seizure and forfeiture of traffickers assets." (p. 18). Although this is true, it is outdated—a fact GAO was well aware of. In August of 1979, the Department of Justice commented on another GAO report, "Gains Made in Controlling Illegal Drugs, Yet the Drug Trade Flourishes." In that response, which GAO printed as an appendix to their report, we stated "Since

CENTAC 18 (and also including CENTAC 2) the effort to attack the financial holdings of these organizations . . . is established as a primary objective in the initial development of the operational plan for each new CENTAC." (p. 12 of the DOJ Appendix).

Chapter 3 of the GAO CENTAC report is incomplete. DEA's cooperation with IRS is criticized, yet GAO did not mention that DEA had provided IRS with well over 700 Class I and II narcotics violators so that IRS could consider tax investigations of these individuals. The outcome of sharing this information was similarly ignored. Also, the IRS has been involved in nearly every CENTAC investigation over the last two years.

Finally, the chapter is misleading in intimating that DEA "lacks the expertise" to develop financial analyses of narcotics investigations. GAO criticizes DEA for not having financial specialists like the FBI and the IRS. It is most critical to note that DEA's mission is to immobilize drug traffickers. Once a narcotics investigation has been initiated and potential defendants identified, tracking illegal drug profits to trafficker assets is essential to seizure and forfeiture of those assets. All DEA investigators must be sensitized to the information needs of the various criminal and civil forfeiture laws. DEA is in the process of training all of our agents to trade financial assets back to illegally obtained drug profits.

During many drug related financial investigations, DEA will continue to solicit the expertise of other Federal agencies such as the IRS, the FBI, or the Controller of the Currency. Primarily these agencies will join the investigation in pursuit of evidence proving criminal activity according to the statutes under their jurisdiction (e.g., tax evasion, fraud, etc.). But the expertise of these agencies may be used correlatively to aid DEA in tracing assets under RICO, Continuing Criminal Enterprise, or 21 USC 881(a)(6) statutes which are the responsibility of DEA. At the current level of activity, the cooperation afforded DEA by other Federal agencies has been adequate. GAO, however, incorrectly reasons from the fact that we do not have financial specialists to the conclusion that we are unable to conduct drug related financial analysis. Because of our own training programs, and the cooperation of other agencies, this is not true. As we increase our need for financial expertise from other Federal agencies, DEA may find that those agencies do not have adequate resources to assist us. Toward that time, DEA is considering the development of in-house specialists to assure that opportunities for seizing drug related assets are fully exploited.

Although DEA believes the GAO chapter on asset seizing is outdated, incomplete, and misleading in many respects, we readily agree that greater results should be expected in seizing and ultimately forfeiting trafficker assets. During the last two years, about 70 RICO and Continuing Criminal Enterprise cases have been accepted for prosecution. And since November, 1978, DEA has had the legal authority to make civil seizures of drug related assets. Consequently, for the first six months of FY80, over $20 million in trafficker assets have been seized. By the end of fiscal year 1980 over half of DEA's agents will have received 3 to 5 days of training in financial seizure laws and techniques. DEA is committed to greater effort in immobilizing drug traffickers through asset removals.

COMMENTS ON RECOMMENDATIONS

Recommendation: We recommend that the Attorney General direct the Administrator of DEA to evaluate the effectiveness of the various methods used to investigate major traffickers with the aim of determining whether redirecting enforcement resources from less productive approaches is feasible.

Comment: The results of the CENTAC program are impressive. This specialized program is not easily compared to various routine investigative efforts that are most difficult to isolate and evaluate. For example, although DEA has no special program category for case initiations, the opening of new cases must be a routine process of our enforcement activity. DEA does evaluate the effectiveness of our enforcement activity, office-by-office, on an annual basis. One chief concern of these assessments is to relocate resources to increase their effectiveness. DEA will continue to evaluate other investigative programs in terms of their productivity and overall worth to illegal drug supply reduction efforts.

Recommendation: We recommend that the Attorney General direct the Administrator of DEA to expand its program for the use of financial analysis and information in narcotic investigations. Such a program should include: a more effective financial intelligence unit, the hiring of financial analysts, expanded financial analysis training programs, and ensuring that tax-related information is requested and used where appropriate.

Comment: DEA recognizes the need to expand our efforts to seize the assets of illegal drug traffickers. As previously noted, we have restructured our Financial Investigative Section, disseminated policy guidance, and obtained the cooperation of other Federal agencies. Worldwide money-movement models are being developed by our Office of Intelligence in a major strategic intelligence project. By the end of fiscal year 1981 all DEA agents should have received specialized training in financial investigative techniques. The one part of the recommendation not currently accepted is the suggestion that we hire financial analysts at this juncture; for the reasons outlined above, we view this as an open question.

Senator BIDEN [continuing]. I wonder whether or not in these times of budget crunch what would happen if we guaranteed that every dollar that you reclaimed would go into your budget, not into the General Treasury.

Mr. BENSINGER. There's a good opportunity for that now in the Congress. It won't necessarily provide us with new funds, but Customs and DEA could benefit from a provision like a moiety provision where funds seized as a result of information from an informant could be used to pay the informant. That would be a benefit to us from a budgetary standpoint.

In other words, we have an informant that says, there's 10 pounds of heroin coming in on this SwissAir flight and this trafficker has got $200,000 in his desk drawer that came out of a deal 2 nights ago. We go ahead and investigate, seize the heroin; seize the money. That informant, instead of getting paid $4,000 or less or more out of official Government funds, some of the funds from the forfeiture itself could be used to make that payment.

Two things would happen. One, we would have an opportunity to reduce the drain on the Treasury and, two, increase the incentive to get this kind of information.

The other thing I'd say, Chairman Biden, is I suspect that GAO made a survey of what agencies used RICO. DEA with 8 percent of the manpower might well be the lead agency within the Department.

Senator BIDEN. Well, you're obviously aware of the situation. You're obviously moving in the right direction and obviously you should know that if you need aid and assistance in that regard, please let me know. I want to emphasize that again before we go into closed session unless you have something you want to add publicly to what we've said thus far.

I want to make it clear that I am absolutely convinced—and you have been the main reason I'm convinced—that we are on the verge of a heroin epidemic that will have the potential of shaking some of the social foundations of this country. It is not a minor thing at all.

If the numbers that I have heard, if the independent inquiries I have made beyond your organization are correct, if the assessments given to me by my foreign counterparts in the Mediterranean area are correct, we are going to be in position where the U.S. American public is going to be standing and screaming 2 to 3 years from now, "My God, what has happened to us."

I don't think we can overestimate the prospect of that occurring. I'll be the second happiest man in Washington if these dire predictions turn out to be false. You'll be the happiest. The more I get into it, the more I visit the source countries and the leaders in those countries, the more I talk to your counterparts in the Interpols of the world, the more I'm convinced that it's even bigger than I thought it was.

It's one thing to talk about 80 tons, it's another thing to talk about what that means. So I really and truly am fully cognizant of the extent of the problem. My big problem is, how do we deal with the problem? Obviously I'm looking to you, the expert, for those explanations.

My questions are asked in the vain of wanting to know, not in the vein of criticizing. I have been a willing student. Unfortunately, you have sold your plight, your case to me all too well and I'm not at all sure that we shouldn't be saying to the American public and to the political leadership of this country just how serious this is going to be. That's the spirit in which I ask the questions.

Senator Mathias, as you know, has a keen interest in what you're doing and is a member of this committee. He has done some very helpful work on the question of marijuana by beginning to shatter the myth you all knew existed, and by providing the political leadership, to shatter the myth that a roach is not a whole lot different than a cocktail and that marijuana isn't all that damaging.

We will now adjourn the public portion of this hearing and proceed to closed session. I would like a discussion on the familial relationships and to explore a little further the international connections that we have both alluded to here.

Since I do not expect to come back out of closed session, I will adjourn the hearing for the day. I would expect you would be out of here and on your way by 12:30. If that's agreeable.

If there's any public statement you would like to make or you would like to add I don't mean to cut off the open hearing at this point.

Mr. **Bensinger**. Very good, Chairman Biden. I would add a word of thanks to you for your candor and your interest. We have two items we will direct to you and the staff, one dealing with moiety and second is information on deputization which we would commend along with the blessing of the Attorney General and the Department of Justice for State and local law enforcement officers under selected and carefully screened and established circumstances where we're working in mobile task forces and these law enforcement officers are leaving their jurisdictions going from within a city to a country area investigation.

Senator **Biden**. I appreciate that. That would be most useful and with that I will ask unanimous consent of myself to recess to an executive session.

[The prepared statement of Mr. Bensinger follows:]

Prepared Statement of Peter B. Bensinger

Good morning, Mr. Chairman. It is a pleasure to be here this morning to bring the Judiciary Committee up to date on the major issues and situations confronting the Drug Enforcement Administration. I am delighted to have this forum because over the past year there have been changes in the patterns of drug production and trafficking and I think the Congress needs to know exactly what we are seeing.

In many respects, DEA has seen considerable progress. Several major cases with international implications have been brought to fruition. We have accelerated the use of money-flow investigations; we are now hitting the traffickers where it hurts the most—in their wallets. Many of our foreign counterparts have intensified their commitment and efforts against drug trafficking. There has been a marked decline in the number of clandestine phencyclidine laboratories as a result of the Congressionally enacted controls on piperidine.

But, the instabilities of the governments of Southwest Asia are having a dramatic adverse impact on the dimensions of the world drug situation. This area—Iran, Afghanistan and Pakistan—is capable of producing many times over the amount of opium needed to satisfy world demand.

In order to appreciate more fully implications of this Southwest Asian opium production capability, I think it important to reflect on the background of the heroin situation.

Since 1976, all of the indicators we use to trend heroin availability have consistently reflected a downward trend. The purity methodically fell from 6.6 percent and stabilized at 3.5 percent before beginning a slight upward turn during the third and fourth quarters of 1979, when it rose to 3.7 and 3.8 percent, respectively. The price per milligram of pure heroin has risen consistently from $1.26 in 1976 to $2.29 as of the end of 1979.

Medical examiner and emergency room reports are collected from 24 metropolitan areas participating in the Drug Abuse Warning Network (DAWN). Significantly, at the present time, DAWN is recording approximately 35 heroin-related deaths per month in contrast to the 150 per month in 1976. According to DAWN, the number of heroin-related injuries has been declining steadily and since 1978 has returned to the low levels of 1973. The average number of heroin-related injuries per quarter for 1979 is consistent with the average per quarter in the preceding year.

From the data we have accumulated thus far, the national indicators are now showing some increases in heroin availability. The situation is clearer on a regional level. For example, the East Coast cities in particular are reporting purities well above average for those areas. During the same 12-month period in which average retail purity on the East Coast rose from 2.8 to 3.7 percent, heroin-related injuries rose 26 percent. Other indicators such as heroin treatment admissions, retail pharmacy thefts, treatment admissions for heroin substitutes, and overdose injuries and deaths related to heroin analogs all suggest a gradual increase in heroin availability and abuse on the East Coast. The picture remains mixed when one examines the trends in any one metropolitan area. An extended period of increased availability in more than one geographic area would have a more profound impact on national indicators.

In addition to using the above mentioned indicators to measure availability, we use the National Narcotics Intelligence Consumers Committee (NNICC), which is chaired by DEA, to analyze the volume of drugs in the country. NNICC has done a thorough analysis of estimated supplies of heroin coming into this country from 1975–1978. According to the NNICC study, total heroin imports are down from 7.5 metric tons in 1975 to between 3.7 and 4.5 metric tons in 1978. From 1977 to 1978 alone, heroin imports into the United States declined 25 percent.

The study also has analyzed the volume of heroin emanating from principal foreign sources and, in doing so, has clearly highlighted the changing dynamics of the heroin situation.

ESTIMATED SUPPLY OF HEROIN TO THE UNITED STATES FROM PRINCIPAL FOREIGN SOURCES, 1975–78

[In metric tons percentage shares in parentheses]

	1975	1976	1977	1978
Mexico	6.5 (87)	4.0 (67)	3.1 (56)	1.7–2.0 (45)
Southeast Asia	1.0 (13)	2.0 (33)	2.0 (36)	1.4–1.7 (38)
Southwest Asia	(1)	(1)	.4 (8)	.6–.8 (17)
Total	7.5 (100)	6.0 (100)	5.5 (100)	3.7–4.5 (100)

[1] Negligible

Substantially as a result of the continued eradication efforts of the Government of Mexico, joint U.S./Mexican operations, and to some extent as a consequence of an unusually severe drought in late 1977/early 1978 in the northwestern part of the country, Mexico's share of the U.S. heroin market has diminished significantly. The Government of Mexico is to be commended for its dedication to the opium poppy eradication effort.

When I appeared here last year, I expressed optimism regarding the progress in Mexico and I expressed concern about Southeast Asia and the potential of Afghanistan and Pakistan.

Drought conditions directly affected opium production in the Southeast Asian/Golden Triangle area. In a typical growing season, the Golden Triangle can produce between 450–500 tons of opium. As a result of a drought, the 1978–79 growing season yielded only between 160–170 tons of opium. Consequently, estimated shipments of Southeast Asian heroin to the United States dropped about 15–30 percent from 1977 to 1978, and another decline occurred in 1979. The climatic conditions have not improved considerably and so to compensate for the poor yield of the prior season, the opium farmers have planted more. Based on field reporting, DEA estimates that the increased planting will produce between a minimum of 215–240 tons of opium after the 1980 harvest, which is now being completed.

Several factors have had an impact on the trafficking of Southeast Asian heroin. Two of the largest Southeast Asian heroin trafficking networks, the Ah Kong Syndicate and the Li Ming Siu organisation were immobilised as a result of international enforcement efforts. Additionally, DEA implemented the Special Action Office/Southeast Asian Heroin (SAO/SEA) to direct its enforcement, international assistance, and intelligence efforts against Southeast Asian heroin. These actions in concert with many others, led to reduced availability of Southeast Asian heroin.

Another part of Asia—Southwest Asia—gives me cause for grave concern. The consequences of excessive opium production have been experienced in Europe, and, now in the United States as well.

It is estimated that in 1978 Afghanistan produced 300 metric tons of opium and Pakistan produced approximately 400 metric tons, for a regional total of about 700 metric tons. Iran cannot be included in this total because at that time, opium cultivation in Iran was legal and controlled. In 1979, opium production in all three of these countries in Southwest Asia is believed to have increased to a maximum of 1,600 metric tons.

Of course, these are "guesstimates". As you can well imagine, intelligence gathering in that part of the world is, at best, very difficult. Our agents stationed abroad are our primary intelligence source. However, DEA has had to close its offices in Iran and Afghanistan. Our efforts in Pakistan were disrupted extensively, albeit temporarily, and still have not returned to the levels of previous years.

Foreign governments are often a secondary intelligence source, but we do not have ongoing enforcement and intelligence exchange in Iran and Afghanistan and the countries have lost a number of their career drug law enforcement officials.

The high quality and availability of Southwest Asian heroin has made it a very marketable commodity. By mid-1977, West Germany was inundated with this high-quality Southwest Asian heroin. The problem has since spread to other West European markets which traditionally have been and continue to be outlets for Southeast Asian heroin. Despite sincere attempts by European governments to control the narcotics addiction problem, the situation has continued to worsen.

Throughout 1979, Western Europe served as a "sponge", absorbing the increased Southwest Asian heroin production. Approximately 2.5 metric tons of heroin were consumed in Western Europe that year. By way of contrast, the NNICC study estimates that in 1978 Southwest Asia supplied 0.6–0.8 metric tons of Southwest Asian heroin, representing 17 percent of the total market, entered the United States. I expect that proportion to have doubled during 1979.

Although the heroin picture in Western Europe may be stabilizing, the situation still is not good. Drug overdose deaths in West Germany, for example, are almost double those of this country and yet their population is one-fourth of ours. In West Germany, street-level purity is currently between 20 and 40 percent and prices in some European cities have dropped to as low as $25,000–35,000 per kilogram. According to our latest figures, that same kilogram would sell for about *six times* as much in New York City.

DEA intelligence reflects that some Iranian citizens, unable to move cash out of that country because of the currency regulations, have "converted" their cash to narcotics and have smuggled their assets out in that fashion. The profit motive has enticed numerous Black, Hispanic, Italian, Iranian and other traffickers to enter the Southwest Asian heroin trade in the United States. Although at present this trade should be best be characterised as fragmented, there are indications that in the future it will be dominated increasingly by cohesive criminal groups.

Over the past two years, there have been a rising number of seizures and resulting investigations. During 1977 and 1978, small quantities of Southwest Asian heroin appeared in the U.S. and were confined to the New York/Washington, D.C. corridor. Since then, undercover purchases of Southwest Asian heroin also have been made in Chicago, Detroit, San Francisco and Los Angeles.

DEA "Daily Enforcement Reports" document seizures of Southwest Asian heroin which were made both here in the United States and across Europe. For, example, recently on the same day, two unrelated seizures each of three kilograms of exceptionally high purity Southwest Asian heroin were made in Texas and here in Washington, D.C. Seizures of heroin in this quantity and purity have not been experienced in several years.

It is important for DEA to be able to have an idea of the extent to which heroin from Southwest Asia is reaching the retail level here in this country. Consequently, in conjunction with State and local enforcement officials, the DEA New York District Office ran a special street-level buy operation to determine the extent of the retail heroin problem. New York was selected because we believe it to be a primary entry point for Southwest Asian heroin. The first phase of the operation, conducted this past summer in Harlem, found that the average retail purity was 3.0 percent. Based on the results of heroin signature examination, 42 percent of the exhibits collected in this phase were identified as being of the "European/Near Eastern" or "Middle Eastern" type heroin. In this project, these types of heroin are now being referred to as Southwest Asian, that is heroin converted from opium produced in Southwest Asia. The second phase of the operation, conducted in the fall on the Lower East Side, determined that 60 percent of the samples were of Southwest Asian origin. In this phase of the operation, the average purity of the heroin samples was 8.5 percent and some of the exhibits were as much as 20 percent pure.

Given the magnitude of recent developments, the question then becomes, "What plans are there for coping with this new presence and accelerating problem?" Unfortunately, there are no easy answers.

The United States Government has developed initiatives to attack the Southwest Asian heroin problem. The Administration is making the Southwest Asian heroin effort a high priority and is coordinating efforts of the Departments of Justice, State, Treasury, Defense and Health, Education and Welfare.

The Department of State is seeking international cooperation, not only through contacts with individual nations, but also by raising the issue in international forums such as NATO. We are accelerating the enforcement activities of the U.S. Customs Service and DEA both in the U.S. and abroad. Additionally, New York, Philadelphia, Boston, Newark, Baltimore and Washington are being designated target cities where major efforts are needed most to fight the flow of Southwest Asian heroin. The State and local law enforcement agencies are being involved in the anti-heroin effort to the maximum extent. As you can see, the Drug Enforcement Administration is involved in the forefront of this action plan.

On February 28, 1980, President Carter and Attorney General Civiletti hosted approximately 120 law enforcement officials including all State Attorneys General and several police chiefs and prosecutors. At this meeting, the five point program to discuss the threat of Southwest Asian heroin was discussed with these enforcement officials and their cooperation and participation were encouraged.

Both Attorney General Civiletti and I have met with the Italian Prime Minister and Minister of the Interior of the Federal Republic of Germany to discuss mutual concerns regarding the Southwest Asian heroin problem. We intend to continue to assist foreign law enforcement agencies with support services directed at identifying and immobilizing major drug trafficking networks.

In all cases, our preference is to work as close to the source as possible; but, in the case of Southwest Asia, that door has virtually been slammed shut. Consequently, we have accelerated our efforts as close to the source as we can get—through our agents and country attaches stationed along the transshipment and destination corridor in Western Europe. Additionally, the State Department has approved a Special Agent position and an Intelligence Analyst position for Frankfurt, Germany, and an additional Special Agent position for Turkey.

DEA has recently established the Special Action Office/Southwest Asian Heroin. SAO/SWA, as this office is known, was established to meet the imposing threat of renewed heroin production, transshipment and trafficking in and from Europe, the Middle East and parts of Southwest Asia's opium producing counrries. SAO/SWA will address this serious situation on both the European and North American continents in a coordinated, directed high-priority enforcement effort.

Specifically, the DEA Headquarters SAO/SWA program managers are working to ensure that all priority investigations are coordinated and receive sufficient resources. These managers must evaluate all types of investigations and, when needed, shift resources from lower priority areas to significant cases that will have an impact on Southwest Asian heroin. In that same vein, they are making certain that field operations receive supplemental funding to continue and accelerate investigations that have a direct impact on Southwest Asian heroin.

Another important facet of SAO/SWA is the intensifying of the State and local law enforcement officials' awareness of the potential and existing threat of Southwest Asian heroin in the major cities. We are enlisting their intelligence, scientific and enforcement resources for use in conjunction with the Federal effort. The DEA Office of Science and Technology is beginning a program to direct scientific data to State and local laboratories that will assist them with the identification of the components of heroin that originated from Southwest Asian opium.

The DEA Office of Intelligence is intensifying its field intelligence exchange among the various foreign, Federal, State and local participants to ensure that there is maximum development and distribution of available information regarding Southwest Asian heroin organisations and traffickers. Furthermore, in cooperation with the U.S. Customs Service, we are redirecting and intensifying the airport/port of entry program to provide better input to the U.S. Customs Service to obtain maximum efficiency from the "interdiction mode". We are developing specific trafficker/cargo profiles for each of the primary Southwest Asian heroin arrival locales.

All of these actions are designed to counter the increasing availability that could cause Southwest Asian heroin to reach epidemic proportions. I believe that, for the present, our initial measures will blunt to the best extent possible the Southwest Asian heroin threat.

Of course, while we accelerate our momentum against Southwest Asian heroin we must take care to ensure that our efforts to meet the challenge of increasing cocaine, dangerous drugs and marihuana trafficking are not diminished.

Cocaine continues to be widely abused and, according to all available indicators, its popularity is continuing. In 1979, DAWN emergency room mentions averaged 629 per quarter which is in sharp contrast to quarterly averages of 479 in 1978, 397 in 1977, and 312 in 1976. It is significant to note that these long-range increases are not limited to a few areas, but have been reported in the vast majority of cities from which data is available. Cocaine is readily available in pound quantities in just about every major metropolitan area. There has also been an increased demand for cocaine in Spain, Italy, France, West Germany and the United Kingdom.

NNICC estimates that in 1978, approximately 19-25 metric tons of cocaine were smuggled into the U.S., which was a five percent increase from 1977. The trend for 1979 is in the same direction.

Over the past several years, there has been no statistically significant change in the retail-level price/purity of cocaine. Within each DEA region, price has remained fairly stable, ranging from $1,200 to $3,100 per ounce (depending on the purity and the particular area). In and of itself, this stability indicates that traffickers have been able to consistently meet a rising demand for the drug.

Nearly all of the cocaine in the world is processed from leaves harvested from coca plants grown in Bolivia and Peru. There have been reports in recent years of expanded coca cultivation in these countries and possible expanded cultivation in Colombia. Over half the cocaine that reaches the U.S. is converted from coca paste to base and then to cocaine hydrochloride in Colombia, from where it is transshipped. The remainder comes directly from Peru, Bolivia and other South American countries. Colombia will probably remain the single most important smuggling point for cocaine imported into the United States.

Marihuana is an enforcement priority because of the extensive criminal organised networks involved in its distribution and because of the financial implications associated with its trafficking. Furthermore, our growing body of knowledge regarding the health hazards associated with marihuana use gives us cause for concern.

In 1978 approximately 10,700–16,400 metric tons of marihuana were imported into this country, generating a retail market worth $15–23 billion. The U.S. marihuana market has changed radically in recent years. The number of users has expanded and new source areas have emerged. Prior to the mid-1970's, Mexico supplied almost all the marihuana consumed in the U.S.; the remainder was from Jamaica. The balance has swung, however, and now Colombia is the primary source country. This shift is most directly attributable to the success of the Mexican Government's marihuana eradication program. The herbicidal spraying of marihuana fields has reduced production.

I anticipate that the heavy sea and air trafficking of these illicit substances from Colombia will continue. As a result of the large volume of seizures made in the last several years, smugglers have modified their operations. We are seeing continued maritime smuggling not only around Florida, but also north along the

Atlantic Coast and along the Gulf Coast. To a much lesser degree, but no less alarming, is the deployment of motherships from Colombia's Pacific coast to the U.S. West Coast.

Patterns in smuggling by air are also changing. The utilization of long-range aircraft is becoming a more distinct trend. Thus, other areas in the United States besides Florida and the Southeast Coast/Gulf Coast areas are beginning to feel the impact of drug trafficking.

Our greatest hope for control of the cocaine and marihuana problems rests in the drug source countries. I believe that crop eradication is one of the most effective methods of control. We need to help the Governments of Bolivia, Peru and Colombia turn off the faucets of cocaine and marihuana.

Thus far this afternoon, I have addressed myself only to the changing heroin, cocaine and marihuana trafficking picture. The dangerous drug situation deserves attention. This facet of drug law enforcement needs to be handled differently however, because for the most part, the United States is its own source country. Although there is substantial clandestine manufacturing activity, most of these drug substances are already subject to control from manufacture through distribution via the mechanics of the Controlled Substances Act (CSA).

There are 20,000 drug products under CSA control. Each year over *20 billion* dosage units of these products flow through the distribution chain, which consists of approximately 600,000 registrants. The vast majority of registrants, are practitioners; the balance are manufacturers and wholesalers.

Conservatively, we estimate that each year 250–300 million of the dosage units manufactured legally are diverted. The current value of street sales of diverted drugs is thought to be over $1 billion a year. This is easy to visualize when you consider, for example, a single dosage unit of Dilaudid (hydromorphone), which can be purchased retail for about 17 cents, can be resold on the street for up to $60. In addition to the profit motive, reduced heroin availability contributes to the demand for diverted drugs. Supplements are needed for non-existent or poor quality heroin.

The CSA provides for a "closed" or controlled distribution system from manufacture to use. The system is designed to ensure that there is an adequate supply of controlled substances for legitimate medical, research and industrial needs, while at the same time reduce the diversion of drugs from legitimate channels into the illicit market.

Under the Controlled Substances Act, DEA has clear authority to monitor activities at the manufacturing/distribution levels. And, we have been very successful at reducing diversion at this level. It is at the retail level where 80–90 percent of all drug diversion occurs. Most commonly, this diversion is accomplished via indiscriminate prescribing, forged prescriptions, thefts and the illegal sale of drugs by registrants. Additionally, individuals who obtain prescriptions and controlled substances by feigning medical need or who obtain multiple prescriptions from different physicians are also responsible for diversions at retail level.

DEA's statutory authority to regulate at the retail level is limited and, consequently, the primary responsibility for enforcement at this level has been left to the States. The general acceptance of this division of responsibility is demonstrated by the fact that 45 states and the District of Columbia have signed Memoranda of Understanding to that effect.

It has been and continues to be DEA's policy to support the states in their efforts to control retail diversion. This support takes many forms and includes both enforcement and non-enforcement initiatives.

The most substantial state assistance effort has been the establishment Diversion Investigation Units—DIU's. Through this program DEA acts as the catalyst to coordinate funding, manpower expertise, and various enforcement units into a cohesive state effort. DIU's are manned and managed by state authorities, although a DEA representative is assigned on a full-time basis for coordination and support. Our objective is to launch the participating state on a sound start by providing direct Federal funding and support and, ultimately, to have a state-sustained, permanent DIU-type program.

DIU's were initiated on a pilot basis by Texas, Michigan and Alabama in 1972. All three pilot states have endorsed the program and are funding their DIU's, as are California, Georgia, Illinois, Massachusetts, Nevada, New Hampshire, New Jersey, North Carolina, and Pennsylvania. DEA still is providing grants to Maine, Washington, Hawaii, Oklahoma, Utah, New Mexico, the District of Columbia, and the newest DIU, Arkansas. Thus far, only one state has declined to support the program at the conclusion of Federal funding. We anticipate that two additional units will be brought on board this fiscal year.

In response to the growing threat of retail diversion, six months ago DEA initiated Operation Script. This project supplements existing efforts and concentrates our resources toward specific retail problems. DEA's technical, investigative, intelligence and legal resources are being channeled to focus on high impact/high visibility investigations of 94 pre-selected targets in 24 cities. Operation goals include:

—decreasing diversion at the retail level;

—demonstrating the Federal Government's concern;

—increasing public and professional awareness of the diversion and abuse of legitimately manufactured controlled substances;

—encouraging more states to take action against practitioner and pharmacy diversion;

—demonstrating the need for and continuation of DIU's;

—supporting possible FDA actions regarding the indications and use of controlled substances;

—obtaining additional information which may be used in establishing or decreasing quotas and/or restricting imports of controlled substances.

Although thus far I have directed all my comments toward enforcement approaches to minimize retail-level diversion, a major thrust of our efforts are directed at non-enforcement initiatives. For example, DEA participates in four informal "working committees" which are designed to improve communication with health care professionals and the related industry.

The Pharmacy Theft Prevention (PTP) project is a nonenforcement directed endeavor with proven results. Over the past two years, programs have been established in 18 cities. PTP is an approach wherein pharmacists, police, government and media work together in a joint community action effort directed at reducing pharmacy thefts. In this area, DEA's job is basic and inexpensive—we are the catalyst that gets the community going. Statistics show that since the initiation of the program, pharmacy thefts increased nationwide, while thefts in PTP cities declined.

In addition to the above noted programs, DEA is developing a legislative proposal that will allow us to pursue new avenues. We are currently in the process of looking towards revisions of the Controlled Substances Act in order to enhance DEA's ability to combat retail diversion.

I have discussed only several of our key program elements: those which have an impact on heroin availability and those which effect the control of licit drugs. The other program elements are no less important. Rather than elaborate extensively on each of these operations, I have attached an appendix to my formal statement which details some of DEA's program goals and accomplishments.

For all our accomplishments, we still have tasks of considerable magnitude facing us. The potential of Southwest Asia to flood this country with high-quality heroin is very real. I believe that the five point program outlined earlier will represent a strong U.S. Government response.

Our Federal and State and local interagency cooperation is at a high level, and as a result, I believe we will see strong government programs in force. There is also an important role for the Congress as well.

The Department of Justice has forwarded to your committee a legislative proposal which will authorize the Attorney General to designate selected State and local law enforcement officers as federal officers for the purpose of assisting the Drug Enforcement Administration (DEA) in the enforcement of its federal drug responsibilities. This legislation is necessary to enable the DEA to maintain its cooperative effort with State and local law enforcement authorities to combat drug trafficking. This legislation needs your prompt consideration.

I think the penalty structure needs careful examination with an eye towards revision. The vast majority of illicit drug money comes from marihuana and cocaine. Yet, what penalties do marihuana traffickers face if convicted? At present, the maximum is five years, but the average sentence is three years. And over half the convicted marihuana traffickers do not go to prison at all. The House subcommittee on Criminal Justice has recommended doubling the penalty for large-scale marihuana traffickers, those who are moving 1,000 pounds or more. I strongly endorse that proposal.

Another aspect of the problem we face for which there is legislative remedy is bail. I again recommend to the Congress that a procedure be implemented whereby a judge or magistrate would preside over a hearing in which the government would be afforded the opportunity to represent that the defendant was a threat to the community, or was likely to jeopardize a witness or evidence, or was likely to flee the jurisdiction of the court. With a procedure of this type in force, I believe that we would see a marked decline in the excessive number of fugitives we now carry on the books.

The present bail system is not a deterrent. Bail is merely another business expense—and a ticket to freedom. We recently apprehended a DEA fugitive, Jimmy Chagra. At the time he fled the jurisdiction of the court, he had been *convicted* of conducting a continuing criminal enterprise and numerous drug trafficking violations. Although his bail had been set at $400,000—he took off. At the time of his re-arrest Chagra had $196,000 in cash in his car.

Mr. Chairman, I realize that there is much to be done. We, in DEA, have a responsibility to minimize the impact of the Southwest Asian heroin problem. With respect to marihuana and cocaine, without control at the source, it is as though we are working with one hand tied behind our back. Nonetheless we will continue to direct our efforts at Class I & II violators. We need the support of the Congress and are available to assist you in whatever fashion may be required. Thank you for your interest and support of our mission.

DOMESTIC ENFORCEMENT PROGRAM

In order to reduce the domestic supply of illicit drugs of abuse to a level with which our society and institutions can resonably cope, this program encompasses: investigation and preparation for prosecution of major violators of controlled substances laws; cooperation with other Federal law enforcement agencies to fully immobilize drug traffickers through the prosecution of Federal non-drug offenses; and utilization of those State and local coopeaative investigations which surface trafficking situations of interstate scope.

Anticipated accomplishments in fiscal year 1981:

Maintain recruitment and utilization of knowledgeable informants and the use of innovative undercover approaches.

Continue development of conspiracy cases and immobilization of major traffickers insulated from routine trafficking operations.

Continue the selective use of Mobile Task Forces combining the knowledge of DEA and other law enforcement organizations.

Continue to provide other Federal agencies with information on non-drug violators of Federal statutes to facilitate prosecution and immobilization of major drug traffickers less vulnerable to prosecution under drug statutes.

Enforce effectively and efficiently the Controlled Substances Act and the Controlled Substances Import and Export Act.

Direct enforcement efforts primarily against large volume interstate drug traffickers.

Expand the use of financial investigative techniques to a broader spectrum of DEA investigations.

Maintain balanced pressure to immobilize clandestine laboratories.

Maintain a viable telecommunications capability by expanding the secure teletypewriter system and replacing obsolete equipment.

Improve and redesign the Narcotics and Dangerous Drugs Information System (NADDIS) to provide varied inquiry capability, quicker response time, and enlarge data storage capability.

Program outputs include the following:

DEA-initiated arrests:	
1979 (actual)	5,306
1980 (estimated)	5,300
1981 (estimated)	5,350
Other Federal referral arrests:	
1979 (actual)	864
1980 (estimated)	900
1981 (estimated)	900

TASK FORCE PROGRAM

The Task Force program is operated under DEA direction to stimulate and provide support to Stae and local governments in investigations and prosecutiions of drug violator cases.

On-the-job training is proven enforcement techniques is provided to State and local officers, and the exchange of drug intelligence between Federal, State, and local enforcement agencies is promoted.

Anticipated accomplishments in fiscal year 1981:

Develop in each task force jurisdiction an effective cadre of State and local officers thoroughly trained and experienced in proven drug enforcement techniques.

Focus the task force investigative efforts on all levels of violators of the priority drugs of abuse.

Increase the number of State and local officers with on-the-job training through rotation of personnel assigned to task forces.

Provide actionable intelligence to task force participants.

Develop a structured intelligence exchange mechanism with minimum DEA participation that will be (1) implemented in task force cities once basic task force objectives in the area are accomplished, and (2) established in selected jurisdictions where DEA resources preclude establishment of a State and local task force.

Encourage and motivate State and local agencies to plan, program, and budget for greater proportion of support cost for task forces.

Program outputs include the following:

State and local initiated arrests:	
1979 (actual)	1, 592
1980 (estimated)	1, 650
1981 (estimated)	1, 600
Federal initiated arrests:	
1979 (actual)	2, 560
1980 (estimated)	2, 500
1981 (estimated)	2, 000

FOREIGN COOPERATIVE INVESTIGATIONS PROGRAM

This program is responsible for: efforts to reduce illicit opium production and the supply of heroin; efforts to curtail the supply of illicitly produced dangerous drugs, cocaine, hashish, and marihuana; monitoring the diversion of controlled substances legally produced in foreign countries; the collection and dissemination of tactical/operational and strategic intelligence; and advising and assisting foreign governments on the creation or improvement of their drug enforcement efforts.

Anticipated accomplishments in fiscal year 1981:

Encourage, advise, and assist host countries in the development and implementation of effective measures to control licit drug crops, disrupt illicit cultivation and conversion, and interdict in-country staging areas and trafficking routes for movement of drugs into the international smuggling channels.

Encourage and assist host countries to establish and support effective drug intelligence agencies and promote intergovermental enforcement cooperation and intelligence exchanges.

Promote, advise, and assist source countries in the planning and implementation of effective programs for eradication of illicit opium, coca and marihuana crops; encourage vigorous control of licit cultivation.

Cooperate with foreign governments in joint prosecution of major violators of mutual concern.

Maintain balanced investigative pressure to contain the influx of Mexican heroin.

Direct within the framework of drug priorities increased effort against major suppliers of Southeast Asian heroin now appearing in the retail market and potential increased supplies of Southwest Asian heroin

Encourage development of essential chemicals program to identify laboratory operations and restrict trafficking in essential chemicals destined for illicit use.

Support host country institution building process through DEA training of cadres for establishment and operation of cooperative and effective drug enforcement agencies.

Promote the adoption of crop substitution and alternate income producing programs.

Increase joint investigation and prosecution of international traffickers.

Increase efforts to collect money-flow documentation to support joint prosecutive efforts.

Interface South American operational efforts with domestic DEA operations and ongoing U.S. Coast Guard and U.S. Customs Service efforts directed towards drug interdiction at sea.

Program outputs include the following:

	1979 actual	1980 estimate	1981 estimate
Foreign cooperative arrests	1,130	1,100	1,100
Trafficking networks developed	28	32	32
Trafficker profiles completed	152	265	300
Enforcement targets identified	1,627	2,000	3,000
Trainee-days	13,667	14,000	14,000

COMPLIANCE AND REGULATION PROGRAM

This program involves the regulation of the legal trade in narcotics and dangerous drugs. By authority of the Controlled Substances Act this activity includes the scheduling and classifying of controlled drugs; establishing import, export, and manufacturing quotas for controlled drugs; registering manufacturers, handlers, and dispensers of controlled drugs; and investigating and determining points of diversion into the illicit market.

Anticipated accomplishments in fiscal year 1981:

Properly schedule all substances with abuse potential, establish annual production quotas for Schedules I and II substances, and provide required statistical data to the United Nations. Ensure that every registrant adheres to the Controlled Substances Act (CSA) and its implementing regulations through:

Annual registration of all legitimate handlers of controlled substances.

Annual investigations of bulk manufacturers of Schedule I and II controlled substances.

Cyclic investigations once every three years of all other distributors of controlled substances listed in Schedules I and V, and manufacturers of controlled substances listed in Schedules II and V.

Complaint investigations targeted against registrants whose activities indicate actual or suspected diversion.

Pre-registrant investigations of all new manufacturers, distributors importers, and exporters of controlled substances.

Development of a closed system of drug destruction.

Assist states and industries in their regulatory and compliance efforts and, promote the Pharmacy Theft Prevention program and State mini-DAWN systems.

Identify and evaluate the scope and magnitude of drug abuse in the United States.

Maintain information systems that monitor the manufacture, distribution, and inventory levels of controlled substances.

Maintain liaison with registrant groups through active meetings and exhibits program.

Program outputs include the following:

Investigation:	
Regulatory:	
1979 (actual)	1,120
1980 (estimated)	1,120
1981 (estimated)	1,270
Complaint:	
1979 (actual)	300
1980 (estimated)	300
1981 (estimated)	150
Preregistrant (nonpractitioner):	
1979 (actual)	1,300
1980 (estimated)	1,320
1981 (estimated)	1,350

DIVERSION INVESTIGATION UNIT (DIU) PROGRAM

The purpose of the Division Investigation Unit (DIU) program is to coordinate a national program to reduce diversion of controlled substances through the provision of investigative and administrative support to the operating units; conduct liaison activities before, during, and after installation of each DIU to enhance its probability of success; and conduct negotiations within the State milieu leading to the installation of these units.

Anticipated accomplishments in fiscal year 1981:

Establish new DIU's in three states.

Maintain the level of activity in existing units through coordinated national program.

Program outputs from July 1978 through June 1979:

Arrests:

Registrant related	247
Nonregistrant related	160
Total	407

Amount of legitimate drugs removed from traffic as reported by DIU states was 736,309 dosage units of controlled substances.

INTELLIGENCE PROGRAM

The purpose of the Intelligence program is to provide a variety of criminal intelligence support to the narcotics enforcement community. This includes the collection, analysis, production, and dissemination of intelligence data; and the development of the PATHFINDER and El Paso Intelligence Center (EPIC) capabilities.

The underlying rationale of the Intelligence program is to provide support that will promote the most effective use of Federal drug control resources.

Anticipated accomplishments in fiscal year 1981:

Support DEA, other Federal, State and local drug investigative agencies with tactical and operational intelligence designed to immobilize major drug trafficking networks and subjects through conspiracy, Racketeer Influenced Corrupt Organization (RICO) and other applicable statutes.

Collect, analyze, and interpret all source intelligence concerning organized crime's involvement in narcotics trafficking.

Continue the El Paso Intelligence Center (EPIC) as a vehicle for exchange of drug intelligence with other Federal, State, and local enforcement agencies.

Identify major PCP laboratory operators and traffickers.

Disseminate intelligence on the magnitude and direction of the drug threat, and identify major changes in world-wide trafficking patterns.

Continue to conduct Special Field Intelligence Programs (SFIP).

Continue efforts to fully use the Drug Abuse Warning Network (DAWN). Analysis of DAWN statistics provides trend information on abuse levels and availability in various areas of the United States. Continue analysis on other information systems such as the System to Retrieve Information from Drug Evidence (STRIDE) and the Offender Base Transaction System.

Collect, collate, and evaluate statistical information on DEA operations to assess the drug problem, DEA's impact on it, and trafficking patterns and enforcement activities internationally and domestically.

Continue to expand DEA's automated intelligence capabilities via PATHFINDER.

Program outputs include the following:

	1979 actual	1980 estimate	1981 estimate
Trafficking networks developed	200	185	160
Trafficker profiles completed	2,285	2,305	2,350
Enforcement targets identified	23,641	27,187	33,000
El Paso Intelligence Center (EPIC) watch transactions	120,000	140,000	160,000

TRAINING PROGRAM

The Training program provides entry level training for special agents, compliance investigators, and intelligence analysts; in-service videotape and sound/slide training programs for use throughout DEA; supervisory and Mid-level Management training programs for appropriate personnel of all disciplines within the agency; and a variety of Advanced and Special Skills programs such as Conspiracy Investigations, Financial Investigations, and Intelligence Collection to improve and update capabilities of the work force.

Anticipated accomplishments in fiscal year 1981:

Continue to provide necessary entry level training for DEA personnel.

Provide in-service videotape and sound/slide programs for use by all disciplines within DEA.

Continue to provide necessary supervisory and mid-level management, and executive training to enhance management skills.

Continue to provide advanced investigative and specialized skills to promote effective and efficient drug law enforcement.

Program outputs include the following:

Trainee days:	
1979 (actual)	18, 258
1980 (estimated)	18, 000
1981 (estimated)	18, 000

DRUG LAW ENFORCEMENT TRAINING PROGRAM

The purpose of the Drug Law Enforcement Training program is to expand DEA's enforcement and suppression efforts by increasing the cooperation between law enforcement agencies at all levels of government in the United States and convey changes in national priorities and strategies to all levels of drug law enforcement effort; develop required training programs and determine resource requirements to provide increased skills to Federal, State, and local police agencies; and utilize all available resources where appropriate to gain the benefits from greater expertise and prevent duplication of effort.

Anticipated accomplishments in fiscal year 1981:

Provide training in basic drug law investigative techniques and methodologies plus advanced and specialized skills to State, municipal, military, and other Federal police officers and chemists.

Provide training in management, leadership, and training of drug law investigative units for mid-level management to State, municipal, military, and other Federal police professionals.

Provide information, publications, films, other materials, and displays on controlled substances, drug abuse, and its problems to the public, community leaders, criminal justice agencies and associations, Controlled Substances Act registrants, and educational and health professions.

Program outputs include the following:

	Number of students		
	1979 actual	1980 estimate	1981 estimate
Drug Enforcement Officers Academy (8 weeks)	43	50	50
Law Enforcement Training School (2 weeks)	3, 172	3, 000	3, 000
Forensic chemist seminar (1 week)	62	70	70
Diversion investigations (1 week)	21	60	60
Conspiracy investigations (3 days)	434	500	900
U.S. Army CID (5 days)	144	150	150
Other training seminars (1–5 days)	2, 702	3, 000	3, 000

[Whereupon, at 11:52 a.m., Wednesday, April 16, 1980, the hearing recessed to go into executive session.]

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DEPARTMENT OF JUSTICE AUTHORIZATION CRIMINAL DIVISION

WEDNESDAY, APRIL 23, 1980

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m., in room 2228, of the Dirksen Senate Office Building, Senator Joseph R. Biden, presiding.

Present: Senators Biden, Thurmond, and Hatch.

Also present:

Senator BIDEN. The hearing will come to order.

OPENING STATEMENT OF SENATOR BIDEN

I'd like to welcome Phil Heymann and the members of the Crimina Division who are here. Today's Department of Justice authorization hearing will focus on the Criminal Division.

Some changes and reassignments are contemplated; the Division has also been criticized by the General Accounting Office, generally in the area of narcotics prosecution. Although the hearing will explore other matters, the primary concern to me as chairman of the Subcommittee on Criminal Justice is the effect on the domestic war on narcotics.

The Criminal Division is on the front line of that war. As you know, I just returned from Turkey, Greece, and Italy and we also had an opportunity to discuss this matter in another hearing with Assistant Attorney General Heymann, earlier this month.

I don't believe that we will succeed in keeping the flood of opium from leaving Pakistan, Afghanistan, and Iran, but based on interviews of over two dozen officials at all of these levels of three governments, I'm convinced that the three prime transshipment and producing countries, even when they give their best efforts, will only be of marginal assistance in stopping the flow of heroin from reaching our shores.

We appropriately focus on the critical law enforcement function of the Department of Justice because the prior formula for success in stopping heroin, waged through cooperative governments in producing countries like Turkey and Mexico, may not be available to us at this time.

Today's hearings will focus on the Criminal Division's plan to meet the challenges. As Assistant Attorney General Heymann knows, the international drug traffic is one of my primary concerns, but the concern also of this hearing today will be on the reorganization efforts and the overall activity and actions of the Criminal Division.

It seems to me that although my focus and my interest as chairman of the Subcommittee on Criminal Justice has been first and foremost in the area of need for coordination, cooperation and involvement with international drug trafficking, organized crime and the networks in this country, there's much more to be discussed by the Criminal Division and there's much more that is involved. I suspect that my colleagues who've indicated an interest in this hearing will also want to explore other aspects of the operation of the Criminal Division.

I don't mean by my opening statement to suggest that this oversight hearing will be limited to the manner in which the Criminal Division deals with the question of narcotics and/or organized crime.

I have a longer and more elaborate opening statement which I will defer, because there's much to be discussed and I know that, Phil, you have an opening statement.

I would suggest that both for the record and for my gratification you take the time you think you need to develop that statement and not merely put it in the record as sometimes you do in the interest of getting on to questions, if that meets with your approval.

STATEMENTS OF PHILIP B. HEYMANN, ASSISTANT ATTORNEY GENERAL; JAMES W. MUSKETT, CHIEF, OFFICE OF ADMINISTRATION; STEPHEN HITCHNER, CHIEF, OFFICE OF POLICY AND MANAGEMENT ANALYSIS; JOHN C. KEENEY, DEPUTY ASSISTANT ATTORNEY GENERAL, AND FRANCIS M. MULLEN, ASSISTANT DIRECTOR, CRIMINAL DIVISION, FBI

Mr. HEYMANN. I appreciate that very much, Mr. Chairman. I have with me today leading from my right, Jim Muskett, the Chief of my Office of Administration; Steve Hitchner, the Chief of my Office of Policy and Management Analysis; Jack Keeney, the Senior Deputy in the Criminal Division; and Bud Mullen, the Assistant Director for the Criminal Investigative Division in the FBI.

Senator BIDEN. Welcome, gentlemen.

Mr. HEYMANN. I would like to begin with a description of how the Criminal Division's functions spread out, what it is we ought to be doing, and then move from that into a picture of what that means in the white-collar crime area, broadly speaking, and public integrity.

After that I'd like to say some words about a subject that is of acute interest and concern in the public integrity area and that is the question of why we decline cases, what we decline, and whether we've been doing that in a fair and unbiased way.

But let me begin broadly and then I'll to move in more narrowly.

Senator BIDEN. Fine.

Mr. HEYMANN. And I suspect, Mr. Chairman, with your indulgence at the very end we may even be talking about individual closed cases to some extent.

Senator BIDEN. That's up to you. I have no objection.

Mr. HEYMANN. It's a year since I've had very long and very probing oversight hearings chaired by you, Mr. Chairman. I still laugh a little because they were the longest hearings I've ever been through. I think we took about 4 hours that day. I think we'll be somewhat shorter today.

Senator **Biden**. You're a very important division.

Mr. **Heymann**. That's probably why.

It's a year since my reorganization of the Criminal Division and we've been doing a lot and beginning to see what we are and where we're going.

I'll begin by talking about the Criminal Division's mission. The Criminal Division's mission can best be described in two terms—the functions that the Division performs, what we do; and what are the other agencies out there that we do it with.

I'll start for a minute with the latter. Criminal Division sits in this huge bewildering world of law enforcement, right there with stars and planets circling around each other and nobody quite in charge, with elaborate systems of cooperation worked out over time.

First of all let me mention five groups. There are some 1,800 attorneys in the 95 U.S. attorney offices. They spend somewhere between half and three-quarters of their time on criminal cases.

That adds up to much more time than we spend from Washington.

Second, there are over 20 major Federal investigative agencies now. Besides, of course, the Federal Bureau of Investigation, they include the Inspectors General in 15 executive departments and agencies, as well as the Drug Enforcement Administration, Customs, Secret Service, postal inspectors, IRS, and Bureau of Alcohol, Tobacco and Firearms. A world of investigative agencies.

Third, we relate closely and have to figure out a system for working with a variety of Federal regulatory agencies which send us cases: Securities and Exchange Commission, the EPA, Mine Safety and Health Administration, OSHA.

Fourth, there are literally thousands of investigators and prosecutors. There are thousands of separate prosecutorial units, maybe 3,000 or 4,000, that means offices at the State and local level.

They have concurrent jurisdiction over many offenses. Where we have concurrent jurisdiction with them, you can't begin to make sense of the system unless the Criminal Division or somebody else thinks what the relationship ought to be there.

Finally, there are a host of other organizations, public and private who affect law enforcement, even though it's not their principal concern.

Federal program agencies, by what they do, and the Congress, when it passes a new program, affect law enforcement substantially. We have constant interaction with the national security agencies on a variety of matters where their activities, particularly their secrets, can affect law enforcement.

What I'm trying to do is spread out this world of State, local, Federal prosecutors, investigators, program and regulatory agencies that somehow or other have to be integrated into the system. And they are to some extent.

Now, what do we do in the criminal division? The first major function of the criminal division is what you would expect, to develop and litigate cases, either independently or jointly with the U.S. attorneys, but only where specialized expertise, central coordination or national perspective is needed.

It's easy for me just to list the major categories of such cases. One is organized crime. From the Criminal Division we run the largest, single Federal prosecutorial office. The Organized Crime Section is larger than the U.S. Attorneys Office of the Southern District of New York.

It's intended to be cracked and we do it to give it emphasis and because the cases are so difficult to investigate and prosecute that they can't compete with the other work of the U.S. attorney's office.

Senator BIDEN. How many people are in that Section?

Mr. HEYMANN. I think that we are authorized 160 lawyers. I can't remember the staff's number, Senator Biden, but it's plus or minus 4 or 5 and at any given time because of the lapse in hiring. There would be 15 less than that, 15 or 20.

Senator BIDEN. For the record, will you submit to us the total number of attorneys and if you could a breakdown for us? We may already have that, but I don't think we do. A breakdown of the organization in that Section, how it is organized, who's resonsible for what and how cases get to and are processed through that specific Section, would be useful for the record.

[The material referred to above appears at the end of today's hearing.]

Mr. HEYMANN. Another major category of cases that are sensibly handled centrally is the new anti-Nazi unit cases in deportation and expatriation. The Office of Special Investigation cases require some kind of central expertise.

Espionage cases are extremely complicated to handle. We play an important role in all major espionage cases.

Major cases in the courts of appeals that are going to set the law for an entire circuit are an area where I want to see the Criminal Division play a bigger and bigger role here. We shouldn't let a single U.S. attorneys office command the litigation of an issue that may be important to maybe 15 U.S. attorneys offices in the fifth circuit. And the U.S. attorneys I believe agree with that.

Finally, we ought to and will be the ones to litigate where we're dealing with an innovative prosecutive or investigative technique. It seems to me that the Criminal Division ought to be the place that gives the resources to experiment with something new.

Now we are very much into financial investigations, because of nterest in narcotics. It may work out that we get very good results from financial investigations. We had very good results in a major case in southern California and in Florida we've had very good results. We want to try more. It takes resources, it takes coordination of a number of investigative agencies. We're sensibly in the forefront there.

Let me move from litigation.

When I described that network of thousands of separate units of investigators and prosecutors, I was describing what seems to me to be a situation requiring that someone to be attempting to exercise leadership in policy development and implementation.

If more than one wants to do it, fine. But some single actor, some actor out there, a U.S. attorney, FBI, DEA, us, State and local, should be assuming more responsibility for, if you like, fine tuning the system, or if you are more pessimistic, even rough tuning the system.

No single actor in the area I described earlier is charged with responsibility for those issues.

Now let me describe what I think the Criminal Division can do there. One thing is for prosecutors, to become involved in systemwide legal issues, such as one that I hope you've forgotten, Senator, grand jury reform.

Senator **Biden**. I have.

Mr. **Heymann**. Or, for example, the scope of the RICO statute. Relations with the Internal Revenue Service. Yesterday I was testifying at the Internal Revenue Service's appropriations hearings before Senators Chiles and Nunn.

These are legal issues that cut systemwide and there is literally no one else besides the Criminal Division that can play a major role in the legislative matters affecting the whole Federal system.

A third category of issues are the priorities, objectives, and declination policies to guide the allocation of Federal law enforcement resources. We have to think about what we ought to be doing in light of what others are doing, in light of what we can do most effectively, and in light of what will make the most difference.

There is no competitor, at least for prosecutors, in thinking about that. The Criminal Division has to do more and more of it.

You mentioned the problem of southwest Asian heroin which is a major problem. We have to step into any new major law enforcement problem that have policy dimensions.

Finally, the Criminal Division seems to be the sensible place for developing, at least in a crude way, a set of understandings with State and local prosecutors. We have established in the last few months an executive working group representing the Federal Government, LEAA, U.S. attorneys, Criminal Division, the National District Attorneys Association, the National Association of Attorneys General.

Much to our surprise we had business to discuss, and we discovered that we liked meeting. I described that as a triumph, that I heartily welcomed, when we met 2 weeks ago. I proposed that we meet next in September and I was overruled by a motion that we meet in Washington on the 22d and 23d of July.

Any group that wants to meet in Washington on the 22d and 23d of July——

Senator **Biden**. I'd check their credentials if I were you. They may have been infiltrated.

Mr. **Heymann**. The first function of the Division is litigation, but only where we have something special to give to it; the second function is policy, legal policy, law enforcement policy, allocation of resources.

A third major function of the Division is a traditional one: to provide legal advice, technical assistance, training for the U.S. attorneys, and in cooperation with generally the FBI to investigative agencies.

It's a little bit more than we can claim, to claim that we have the expertise and the knowledge to train the U.S. attorneys and train the agents, but we are in a position to combine our knowledge with what Bob Perry knows about the *Arahjo* case—that's the name I wanted—investigation in southern California, financial investigation.

We can bring in Bob Perry, bring in DEA, we can bring in the FBI through Francis M. (Bud) Mullen and we can put together a training program on financial investigations, and we've done it, which will then be given to assistants and agents in large numbers for half the country. We generally do it east of the Mississippi and west of the Mississippi.

The Narcotics and Dangerous Drug Section and DEA have done this together. We have done this with the FBI in the areas of fraud and public corruption.

A fourth major function of the Criminal Division and the last one that I want to mention is to review, coordinate, and in some way limit the use of the most sensitive statutes, investigative techniques, and judicial processes. To be a little bit of a judge within the system.

Congress put us there and it consumes an amount of time, personal time, that I wish I didn't have to give it, but the Division reviews and approves, and I have to personally review and approve all requests for electronic surveillance after a lot of help from my staff.

We as a division review and approve proposed indictments under the RICO statute. All immunities in the criminal area come to us. We make the decision as to who goes into the witness relocation program. We review, process subpenas of the press, we sit on the board now that has to approve every undercover operation with Bud Mullen, FBI people. We sit on it.

And of course, when it comes to the international aspects of criminal law, which I'm going to discuss just a little bit more later, we play the central role.

Let me conclude this part of my testimony by taking just a couple of minutes and spelling out how those functions in that world of many, many investigative agencies, all independent, prosecutors all independent, how those functions are playing out and what we're trying to do with regard to them in the white-collar crime area.

There are some interesting innovations.

First of all, let me talk about the economic crime field unit program. We mentioned it last year, projected to have 27 or 30 economic crime units, largely staffed by U.S. attorneys with something called an economic crime specialist, who will be on the Criminal Division's payroll.

It was initiated by order of the Attorney General in February 1979; perhaps we're one-third of the way to full implementation. Of our 94 or 95 districts around the country, 16 now have units; 17 economic crime specialists are in place, 1 of those districts has 2.

We expect to bring the total number of economic crime specialists to 23 by the end of the fiscal year. Our budget request for next year includes 19 more attorney positions.

Now what do we want economic crime units and economic crime specialists for? The answer requires you to look at what the world looks like to the U.S. attorney in, say, Portland, Oreg.

Economic crime cases are being brought to Sid Lezak in Portland, Oreg., by many investigative agencies. The investigative agencies don't have a natural way to tell each other where they're concentrating on. Someone has to be responsible for determining where there are gaps in investigation, where there are gaps in what we're prosecuting, and where there is overlap.

With some investigative agencies in the white-collar crime area, not with the FBI or the postal inspectors, but with some there's a need to stimulate their attention and train them in the necessary investigative techniques. These are agencies that haven't been in this business before.

There is a need to determine the outlook of State and locals, finding out what they think the problems are and seeing what they're doing.

In addition, we have to be getting from the U.S. attorney a sense of priorities so that we know exactly what he means to do in that area.

All of these are things that you would think a U.S. attorney might do himself or herself. But these are problems that a U.S. attorney can't reasonably be expected to handle personally along with managing a difficult caseload and a sizable office.

Therefore, we're sending specialists out there to be half special assistants to U.S. attorneys, half employees of the Criminal Division, to work with the U.S. attorney, with the investigative agencies, with the State and locals, and with businesses, and to find out what the white-collar crime problem is, tell us what it is, develop priorities between us and the U.S. attorney, and work with the investigative agencies.

That leads very easily to the second major development we have going on in the white-collar crime area.

At one point we thought that we would soon get economic crime specialists around the country in such a way that they could play this unifying policy facilitating role so that we could cooperate with the investigative agencies, U.S. attorneys, Criminal Division Deputy Attorney General.

But two things are happening. One, we're moving more slowly getting them out than we thought, because they're hard to hire. Hard to hire, not because we're short of recruits. We've had many recruits I believe. It's hard to hire because it's hard to find the right person for this specialized type of job.

The second thing that's happening is that we're finding we can't expect an economic crime specialist to cover five districts, five Federal prosecutor districts.

So we'll never have enough, we'll never have 94 for 94 districts.

We're left with the question, what would we make of the Attorney General's commitment to set national priorities within the area of white-collar crime? How would we do that.

We've done something that I think is very interesting. As an interim measure, and perhaps I'd like to make it permanent, the Division's new Office of Policy and Management Analysis, headed by Steve Hitchner, here on my right, assisted by the proper sections in the Criminal Division and the economic crime specialists out in the field, began last November a massive effort to collect and analyze data concerning white-collar crime and corruption on a nationwide basis.

We started with rather modest expectations for the project. I've told them that what I'd hoped for and wanted was nothing more than a certain amount of material collected and six intelligent people sitting around deciding what national priorities might be, but it's turned into something much more systematic, much more promising.

We collected a rather staggering amount of information from around the country, about what the Federal prosecutors and investigators in every corner of the country perceive to be the extent, nature, and importance of different kinds of white-collar crime and corruption.

This detailed information has come from a total of 238 units, including the economic crime units, the inspectors general, other divisions within the Department of Justice, the field offices, the regional offices of every major investigative agency, and the SEC.

We have compiled it in a remarkably orderly way and we are about to make recommendations to the Attorney General on a set of priorities that I think would be helpful to the prosecutors, helpful to the Department of Justice and helpful to the Congress.

For the first time, I think through this project, you are going to have a good sense of what we mean when we talk about white-collar crime and corruption.

Now, I think you're going to see it in much richer detail and you're going to have a sense of what we're doing and with a little bit of luck, it's going to be a very useful project. The Congress is going to be able to say, now what did you do on this fifth major area of white-collar crime you talked about what's the whole Federal Government done there, and get an answer.

Or why is such and such not listed as the major priority. That's predicting a little, but we have to get it through the Attorney General first and he's enthusiastic about the project already.

Those are the major items that we're doing.

We are supporting the inspectors general. The inspectors general program is obviously a major aspect of fraud prevention. The inspectors general can eventually do more to prevent program fraud than we could ever do through prosecution.

Attorney General Ben Civiletti had the extreme good sense to press for an organization of inspectors general such as this. It's chaired by the Attorney General and the Deputy Attorney General. We are working with them. It's hard, it doesn't move fast, but it is a major project within the Department of Justice and within the Criminal Division.

We are concerned about a new type of fraud, commodities fraud, which has been hitting the newspapers a lot.

In times of inflation there are large numbers of American citizens who are out there eager to protect themselves against inflation by buying futures or options on oil, gas, gold, silver, anything that you can sell that they think will be a hedge against inflation. With large numbers of people out there trying to buy hedges against inflation, there are large numbers of swindlers in little rooms, boiler rooms, with banks of phones calling them up, saying send in your advance deposit and you'll be secure against inflation.

It's a national problem. It moves from State to State. It requires some centralized expertise, it ought to be coordinated with the Commodity Futures Trading Commission. We will probably move into that area. We are getting very serious about major life-endangering violations of health and safety regulations that the Congress has passed. The Senate in the proposed criminal code has given us a crucial step in that direction with a knowing endangerment provision. The House has not so far agreed with that. Whatever happens, we will press very hard on these issues.

I should mention one last thing, international aspects of economic crime, and that will take care of us in this realm of initiatives that you should know about.

We are also concerned about the relationship of overseas banking and overseas financial institutions to white-collar crime and fraud.

We're worried that there may be substantial advantages that are obtained by white-collar criminals as well as by narcotics dealers through the use of overseas banking channels.

We have assembled under the leadership of the Chief of the Narcotics and Dangerous Drug Section an Interagency Study Group on international financial transactions. Participants come from the Comptroller of the Currency, State Department, Federal Reserve Board, Customs Service, DEA, FBI, Postal Inspector Service, Central Intelligence Agency, Internal Revenue Service, and SEC. We are going to try to find out what we can about international banking and fraud.

That, Senator Biden, is my summary for you of what I believe the Criminal Division ought to be doing, how that relates to the other agencies that are out there, and what we're doing to give concreteness to the four broad functions that I think define the role of the Criminal Division.

If you like, I could pause and respond to questions. I would like at some point, after we've talked about this, to go into my supplemental statement on that last and crucial part of our responsibilities and that is calling the shots fairly whichever direction they go.

Senator BIDEN. Well that being the case, if you'd like to do that, why don't you just continue? I have a number of questions; I'm sure that Senator Thurmond does also, but I think it's best that you go forward with all your testimony and then we can address it all.

Mr. HEYMAN. It's a pleasure for me to do so and I appreciate the patience of you and Senator Thurmond.

Let me take a few more minutes of the committee's time to discuss how we performed one essential part of our mission—the investigation, evaluation, and, where appropriate, prosecution of public corruption cases.

When you put it into terms of calling the balls, and the strike, strikes, and not caring whether the pitcher is Republican or Democratic, you're not just talking about one essential part of our mission. As my statement says, you're talking about the single most important part of our mission.

I'd like to begin by reviewing the rather dramatic record of the last few years, in terms of public integrity and public corruption cases. Then I'll discuss how it is that out of any 100 initial allegations, most will not and should not lead to a prosecution—that is why you will find us declining cases against political figures and governmental officials.

Third, I'll talk about some possible causes of misunderstanding about the nature of declination decisions. And finally, I'll just give a short peroration on why the courage to close cases—and it takes real courage among prosecutors and investigators—is as important as the courage to bring cases.

Occasionally, I'll touch on recent criticisms, in my view, unfounded criticisms, of several of our declination decisions in the last few years. I would be disingenuous if I didn't say that this is stimulated in our minds by a series of articles thoroughly questioning the decisions of the public integrity section. The answers seem to me to be clear, but it's fair to ask the questions.

Let me begin with the rather remarkable record of what's happened in the public integrity area, and some statistics. Over the last few years, there has been a remarkable burst of activity in tackling public integrity cases on the part of the Federal law enforcement system.

To the best of our knowledge, 43 Federal officials were convicted for corrupt activities in 1975. In 1979, 102. In 1975, State and local officials convicted numbered 112; in 1979, the number was 182.

To keep the Government honest, you have to police the private individuals who seek to corrupt public officials. There, too, the growth has been striking. In 1975, 24 private individuals were convicted in cases involving public officials; in 1979, the number is 10 times greater.

To show what's in the pipeline, let me cite an FBI statistic. In February 1978, the Bureau had underway 574 public corruption investigations, involving everything from crooked cops on the beat and school board members taking kickbacks, to persons at high levels of State and Federal Government.

In December 1979, the public corruption investigations underway numbered 1,192.

To account for this increase is not hard, but it's worth the committee being aware of why it is coming about. I don't think it means that public officials are more or less honest than they ever were. Instead, it's a satisfying result of a deliberate change in focus in law enforcement policy. The centerpiece in the growth was Attorney General Bell's decision in early 1977 to place public integrity cases among the Department's top four criminal priorities. And, of course, Attorney General Civiletti's continuation of that priority. That decision has meant more agent time, more attorney time devoted to the subject and to sophisticated analysis.

A second cause of the growth has been the creation of new operating units. The FBI created a public corruptions subunit within its White-Collar Crime Unit. In 1976, Attorney General Levi created a Public Integrity Section in the Criminal Division, drawing together the formerly scattered effort directed at public integrity cases. The Public Integrity Section has grown from 9 attorneys to a current complement of 28. It's been possible with these specialized units to learn more about the crucial statutes and the relevant investigative techniques.

The FBI has developed a team approach to its investigations, consulting with the U.S. attorney early on so as to develop cases in the most effective way.

The Public Integrity Section exercises leadership among the U.S. attorney offices with training programs, consultation, and joint prosecutions.

A third reason for the extraordinary growth is the plain enthusiasm of FBI agents, newspaper reporters, Government program agencies and prosecutors for developing public corruption cases. In the decade after Watergate, these cases are perceived as important and urgent, contributing directly to the public welfare.

As in the competitive world of journalists, so in the competitive world of law enforcement agencies, detecting and proving a case of major public corruption is a highly valued achievement. It's extremely valued in the Federal system.

The fourth cause of growth—and the greatest catalyst for continued growth—is the ironclad policy of independence adopted under the last two Attorneys General. This policy has insulated the Department of Justice from influences that should not affect decisions in any criminal case.

Under a rule promulgated by Attorney General Bell in September 1978 and repromulgated by Attorney General Civiletti last year, the prosecuting attorneys in the Department, whether at the Assistant Attorney General, section chief, or staff lawyer level, are forbidden to have any contact or communication with the White House or the Congress concerning open cases.

That is complied with in regard to the White House without exception, almost without exception in regard to Congress, and these exceptions are simply the mistakes that come when someone picks up the phone and calls and somebody else answers it.

Another part of the policy says that prosecution decisions will be made at the Assistant Attorney General level or the level below that. If the Deputy Attorney General or the Attorney General wishes to overrule a particular decision, the overruling must be submitted in writing, including a statement as to the reason. It must be made public, if that's consistent with privacy rights. This is an extraordinary development. The confining of the prosecutorial decision to a professional, largely career-oriented, sphere. The White House and the Congress are forbidden to go near it. The Attorney General, the Deputy Attorney General can only become involved if they're prepared to go on the record as to what they're doing. The policy of delegating the decisions to the career prosecutors, and making decisions on the record, insures that case decisions are made carefully and completely on the merits. It's healthy. It's symbolically right. It reinforces the nonpolitical character of a nonpolitical department, particularly in the criminal area. I'll abbreviate the next section of my testimony with the understanding, Senator Thurmond, that everything will be going in the record.

The record makes clear that there is this ironclad rule of hands off, this neutral zone, as Judge Bell used to call it, this noncombatant zone of criminal law enforcement. Let me make it clear that it's really operating that way.

It's quite impressive. In the last 3 years the Department has obtained indictment and conviction of five Congressmen for corrupt acts connected to office. Their names are set out in the written testimony. We also sought and obtained indictments against three other Congressmen, although we didn't succeed in obtaining conviction.

We are currently proceeding with the Abscam investigation which is very dramatic; and quite large. The investigation of persons closest to the White House has been extensive and painstaking. So much so that the Washington Post, last Saturday, ran a news story speculating whether the potential cost of legal defense would not discourage some people from public service. Not a foolish worry.

We've just finished the Lance trial. We appointed a Special Counsel to investigate the President and his family, and the finances of the Carter warehouse. We conducted an 18-month-long grand jury investigation to follow every strand of allegation concerning Robert Vesco's fugitive status and a White House official.

We requested appointment of a Special Prosecutor to investigate alleged cocaine use by the White House Chief of Staff. The Washington Post mentions others. I don't believe that there has ever been a White House that has been so completely willing never to ask questions, never to respond, never to say a word, because we haven't heard a word from them, despite substantial and thorough investigations within the White House family itself. We have not heard a word.

The Public Integrity Section of the Criminal Division, which is under a little bit of attack, had full or shared operational responsibility for many of these cases.

There are also lesser known cases of Federal officials in which this section had an operational role.

These include the conviction of a representative to the Great Lakes Regional Commission for using Commission funds to aid Democratic farmer or labor candidates, a Federal Cochairman of the Coastal Plains Regional Commission, a former American Ambassador, a former Assistant Director of the Bureau of Engraving and Printing. We're proceeding to trial in the next few weeks against the former Chief of the Federal Highway Safety Commission.

The State and local level of the Public Integrity Section has been very active. Over the last 3 years, we have participated in the indictment and conviction of a Mississippi State senator, one of the most powerful members of that body; a prominent Pennsylvania State representative; the sheriff of Madison County, Ill.; first deputy sheriff of Randolph County, Ala. for vote buying; the sheriff of Perry County, Miss., for RICO violations; conviction of the East Chicago, Ind., building commissioner and sanitary district commissioner; the former police chief of Houston, Tex., the insurance commissioner of Florida; a county judge in St. Francis County, Ark.; chairman of the State Liquor Control Commission in Iowa; the chairman of the Board of County Commissioners of Knox County, Tenn.; police chief in Gary, Ind.; and the former Mississippi director of highway and safety.

We recently indicted also the two most prominent members of the Washington State Legislature for allegedly accepting payoffs from undercover agents who posed as persons pressing for legalization of gambling in that State. The list could go on. If I would include cases handled solely by U.S. attorneys around the country, and with no Public Integrity Section work involved, the list would be far too long to read to you.

But the point is clear. Our activity as prosecutors has been far reaching, productive, and wholly impartial in ferreting out public corruption. If anyone in the audience or on the committee wants to take the trouble to check the party affiliation of the defendants in all these cases, and we picked out the major cases to bring to your attention, they will be left with no doubt as to the nonpolitical, independent character of our activity. Somebody just may want to see how the Justice Department under a Democratic administration handles Democrats and Republicans, with balls and strikes.

The record is one I'm proud of. The FBI and the attorneys in the Criminal Division are proud of it, and, this is important at the moment It's a record that's been developed in large part under the leadership of Tom Henderson as Chief of Public Integrity.

Winning convictions, though, is only half a prosecutor's job. Equally vital is to sort out which cases to prosecute and which to decline.

Declinations are the rule, not the exception. What I'm building up to, of course, is that the Public Integrity Section and Tom Henderson have been questioned, legitimately questioned, about a set of declinations and the declinations looked dead right to us.

They looked like cases that should be declined. But the question is a perennial one. Declinations are the rule, not the exception. Of 171,000 criminal matters referred to Federal prosecutors in fiscal 1976, 108,000 were declined, 63 percent. The Senate and the House came back to us and said, my God, we're stunned by that, what is happening here? But it's the rule, declination of cases.

Cases are declined for a variety of reasons. The first is scarcity of resources. You can't handle all the cases. Sometimes I like to playfully say we have one Federal prosecutor for 100,000 American citizens and out of 100,000 citizens too many commit crimes for each of our Federal prosecutors.

We try to make our resources have the most effect by selecting areas where deterrence is especially important, where the Federal interest is the greatest, cases with the greatest culpability and cases where we have the best chance of winning. We often defer to State and local prosecution or to administrative sanction to save resources.

The most important reason for lack of prosecution is a lack of merit in the prosecution. Often, upon investigation, we discover there simply is no evidence supporting the initial allegations. In other cases the available evidence turns out to be weak. There's a vast difference between making an allegation and mustering sufficient proof, and the last words I'm about to say are important, to convince 12 jurors, each of them, beyond a reasonable doubt. That's what we have to be able to do before we bring a criminal case, we have to think that we can convince each of 12 jurors, beyond a reasonable doubt.

Declining a weak case is part of a prosecutor's duty of fairness, for the burdens of indictment and trial were never intended and they're not intended by the Congress or the Executive or the courts to be a form of curbstone punishment that we hand out to scoundrels. "If you're a scoundrel we'll prosecute you, even if we don't think we can convict you." Nobody wants that; it's not right and we won't do it.

Declining weak cases is also important because too many losses at trial would seriously weaken the credibility of the Department's future prosecutions. It will hurt us in the long run.

Attorney General Bell suggested that we should seek an indictment only where the available evidence would be at least likely to produce a conviction, likely to get 12 jurors beyond the reasonable doubt. I think that's an extremely sensible standard. Judging what is a weak case is partly a technical evaluation of the evidence: What witnesses are likely to be available, what they will testify to and what credibility they will be given by the jury.

It's also a matter of gaging whether the jury is likely to be impressed by the wrongfulness of the defendant's conduct. Juries can nullify criminal charges outright or they can use terms like "corrupt intent" in a statute to exercise their own sense of fairness and equity.

Many declination decisions are clear calls. If a Government employee cheats on his sick leave, it may be a Federal crime, but almost all prosecutors would decline prosecution in favor of administrative discipline. In the case of a major embezzlement from a Federal program, the opposite call is equally clear. But if we're doing our job right, there will always be tough calls. The cases that will be referred to us, the cases that we'll investigate, will range from the obvious no prosecutions, to the obvious prosecutions and there will always be many cases in the middle.

Every prosecutor faces numerous such close decisions which depend on his evaluation of the adequacy of the evidence, the jury appeal of the case, the Federal interest in the case, the need for deterrence, the availability of alternative sanctions. It is a prosecutor's obligation to call those cases on the merits, in good faith judgment, based on his own evaluation of the case, unaffected by fear of criticism whether he decides to prosecute or not to prosecute.

It's important, I think, to have public support and understanding of this part of the job of prosecutors and investigators. If prosecutors are afraid to call cases on the merits and to decline prosecution when appropriate, the criminal process will be susceptible to serious abuse. Yet at the moment, in the post-Watergate era, all the outside pressures, all of them that operate on our law enforcement officials, our prosecutors, our investigators, push in only one direction, in favor of not declining cases, at least in the area of public corruption.

Declining, even on a case where there is no evidence is likely to lead to charges by somebody somewhere of coverup. And there will always be close cases on which reasonable prosecutors can differ. When they involve a political figure, the prosecutor knows he's likely to be accused of covering up. Law inforcement people care deeply about their reputations for honesty. They are thin skinned about charges of cover up. Without public understanding of the declination function, the temptation will always be to prolong investigations that deserve to be closed, to reveal information that should be kept confidential, even to charge and prosecute when no indictment deserves to be brought.

Now the reason I'm bringing this up, of course, is because one example of misunderstanding of the declination function is the recent mild, and it is mild, flurry of assertions about the prosecutorial record of a man whose rectitude is beyond question. There is nobody in the Justice Department, and I've gone around checking, and so far as I know, nobody in the FBI, who questions the personal integrity and rectitude of the Chief of our Public Integrity Section, Tom Henderson.

He has been a stalwart and steadfast Chief since the creation of the section. It was interesting that he was attacked a little bit in the Jack Anderson column this morning and Mr. Anderson had the decency to put in there that Tom Henderson is a man whose reputation for integrity and conscientiousness is proudly recognized. I thought it was a decent and fair thing to do.

Henderson has been a stalwart and steadfast Chief since the creation; he has led the Public Integrity Section for 4 years in creating the impressive string of prosecutions and convictions I described. He has a reputation for complete independence, for bending to no political wind, for having the guts to call cases both ways completely on their merits.

He has shown tough mindedness and independence of judgment in every matter we have handled together. He has never shirked from telling me he disagreed in the strongest form possible. He does not change his view to please the front office. In short Tom Henderson is universally thought among those who work with him to be beyond question in terms of integrity, rectitude, and nonpartisanship fairness. The questions that are asked in that flurry of fair questioning about a few recent cases may be legitimate, but the answers some have given to the questions are out of touch with a very simple mathematical reality.

Out of the hundreds of matters that the Public Integrity Section considers each year, and it is hundreds, any intelligent observer will find a dozen or so on which reasonable prosecutors will differ. And the Public Integrity Section deals with only political figures. The logic of that is inescapable. There will be every year, in and out, a dozen or two dozen debatable, close prosecutorial calls that go against prosecution, that involve major political figures or minor political figures. There won't be two dozen on major political figures.

The Public Integrity Section has to decline prosecution of political figures in at least some debatable cases. To conclude from the legitimately debatable nature of a handful of declination decisions and from the fact that they involve governmental or political figures, which all Public Integrity Section cases do, that the declinations are a sign of nonindependence or political pliability, an accusation that some few have made against the Public Integrity Section, is just foolish.

The particulars in the assertions about Tom Henderson's prosecutorial record more than bear out my point. The observers have put forward a list of a supposedly "debatable dozen"—declinations another prosecutor may have called a different way—face several extremely awkward facts in citing the declinations as examples of anything besides independent judgment.

The awkward facts are overwhelming. Most of the cases are, upon scrutiny of the full facts, declinations with which no prosecutor would disagree, because the evidence in each was extremely weak or nonexistent.

For most of the cases, they are not debatable calls. The debatable dozen shrinks to the debatable few. By debatable, I just mean legitimately argued either way.

Second, many of the transactions that are being questioned concern events with public employees occurring before this administration, as to which there could be no conceivable motive for the Public Integrity Section in a Democratic administration to go easy even if you assume the most venal of worlds.

Finally, and this is the one that strikes me personally the most, most of the declined cases concern people who have absolutely no prominence or political power. The cases that are being questioned involve, with my apologies to the people who are accused, nobodies, absolute nobodies. Most of them, not all of them, but most of them are unknown to anyone in this room, except perhaps by reading the article. You and I have never heard of most of them, making it more than a little unlikely that the declination could have been biased in any way to please someone is a position of power.

These are the Smiths and Joneses and Browns who are the everyday workers in a Federal bureaucracy. It's implausible to think that there is something other than independent judgment going into

those decisions. Then why does it happen? The fact that decisions
workers in a Federal bureaucracy. It's implausible beyond belief to think that there is something other than independent judgment going into those decisions. Then why does it happen? The fact that decisions like these are characterized as raising serious questions, and it's perfectly legitimately to question them, has been troubling to lawyers in the Criminal Division and many FBI agents. The Director of FBI, Judge Webster, was kind enough to do something that I thought was extraordinary, sticking his neck out in a situation that he didn't have to. He sent Tom Henderson a letter and he sent me a copy of it. Chairman Biden said, if you have such a letter, you'd better bring it and I forgot to bring it this morning, but I'll submit for the record, with your permission.

The letter says, if I may paraphase, "Tom, the situation has never been better than it is between the FBI and the Public Integrity Section. And it's going to be a great loss when you leave. If you like, I would like very much to get an FBI representative up at your confirmation hearings. I'd like to have somebody from the FBI indicate what the FBI thinks of you." On the basis of that letter, I asked Bud Mullen, the Assistant Director of the criminal side, to come and he's here today, in case anybody has any questions.

We care and we worry about allegations that legitimate independent judgments look corrupt to somebody or look worrisome. When assertions are made about Tom Henderson, whose integrity is unquestioned in this system, the bell tolls for every lawyer and agent who has to decide close cases involving political figures and who deeply values his reputation for integrity. Why has it happened? I just have about 5 more minutes and I'll be through; I appreciate your indulgence.

In a sympathetic light, there are a number of common reasons why the declination function may be misunderstood, why people think there's something wrong going on there. First, very few people know how common declinations are. The 63-percent declination rate stunned the House and the Senate Judiciary Committees and caused them to ask us for an explanation.

Second, it can be hard for anybody, especially lay people to keep in clear view the difference between scandalous, improper, immoral behavior and criminal behavior and the difference between suspecting criminal behavior and proving it, proving it to each of 12 jurors beyond a reasonable doubt, particularly when a matter is being discussed in the nontechnical confines of a journal or newspaper. When we pursue an investigation, often we find that a suspect behaved badly; he even may have acted like a scoundrel, and yet he has not committed a Federal criminal violation.

For example, when a legislative subcommittee omits to put a witness under oath, and we have one of those, I believe, in the set that's being talked about, we simply can't bring a perjury prosecution against the witness, even if he lies terribly. If he's not under oath, then we can't prosecute him for perjury.

Sometimes, we end up at the conclusion of an investigation strongly suspecting the person is guilty of the criminal offense, but unable to assemble adequate admissible evidence. The distinctions between scoundrels and criminals, between people we believe have committed crimes and those whom we can prove it against are frequently lost.

Another cause of potential misunderstanding is that we generally can't talk much about our declinations. Investigative information is to be presented in court or not at all. We can and do present to this committee, whenever it wants it, and to the House Judiciary Committee, whenever it wants it, or with some very few exceptions, any closed file that you want to review. It's a practice that is a strong guarantee that we are not hiding something or conducting inadequate investigations.

We have to protect privacy. We generally refrain from disclosing our investigative information, except in the confines of an indictment or trial or in response to oversight requests from the Congress on closed cases.

Certainly as an agency following the rule of law, we have no business broadcasting our suspicious or hunches about guilt.

So the public often sees us closing a case on what looks to them and to us like a person who may well be guilty, or at least a scoundrel, and we don't say and we should not say, that person is probably guilty and was also a scoundrel. It just looks like we're giving him a whitewash. Yet all we're saying is there is not the evidence to convince 12 jurors beyond a reasonable doubt that he committed a crime.

Another potential cause of misunderstanding is that the allegations of criminal conduct that go to the Public Integrity Section often surface in highly charged settings where people have properly, strong feelings about matters of moral conduct or public policy and the criminal law is simply not giving those feelings adequate expression.

All of the cases that I'm about to describe are cases that have been thrown up as questionable declinations. If a lobbyist gets advance access to inside information from a Government department, that cozy situation is a troubling one, fully warranting congressional inquiry and reform.

But if we are determining whether the lobbyist committed perjury in testifying about the cozy practice he had with a Federal agency, there's no way around the criminal laws requirement of literal falsity and the two witness rule.

In another case, the Civil Service Commission is discovered to be giving weight to political recommendations in hiring. That's a scandal and heads should roll, but if we're looking at whether a criminal obstruction of justice occurred in the course of a commission's response to a congressional investigation, we have to measure our evidence against the stringent intent requirement of the obstruction statute.

That we end up declining prosecution doesn't mean that we condone the hiring abuse or the inadequate response to a congressional inquiry. Yet the distinction between criminal behavior and immoral behavior and the frequent difficulty in meeting the reasonable-doubt standard can be hard to keep in clear focus. Especially when people seem to desire some sanction for immoral conduct.

A fifth reason why declinations, perhaps are viewed with more suspicion, by a hundred times, than I'm saying they deserve is an interesting one.

The law enforcement business is very competitive, with jousting and bruising between agencies. It is competitive between State and Federal prosecutors, between Federal prosecutors and Federal prosecutors, between the U.S. attorneys and the Department of Justice, between the FBI and DEA, between the FBI and some U.S. attorney's office. This is a rough-and-tumble bunch that I blundered into. They like to play tackle football, they don't like to play softball. Each one hopes to make the big case. Each one is surprisingly willing to accuse the other of covering up, backing down, inadequate investigation, if the other won't go along. There will not always be complete unanimity among all the prosecution lawyers, all the grand jurors, all the investigative agencies on what tactics are to be used in investigation or whether a case should be declined.

There is, of course, a fair process of review, for resolving any serious disagreement. The FBI knows very well, and exercises that knowledge, that if it disagrees with the decision of the Public Integrity Section, if they want to prosecute and Public Integrity says no, they can come to me or they can take it to the Deputy Attorney General or they can take it to the Attorney General.

They know that; it works that way. They have come to me, and in one of these cases, the Tennessee investigation, they did just that, maybe more than once.

But if an observer is looking for—if an observer has a close declination question, involving a Federal official, or a State official or a political figure, and is looking for an insider who is prepared to say it's a sellout, it's corrupt, it's wrong from the word go—I have never seen anything so bad in my life—there is a fair chance that the observer will be able to find someone in the Federal investigative or prosecutorial network who is likely to say that.

Perhaps not many, but there are enough out there that someone is likely to say it. Vocal dissent is part of the roughhouse world of law enforcement. The last two reasons why we get a beating on declinations that we don't deserve, I think, is the typically slow course of criminal investigations and the fact that the procedures are often hard to understand.

There are sometimes very good reasons why investigations go slowly. We may have to wait for a tax return under the Tax Reform Act, we may wait for a second trial of a lesser individual to go through in order to try to obtain the cooperation of the defendant after trial. Somethimes the delay is caused because we are overloaded; sometimes the delay is caused because we have been careless, and I don't mean the Public Integrity Section, I mean any Federal prosecutor and probably any State prosecutor. The delay caused by carelessness is likely to diminish immensely with a new management information system that we're putting in, that will enable Jack Keeney and me to know what case hasn't been acted on for 2 months.

Yet there are delays, often legitimate and sometimes illegitimate. I suspect that Congress experiences illegitimate delays too. Yet when a reporter inquires about the Congressman XYZ investigation and is told 6 months later that it's still under investigation, the first impulse may be to think it is a stall or coverup.

We can't say much if it's still under investigation. If the reporter is lucky enough to then write a story, and say why don't they get off their behinds on the Congressman XYZ investigation, it's likely that if we still are investigating, we will take some step in the near future, not in response to the story, yet it will look like it's in response to the story. This is not the most important, but it's another reason why there's a lot of confusion in the area of prosecution of political figures.

Finally, there's the question of procedure. The Jack Anderson column this morning concerns procedures in the grand jury—if the committee feels like going into it, I'll be happy to go into it—but a lot of it is simple confusion about the procedures and traditions of grand jury practice. When procedures are complicated and when you're dealing with a political figure and when it's a close case, there is a tendency to think that everything that we cannot do because of procedural rules is an attempt to coverup.

Well, let me close. The committee has been very indulgent. I began by showing the figures for public corruption cases are going up quickly. I began by saying that the reasons they're going up is because Attorneys General are saying make them go up, because the FBI and we love this type of case, almost dangerously so, and because we are free of any entanglement from the White House or from the Hill. We simply cannot be touched. I feel absolutely fearless with either group. We cannot be touched.

They're going up, and, they're going to increase next year and the year after. I ran through with you a list that shows that the White House has been investigated without a comment from them, to my knowledge. I don't know what the President says to the Attorney General, but I know what the Attorney General says to me, and I am not aware of a word on any of these matters.

The Congress has been investigated thoroughly without a comment from anybody except the Congress and a list of State and other Federal officials that's imposing.

I suggested that you might check their political parties to find out whether you think we're favoring Democrats over Republicans.

I've said that there is a source of concern and I want to close talking about that. And the source of concern to us is that there can be real doubts about someone of the integrity of Tom Henderson not that his decisions can be questioned. They ought to be questioned with something in mind like Jack Anderson's column this morning: This is a man whose reputation for integrity and conscientiousness is not questioned. That ought be in the background as Anderson put it in the background.

But I want to close this way. I don't make light of the public's responsibility for scrutinizing the action of law enforcement and prosecutorial agencies.

That is a very important long-term safeguard against abuse. But at the same time we have to hit a balance, all of us have to hit a balance. Not a balance between prosecuting the powerful when they're gulty and not prosecuting the powerful when they're guilty, but a balance between being sure that we prosecute everybody who's guilty, powerful or not, and being sure that we don't prosecute people when there's no fair chance of conviction, powerful or not.

We have to avoid creating a system in which the only incentive is to prosecute, no matter how weak or nonexistent the case. Members of Congress know better than anyone that in running for office and holding office, they will be the target of allegations from people of varying degrees of credibility. They'll be the target of allegations of criminal conduct. A system in which momentum builds up unceasingly from public allegations against the political figure, to paper-thin indictment, without the chance for an independent hardnosed assessment by a prosecutor of the merits of the case, would hardly be a good system.

If we don't insist that our prosecutors look hard before they turn an allegation into an indictment we will find that political figures, governmental figures are being prosecuted very unfairly, punished by prosecution.

The reason I didn't want Tom Henderson to come up here today, although some members of the committee wanted Tom Henderson to come up, was because I don't want the next head of the Public Integrity Section—I've appointed Gerry McDowell, one of the most highly respected prosecutors, the next head of Public Integrity—I don't want the next head to see, to know, to believe that the head of the Public Integrity Section can at any time be called before a committee of either House and publicly attacked for his declinations.

I don't know whether an attack would have come or not, but I don't want that to happen. I wouldn't let that happen. I am responsible for what the Public Integrity Section does. If the Public Integrity Section is going to fairly call declinations, they're going to make calls without fear of accusations of coverup on one side, or fear of political pressure on the other.

If they are going to fairly call them; they're going to have to be insulated on both sides. Insulated not only from the White House or Congress saying, don't prosecute this case, but also from the White House or Congress saying, you have to prosecute this case.

. I don't have to be insulated. Call me. I'll come when you want me, but I don't want the next Public Integrity Section chief to be deciding every case, recognizing that he may be called before a committee of either House and asked why didn't you prosecute that perhaps, scoundrel, perhaps likely criminal, but someone against whom we don't think we can get a conviction. Part of the fault belongs to us. We haven't stated what I'm saying now, clearly enough in the past. We haven't stood up and said it. You have to stand up to say it.

Part of the problem is that other people have to recognize what I'm saying. Soon after his appointment, Attorney General Civiletti stood up and said that all Department lawyers ought to remember that there's an ethical obligation to handle Government cases with reasonable speed and to close cases when closing is appropriate.

We have to have the courage to close unworthy cases that are going nowhere, rather than endlessly postponing decision and letting investigation itself become a new form of punishment.

If declination decisions in public corruption cases are automatically made the basis for charges of cover up, then our system of justice will be in trouble. For then investigations that should be closed instead will be indefinitely prolonged, with unjustifiable damage to the lives of people who are guilty of no criminal offense. And pressure will grow for indictment, no matter how thin the proof.

In light of the record of prosecutions and aggressive investigations established by the FBI, by the U.S. attorneys offices, and under Henderson's able leadership of the Public Integrity Section, a declination decision in the public integrity area is surely by now entitled to a presumption of regularity.

Jack Anderson gave a little bit of that today. When we decline to prosecute unmeritorious cases, it is as much a part of our system of justice as when we prosecute the guilty. That's all I have to say, Senator Thurmond, and I appreciate being allowed to go on at such length, but it's a matter that we feel very strongly about.

Senator THURMOND [presiding]. Thank you, Mr. Heymann, for preparing and those who are with you.

Mr. Heymann, have you requested any new positions for the Criminal Division in this year's budget, and if so, how many?

Mr. HEYMANN. The only new positions, Senator Thurmond, are 20 for the economic crime units, 19 of them are attorneys, 1 is not. That would allow us to get the economic crime specialists out around the country to about 28 or 29 districts.

I think we have one in South Carolina right now.

Senator THURMOND. How many lawyers have you in the Criminal Division of the Justice Department, now?

Mr. HEYMANN. Let me ask Mr. Muskett for the exact figure.

Mr. MUSKETT. Senator, we have a ceiling of 448 attorneys and we are authorized 473 and we have on board 396.

Senator THURMOND. You're authorized 473?

Mr. MUSKETT. Yes, sir, and we have money for 448.

Senator THURMOND. What?

Mr. MUSKETT. We have the money for 448.

Senator THURMOND. For 448 and you actually have 300——

Mr. MUSKETT. 396 on board,

Senator THURMOND. Ninety-six——

Mr. MUSKETT. With 29 attorney commitments.

Senator THURMOND. You're not filling those positions because you're trying to cooperate with the President in reducing the budget, or just why?

Mr. MUSKETT. The freeze went on approximately 30 days ago, and since then, we haven't made any additional commitments.

Mr. HEYMANN. The answer, Senator Thurmond, is we are hit by the freeze now. The President's freeze on Federal employee hiring will force us to go down substantially in terms of numbers. Substantially, it's hard to guess, we'll end up maybe 30 or 40 down.

We also are running with some 50 vacancies because a number of positions, particularly the economic crime positions, are difficult ones to fill that take a long time to recruit for.

Senator THURMOND. Well, would you be greatly handicapped, if you did not fill these positions and you continue with the 300-odd people instead of 400-odd?

Mr. HEYMANN. I think we're seriously handicapped. Obviously, Senator Thurmond, almost any operation can work with about 80 or 90 percent of the resources it has. Well, a number of those vacancies are in organized crime. We still have—how many vacancies in organized crime, Jim?

Mr. MUSKETT. Fifteen.

Mr. HEYMANN. We have 15 of them in organized crime. We have major organized crime workloads that the committee itself investigated and satisfied itself of. With those 15 vacancies, we will be slower in bringing important cases, but we'll still bring important cases. We won't be able to bring as many, but we'll still bring some. It's much the same in fraud and public integrity and economic crime areas. They're important to us.

Senator THURMOND. You feel then that when the freeze is lifted that you should employ more people.

Mr. HEYMANN. I'm quite satisfied with the budget that we set up. I think that if the freeze were lifted, we ought to go up to our present ceiling—plus 20—which is what we requested of the Congress.

Senator THURMOND. Your present ceiling plus what?

Mr. HEYMANN. Plus 20 new positions, which is what we requested of Congress.

Senator THURMOND. And that would be a total of how many?

Mr. HEYMANN. I'm mixing authorized positions and ceiling positions. Give it to me, Jim.

Mr. MUSKETT. 493 authorized positions and 468 ceiling. We would have the money to employ year-round 468 attorneys.

Senator THURMOND. How many lawyers are assigned now to this Public Integrity Section?

Mr. HEYMANN. I believe the figure is 28. Is that right? Do you want to know in place or how many slots, Senator Thurmond?

Senator THURMOND. How many have you requested in the budget and how many do you have, actually?

Mr. MUSKETT. We're authorized 40; the ceiling is 39; they have 29 on board and two commitments—attorneys waiting to come on duty.

Mr. HEYMANN. Much of that 40 will go out in the field as economic crime specialists.

Senator THURMOND. I believe you spoke about the declinations in your presentation. Is the increasing number of declinations the result of increased grand jury activity, or an increase in white-collar crime?

Mr. HEYMANN. I suspect that we don't have an increasing number of declinations, Senator Thurmond. What a declination really means, if you get to the bottom of it, is that in some way the investigators and the prosecutors are not fully in tune. It means that the investigators—and it doesn't necessarily mean the FBI, it could be Customs or ATF—are investigating things that we're not prosecuting.

Senator THURMOND. The difference is the investigators feel that there was crime there, but the prosecutors feel that there's not enough evidence to convict on the crime.

Mr. HEYMANN. That's an important basis for it. Another important basis is, we may say, look, we can't afford to prosecute somebody who stole even $500 from a Federal office. We may say that's just too small; we don't have enough resources to do it and tell the investigative agency to please take it to the State or local prosecutors.

Senator THURMOND. What procedures does the Criminal Division use to review a prosecutorial decision to decline to prosecute?

Mr. HEYMANN. I think I'm going to ask Jack Keeney to describe those procedures.

Senator THURMOND. I might ask you this; Is there a review by someone of all decisions to prosecute?

Mr. KEENEY. No, sir, there's not.

Senator THURMOND. Before the action is taken?

Mr. KEENEY. No sir, there's not. A U.S. attorney might well decline and there would be no review at all with respect to that declination. Unless the investigative agency were dissatisfied with the decision, then they would come to the Criminal Division. In a case handled in the Criminal Division, there is a supervisor who reviews it. A lawyer makes a review and makes a recommendation and that is passed on by one of his superiors. How far up the line the review process goes, Senator, depends upon the novelty of the case and other circumstances, how important the case is.

Senator **Thurmond**. Does a district attorney make a final decision in the case, or does the Justice Department sometime overrule him either way?

Mr. **Keeney**. He makes the decision in a case in which the Department is not involved. He makes it on his own and again as I said, if the investigative agency disagrees with the decision, or somehow or other the decision is brought to the attention of the Criminal Division and it seems that we should look into it, we do so. On occasion, the U.S. attorney is overruled, but not frequently.

Senator **Thurmond**. In other words, the district attorney makes the decision in the first instance.

Mr. **Keeney**. Yes, sir.

Senator **Thurmond**. And if the investigators do not agree with the district attorney's decision, then they can appeal to the Criminal Division to review the matter?

Mr. **Kenney**. Yes, sir.

Senator **Thurmond**. That's the way it's handled?

Mr. **Keeney**. Yes, sir.

Senator **Thurmond**. So every case is not reviewed before it is prosecuted?

Mr. **Heymann**. Not reviewed, the great majority of cases would not be reviewed in Washington, prior to a decision to prosecute or decline.

Senator **Thurmond**. Mr. Heymann, I had some questions here on the Jack Anderson article, I was going to propound to you, but Senator Hatch was interested in this matter, primarily, so I might just turn it over to him and let him handle that.

Senator **Hatch**. Thank you Mr. Chairman. As you probably already know, this article of Jack Anderson's this morning is the most interesting one and I have to admit these things in the article are true. Are true as far as I have been able to ascertain. I have met with Mr. Ulmer, who, of course, does not want to divulge what really happened within the grand jury proceeding without a subpena from this committee or any other committee for that matter, and I have investigated it personally very much.

From what I heard today, your basic testimony is that you're not going to produce Mr. Henderson and ask him to come up and testify in these oversight hearings because Mr. Henderson is the Chief of the Public Integrity Section and you feel that should not be part of politics. Am I misphrasing that? That's what somebody told me you said earlier.

Mr. **Heymann**. If I could just make clear where I agree and disagree Senator Hatch. No. 1, I would like to have an opportunity to run over with you the Ulmer allegations as quoted in the Jack Anderson article. I myself obviously lived through the period where Ulmer was making accusations and we transferred control of the investigation so I am quite familiar.

I myself met with the grand jury, myself met with the judge, Judge Bryant, the chief judge, and know all the players backward and forward, so I'd like to have an opportunity to comment on it. What I really said about not producing Tom Henderson is very close to what you said. That is, I don't want Tom Henderson's successor—and I think perhaps you'll agree with me and maybe not—I don't want Tom Henderson's successor, and I've appointed a successor, Gerry McDowell, to have in the back of his mind when he sits down and decides he's going to make a recommendation on a White House figure, a Congressman or a nobody, like the group that is mainly being talked about here in most of the articles, I don't want him to have the feeling that he's going to have to come up and personally account—a career person, he is a career person—I don't want him to feel that he is going to have to account personally, rather than have the Assistant Attorney General in charge of the Criminal Division, the guy who is responsible for taking the heat, appear and take the heat.

Senator HATCH. Sir, the only problem I have with it is that I want to get to the bottom, one way or another. The only way to do that, I don't think is above the law, I don't think anybody's above politics, I don't think anybody's above testifying in front of this august committee, and especially somebody from the Justice Department.

You have to depend on this committee, just like we have to depend on you and I would suggest that the allegations made here are quite serious, but this isn't the only problem. I've been interested in the supplemental statement about Phil Heymann, excuse me, by Phil Heymann, with regard to Mr. Henderson. It's 21 pages long.

Mr. HEYMANN. That's correct.

Senator HATCH. Now, why in the world would you have to go to that kind of bother to back up the Chief of the Public Integrity Section, if we are, there isn't some concern about public integrity as administered by Mr. Henderson? Now let me ask one other question. These charges in this article. I'm not happy to see the article either.

Mr. HEYMANN. Which article, Senator Hatch?

Senator HATCH. The Anderson article, because it puts me right in the middle of somebody who has done some thorough investigation on this, and I have and before I would like to be put in the middle, because I want to do some other things and I'm going to anyway, but now that I'm there, I won't be happy until Mr. Henderson, like any other member of our bureaurcracy here in Washington or the Justice Department, who is up for another position, comes up here and testifies before the Judiciary Committee.

I don't think I'll be happy unless this committee subpenas Mr. Ulmer and anything he can bring with him to get into this matter and looks at it in a bipartisan matter.

Today, as a matter of fact, a letter has gone to the Justice Department from a number of us in the Senate on both sides of the floor requesting Mr. Henderson to testify.

And some of my great colleagues on the other side of the floor signed this letter, and a number of us have signed. I think basically it would be an affront to this committee by the Justice Department, if Mr. Henderson like any other citizen doesn't testify.

I think it would be bad for Mr. Henderson, because if he is not, if these problems do not affect him, or if they are overthrust, or if they are not accurate, we've only heard one side of the issue. He ought to have the opportunity of showing where these charges are wrong. Mr. Ulmer ought to have the opportunity of showing where they are right and I think there are some other questions that Mr. Henderson has to answer with regard to a whole variety of matters under his direction as Chief of the Public Integrity Section.

Senator **Biden**. May I interrupt your talk, Senator Hatch?

Senator **Hatch**. Sure.

Senator **Biden**. I don't have any doubts that you are right that when the Department says to Tom Henderson, "We don't want you appearing and being questioned on declinations because we want the Chief of the Public Integrity Section to be insulated from that.

I don't have any doubt that this is dangerous for Tom Henderson.

Senator **Hatch**. For our whole system.

Senator **Biden**. Well, to me it's essential for the health of the system, Senator Hatch.

Senator **Hatch**. How's that, I'd like to know? We're always had a good relationship.

Mr. **Heymann**. If you would, let me go a bit farther with my reasoning. Move it one layer lower than Tom Henderson. What about having my trial lawyers who make recommendations in the Public Integrity Section, people as you say who are like everyone else subject to subpena, and I suppose they are. What about having my trial lawyers come up and account for their recommendations?

Senator **Hatch**. Why not, if we've had the allegations that need to be cleared up.

Mr. **Heymann**. Because——

Senator **Hatch**. You want this to go on?

Mr. **Heymann**. No; because it's my responsibility as head of the Criminal Division to respond. It's my responsibility to be right or wrong. It's my responsibility to give direction to them and to hire them and fire them. And I have fired and I've transferred and I do it more than others.

It's my job and I'm the one who is supposed to take the heat, Senator Hatch. What can I say, how can I run the Criminal Division—if this is a rhetorical question—how can I run the Criminal Division, if the head of my Public Integrity Section knows that he has to respond on every decision he makes to the Judiciary Committee, as well as to me?

Senator **Hatch**. My good friend, Phil, this is the only time in the history of this committee, in my opinion, at least since I've been here that the head of the Public Integrity Section would have to testify. Now he can't be insulated from having to answer charges, just like anybody else.

Here we have, these aren't insignificant charges, these aren't just little darts thrown here and there. These charges go to the very integrity of the Chief of the Public Integrity Section. If I could just finish, I'll be happy to listen.

To me, it isn't an insignificant incidental situation that can be handled just by you. The charges aren't made against you, they're made against Mr. Henderson. Now, I hope, Mr. Henderson is absolutely all right here, I hope in my heart that he is, because we've had enough allegations in this town and across the country about corruption. But you know if there is this type of alleged corruption in the Justice Department itself, then if I were you, Phil, and everybody else down there, I'd be extremely interested in getting it out in the open and getting it cleared up and straightened out.

Here's a column that goes to 150 million people in this country. Now if we don't have a hearing, now if we don't let Mr. Henderson come in and give his side of this issue and look at it from all sides, and I think in a bipartisan way, get our colleagues on the other side to also sit in on it and make sure that every right of Mr. Henderson's is protected and Mr. Ulmer's too, and perhaps others, who I've been chatting with, then I don't think we're doing justice to the Justice Department, we're not doing justice to this country, we're not doing justice to this committee, we're not doing justice to Mr. Henderson.

We're not doing justice to Mr. Ulmer either, whom I've met and I can tell you this, appears to be a man of utmost integrity, appears to be a man who stands up for what he believes, even though it is very, very pressure packed for him, and who has a lot of charges that he cannot divulge because they are part of the grand jury process. At least he says he can't. Now all I can say is that this is a serious problem.

Mr. **Heymann.** It has been taken most seriously in the Department——

Senator **Hatch.** I don't think Mr. Ulmer is the one who gave these things to Jack Anderson.

Mr. **Heymann.** Excuse me.

Senator **Hatch.** I don't think he's the one——

Mr. **Heymann.** No; I understand that it came from your staff.

Senator **Hatch.** I'm not sure of that, I don't think that's true. He knows that our staff is investigating; he knows that because he's interviewed people. But I also know that he's got a lot of information that he hasn't divulged in this column.

Mr. **Heymann.** Senator Hatch——

Senator **Hatch.** He did testify; didn't he?

Mr. **Heymann.** Excuse me?

Senator **Hatch.** He did testify in this grand jury.

Mr. **Heymann.** Who did?

Senator **Hatch.** Jack Anderson.

Mr. **Heymann.** Sure he did. I am sorry. We were told that it came from your staff.

Senator **Hatch.** All I want to do now is get to the bottom of it, do it fairly, do it in a bipartisan way, exonerate Mr. Henderson if we can, or Mr. Ulmer if that is the case; but let's at least not put the Justice Department above justice.

Mr. **Heymann.** Senator Hatch, let me ask you a question that doesn't go all of the way to the full range of our disagreement. I mean, the full range of our disagreement is I think that we will be setting up a system that will be unmanageable and a curse on all of us for years to come if this committee decides it wants to—I am not saying it doesn't have the power—but if this committee decides that it wants to call line attorneys, immediate supervisors, section chiefs, and have them working for the committee instead of me.

But let me ask you, Senator Hatch, an intermediate question: You say you need the information. I say ask me the questions you have today. We are sitting here. It is 25 minutes——

Senator HATCH. I say you don't know the answers because you weren't there and you weren't in Mr. Henderson's skull.

Mr. HEYMANN. You will know that, Senator Hatch, when you ask the question, whether I know the answer or not. In most of these matters Jack Keeney eventually signed off on them. On one or two I was personally involved. A number of them Henderson wasn't in——

Senator HATCH. What is the matter with bringing Henderson? He is an attorney; he is a topnotch member of the Justice Department. He has been head of the Public Integrity Section. Last year in your answers to this committee to my questions you made the comment, or who was it made the comment, your office made the comment: No formal external evaluation of the Public Integrity Section has been conducted.

Mr. HEYMANN. I have a sense of personal responsibility about it, Senator Hatch.

Senator HATCH. That is 4 years.

Mr. HEYMANN. I have a sense that I am responsible for the Public Integrity Section. I am responsible for the Criminal Division of the Justice Department. Start with me. Ask me the questions first. I have invited you to ask me about the Ulmer allegation. I too have met Ulmer. I have met Tom Henderson. I have met Carl Rauh. I have met Judge Bryant. I have met the grand jurors. I have reviewed that record.

Senator HATCH. In all of my research and investigation in this matter, I have not heard any allegation against you, or any claims that you did anything improper. I am asking you reasonably. All of the allegations come against Mr. Henderson. And I might add, the Justice Department in general.

But if the head of the Public Integrity Section, who is certainly one of the top level people in the Justice Department, is insulated from the interrogation of this committee when he has these kind of allegations made against him by the foreman of a grand jury investigating, yes, volatile political matters, I think I would think twice if I were you before I would say I will not produce Mr. Henderson.

And let me just say this: You have a request as of today, by a number of us on both sides of the floor, to ask Mr. Henderson to come up here. We do not intend to have an annual review——

Senator BIDEN. May I interrupt? As chairman of this committee, I am unaware of that request. Can the Senator fill me in?

Senator HATCH. I don't have a copy of the letter here. It was sent to the Justice Department today, but I will give you the names——

Senator BIDEN. Because I know I didn't make any request of you to produce anyone today.

Senator HATCH. No; but I think you would if you had this information.

Senator BIDEN. It would have been nice to know it so I could have asked them.

Senator HATCH. Well, we asked everybody about a month ago on the committee to participate. Maybe the staff didn't tell you about it.

Mr. HEYMANN. Senator Hatch, what is it that you think this committee ought to ask the Assistant Attorney General about? The cases that I personally handled?

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Senator **Hatch**. No.

Mr. **Heymann**. I don't personally handle any cases.

Senator **Hatch**. Let's talk about Mr. Henderson for a minute and look at the allegations. And there are others besides these.

Mr. **Heymann**. Let's go down them one at a time.

Senator **Hatch**. Well, let me just read them to you, in case you haven't read them. Anderson says that Ralph E. Ulmer, foreman of the Federal grand jury that looked into the Vesco case, was in a 2-hour session with, apparently, my investigators. Ulmer at one point had tried to resign as foreman because he said he didn't like the strange way the Justice Department was pursuing allegations that the fugitive financier tried to pull strings inside the Carter White House. This is Vesco, apparently.

The Justice Department announced earlier this month that the grand jury had decided against returning any indictments in the case. But Ulmer told the Senate investigators that vital evidence had been withheld from the jury. In fact, he charged that the grand jury was repeatedly sidetracked whenever it sought to chase down leads that might have proved embarrassing to Carter and, Anderson says, his Georgia pals.

He said he felt there had been a deliberate coverup. Now here are some of the details of the jury foreman's charge. The Justice Department conducted the investigation in a haphazard manner, constantly shifting prosecutors, introducing procedural disruptions, and creating confusion.

The grand jury foreman said he had to fight, fight, fight for 17 days to get critical transcripts of the proceedings released for the grand jury's review. I might add that he told me personally that he had a heck of a time and was treated very rudely by the people there, and Henderson was one of those who treated him rudely.

There was a concerted effort, he says, by the Department of Justice to prevent the grand jury from obtaining a quorum at times, the foreman charged. On many occasions, he said, "jurors were given conflicting times as to when the jury was meeting."

One of the early prosecutors, Thomas H. Henderson, Jr., Chief of the Public Integrity Section, "tried to lead the jury by the nose," Ulmer told the Senate people. "Henderson's initial tactic was to rush the investigation by the grand jury," Ulmer charged, "but when the jurors balked at this, after learning of possible White House involvement, Henderson turned to bullying the jury."

Henderson would "harass, badger, and embarrass jurors" who tried to ask the witness hard questions. Morever, Ulmer claimed, Henderson refused to answer questions by the grand jurors, and refused to obtain information requested by the grand jurors, telling them they would have to get it themselves A key witness was Carter himself. He goes on and on and makes a number of allegations that Mr. Ulmer said, and he does say in this article that Henderson, who has a reputation for integrity and conscientiousness, issued the following statement in response to the serious charges made by Ulmer. Then he goes through the statement. And in 1960, after 18 months of work, the grand jury, whose foreman was Mr. Ulmer, voted not to bring in any indictment.

Mr. **Heymann**. Can I take about as much time, Senator Hatch, and respond to that?

Senator Hatch. Could I give you the names of those who signed this letter we sent to you this morning?

Senator Thurmond, Senator Simpson, Senator Dole, Senator DeConcini, Senator Cochran, Senator Baucus, Senator Metzenbaum, Senator Laxalt, and myself. That's nine Senators on both sides of the floor, all of whom are not interested in pursuing this form of partisan political standpoint, who want to do it in a bipartisan way, have asked that you bring Mr. Henderson up here. One of the top members of the Justice Department and against whom—I personally interviewed the man—serious allegations have been made, far beyond what Mr. Anderson has in his column here today.

Mr. Heymann. Now may I respond to those allegations, Senator Hatch?

Senator Hatch. May I make one other comment and then I'll be glad to quit.

Our concern with Henderson is going back 4 years, including his involvement in the Judge Ritter investigation. That's where I first heard Mr. Henderson. Now we have, I think, overwhelming documentation as to Henderson's possible mishandling on politically sensitive investigations, including Federal officials and judges.

Now, I don't know whether he's Republican or Democrat. I could care less. I don't know whether he's honest or not honest. I do care about that, but I think that he's not above the law and ought to come before this committee, since certainly this committee isn't reviewing his present nomination; but I think this committee certainly has to be concerned with whether or not we've properly overseen the Justice Department, which this proceeding is all about.

Senator Biden. Before you move forward, I'd like to apologize for having to leave, but I will come back, The Rules Committee is holding a hearing on measures that relate to the jurisdiction of this committee and I was asked to testify.

It's not your position, is it, Mr. Heymann, that if the committee subpenaed Mr. Henderson that he would be able to lawfully resist that subpena or is it?

Mr. Heymann. I have never thought about it, Senator Biden, and I wouldn't like to say offhand. I do want to be clear that what I'm stating is my belief—but it is a broadly held belief at the moment and rather deeply held in the Department—that we are seeing the beginning of what will be the end of fair decision in the Public Integrity Section.

Senator Hatch. Are you saying that we won't handle it properly?

Mr. Heymann. I don't, Senator——

Senator Hatch. With discretion.

Mr. Heymann. Senator Hatch. I want to be frank with you on this. I don't have the feeling—from the way you've described the questions that are hanging over Tom Henderson's head as major questions involving the Vesco matter, major additional questions, the Ritter matter, and from your unwillingness to hear Bud Mullen, the Assistant Director of the FBI, Jack Keeney, the Deputy in the Criminal Division, Phil Heymann, the Assistant Attorney General of the Criminal Division respond to those—I don't have the feeling that Tom Henderson is coming to anything other than a lynch party where he——

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Senator HATCH. Oh, come on, Phil, my gosh, we've watched this for 3 years, now wait, Joe, I've got to answer this. For 3 years we've watched this on this committee. I don't think anybody has been abused by this committee and I don't think I've abused anybody and I think that statement's way out of order. That's out of line.

I'm happy to listen to all of you; I think that can be part of the proceedings too. I have no objection to that.

But why are we shielding Thomas Henderson, who I've indicated, it isn't just, it isn't the Vesco case, I don't think it's the primary reason why the bipartisan Senators are interested in interrogating Mr. Henderson.

There's a whole variety of cases, including GSA and so forth that we feel that Mr. Henderson may or may not have been the best one. Now what we're saying is why should we shield him? I'm happy to listen to what you fellows have to say; there's no problem with that.

Mr. HEYMANN. The other, just the questions, I apologize for that.

Senator HATCH. I think you ought to, I think you ought to apologize for a lynch party, my God.

Mr. HEYMANN. I apologize for that. But I do have the feeling, Senator Hatch, that as we talk we are spreading allegations that, at least to my mind, have no substance whatsoever. That's why I keep saying, let's talk about Judge Ritter. There's nothing there.

Senator BIDEN. Mr. Heymann, I'm going to interrupt and attempt to focus this a bit, if I may.

Mr. HEYMANN. That would be helpful and you have my apologies, Mr. Chairman.

Senator BIDEN. First of all, clearly in my opinion, if the majority of this committee wishes to subpena Mr. Henderson and they think that's appropriate, I as chairman will be delighted to sign off on such a subpena. No. 1.

No. 2, I think that Senator Hatch's concerns warrant being answered.

No. 3, I think you're prepared to answer them.

No. 4, I respectfully suggest, that I would ask you the questions, since they've been raised, and I think you should make the record and if a majority of the Senators, after reading your responses to the questions thus far, believe that there's a need to have Mr. Henderson, then that's a decision the committee will make.

If the committee makes that decision, then you will have to internally make the decision whether or not you would decide that Mr. Henderson should not come forward and attempt, although quite frankly I don't know how, attempt to resist that subpena.

I'm not suggesting that you would, I'm not suggesting you won't, but I am suggesting that we move ahead, since you all are here and since it is my understanding that most of you at some point had to "sign off" on these matters.

It's a little bit reminiscent of what just happened in foreign relations. In Foreign Relations Committee, we wanted Mr. McHenry to come forward after the debacle relating to the resolution of the United Nations. And we were all insistent on that and we asked previous to Secretary Vance showing up that he be there. Secretary Vance defied that request, showed up by himself and, after some haggling with us, insisted he go forward. We said all right go ahead.

After he went forward, many of the committee said, well you're right, we don't need to have McHenry here. Now, I'm not suggesting I know what the committee will say. But why don't we stop now and have you respond rather than to the general assertion of whether or not Mr. McHenry should or should not, not Mr. McHenry, whether or not Henderson should or should not be here. And respond to the specific issues that were raised in the Anderson column and anything relating to the other case of Judge Ritter and anything else you want to say, so that we will have it on the record and we can make the decision from there.

Mr. **Heymann**. Except that it seems like an exceedingly cool headed and reasonable thing to do, I would think that was exactly right.

Senator **Biden**. Well, why don't we proceed.

Mr. **Heymann**. Let me start by talking a little bit about the Ulmer matter and turn to Jack Keeney on Ritter. I'd like to talk some about the Nard matter, because Tom Henderson wasn't in that one at all and I was involved in the Nard matter. Tom Henderson isn't even involved in a number of the matters that are thrown around about him. As to Nard, he is hardly in at all; as to Cindrich, there's an accusation about something going on in Pittsburgh.

Senator **Biden**. Those aren't the major ones that I'm concerned about.

Mr. **Heymann**. There are a number of them. They just trouble me because he isn't even in sight. I have reviewed everything that went on in the Vesco grand jury, up until the time it was transferred to the U.S. Attorneys Office, in really remarkable detail, because I felt that I had to go up and talk to the grand jury, which I did.

I thought I had to go talk to the judge. I was quoted out of a grand jury leak, incorrectly, in the New York Times and I had to go up there and see whether my memory was right. The leak was incorrect.

This doesn't take us far, but I just want to say very clearly—I know I'm just thinking about my own credibility—I know there was no impropriety in the Vesco investigation.

Incidentally, I anticipated this type of question coming up afterward. It looked to me like an absolute certainty that there would be a congressional review of the Vesco investigation from the beginning. I had a very bright idea and that was I brought in Stanley Sporkin, widely respected enforcement chief of the SEC, and I opened everything to him and he and I and Tom Henderson and four of his attorneys and four of ours did everything we could to try and crack the case that Ralph Ulmer is talking about.

Senator **Hatch**. Could I interrupt for just a second.

Mr. **Heymann**. Yes.

Senator **Hatch**. How many attorneys actually handled this grand jury investigation?

Mr. **Heymann**. There are going to be different attorneys every time——

Senator **Hatch**. But how many of them were there? I understand that there were seven.

Mr. **Heymann**. Seven, it could easily have been seven.

Senator **Hatch**. Isn't that rather unusual?

Mr. **Heymann**. Well, I'm going to get to that in 1 minute. What I'm going to say about that is the line that I hate to break too early.

Eventually I had to let Stanley Sporkin fall off because we went into a grand jury. We did not think we could give non-Justice Department attorneys grand jury information, but we had done substantial investigation with the SEC anticipating the very type of questions you're asking.

I looked very hard from the middle at what was going on. Incidentally when it got to the middle, I transferred it from Henderson to the U.S. attorney's office. I wanted the record to be clean that nobody in the Justice Department had anything to do with it thereafter.

I learned from Ed Pound of the New York Times that the President had been interviewed. Ed Pound of the New York Times called me and said what do you have to say about what's happened? I said, what's happened? He said the President's been interviewed. I said, you're telling me the President's been interviewed; I didn't know it.

I learned that the grand jury had voted not to charge anybody, half an hour, 2 hours, after they had voted that nobody should be charged.

I did not fault in any way, nor did anyone that I know of in the Criminal Division or in the Justice Department, fault the U.S. attorneys' handling. We wanted it to be absolutely pure.

The only thing I did was I went down there and I gave them a charge, I said I want you to nail every bastard you can. That's what I said to them, then I left. Then I told Carl Rauh, one other thing, I said to Carl Rauh, if you want anything, I haven't said this to anybody before, except Carl Rauh, if you want anything from the White House, you have a blank check on me to get it.

In other words having given you this case to follow through, anything you ask for, you have me on your side. It doesn't mean I can deliver, but it means that I will never be other than behind you on anything you want, because I thought, with all those criticisms, I was putting him in a very difficult position.

OK, in a broad way, and indulging every presumption of good faith on the part of Ralph Ulmer, the major problem that went on between Ulmer and Henderson is an institutional problem with the changing grand jury system.

I don't have to tell you, Senator Hatch, or you, Senator Thurmond, or you, Senator Biden, that the tradition is for the prosecutor to run the grand jury—not to ram a conclusion down their throat at the end, but to order the evidence, decide what goes in first, present it in a systematic way, decide what witnesses will come in. But this is changing and it's healthy that it's changing.

It's changing with the grand jury. I think when you next interview Ralph Ulmer, when your staff does, Senator Hatch, I'll give you a crucial touchstone question that I suggest you ask him.

Ask him who he thinks runs the grand jury, because I think he will answer the foreman runs the grand jury. And what happened was, Tom Henderson the prosecutor, and Ralph Ulmer, the foreman, were always quarreling about things.

Now there was an easy answer to that and it's the answer——

Senator **Hatch**. Ulmer and who else——

Mr. **Heymann**. I was saying Tom Henderson, the original——

Senator **Hatch**. And Ulmer were kind of going at each other; is that it?

Mr. Heymann. Only to the extent that you've already referred to it. Now there was an easy answer to it and with the help of the court we rather quickly came to this and that was that the court said, and I want to be very careful about anything I quote with regard to the judge, the court led them to say, look I'm not going to decide whether the prosecutor runs it or the foreman runs it. If there's any disagreement, have the grand jury vote. And that seems to be the wisdom of Solomon. Throughout, thereafter, the grand jury voted on every major procedural question.

Senator Hatch. Isn't that rather unusual? Isn't it unusual?

Mr. Heymann. It's quite unusual because generally the leadership somehow or other gravitates to one or the other much more quickly.

It was quite unusual, but we presented everything to grand jury vote. If they wanted a particular tape or a particular piece of evidence, and the prosecutor said, I think that's irrelevant, if Mr. Ulmer or someone else said we ought to have it, they just threw it to the grand jury. Over and over again, there would be a vote. And of course at the end, they just threw the issue to the grand jury——

Senator Hatch. When you say our leadership passes from one to the other, one or the other, do you mean the foreman or the prosecutor? Who do you mean?

Mr. Heymann. Excuse me.

Senator Hatch. You said a little bit earlier that the leadership will pass from one to the other. Who did you mean by the two it passed between?

Mr. Heymann. Ah——

Senator Hatch. Do you mean the prosecutor and the foreman or——

Mr. Heymann. In response to Senator Biden.

Senator Hatch. Yes; I didn't understand that.

Mr. Heymann. I guess I simply meant to say that in general there isn't much of a contest in a grand jury as to leadership of it. Generally the prosecutors lead it. Occasionally I suppose, and I know it does in fact happen, particular grand jurors, the foreman or others may lead it, but there's generally not much of a contest.

In this particular case, there were also questions of procedure that were troublesome. The biggest question of procedure was who manages the grand jury. But there were fireworks. Grand jurors are never given transcripts of what they have been hearing that day. You never give grand jurors transcripts and there was a demand for transcripts.

We gave in, but it took us 17 days to give in and change the established procedures, as I understand it, of the U.S. attorney's office. We didn't change the established procedures on day one.

Another problem is questions by the grand jury. There is a system that the prosecutors use in processing grand juror questions. Grand juror questions can cause two forms of mischief as well as all the benefits of the grand juror getting the information.

One form of mischief that the grand juror's questions can be highly prejudicial, either to a witness or to a target: You can say, isn't it true that you think Steve Hitchner robbed the bank et cetera, et cetera. It can be highly prejudicial.

The other thing the grand juror's question can do by mistake is it can tip off the witness to much more information than we want the witness to have.

If you want to get the truth out of witness Thurmond and you don't want witness Thurmond to know what witness Biden has said, then you don't want to question witness Thurmond, "To begin, when Biden was in here he said, A B C E F, what do you say about that?" Because then the second witness knows what the first one has said.

We have elaborate procedures; the procedure in the U.S. attorney's office was when the prosecutor was through asking questions, to excuse the witness, ask the grand jury what questions they had, then bring the witness back and have the grand jury ask the questions. There was fussing and fuming about that system.

There was fussing and fuming about keeping notes. When grand jurors make notes, we don't want the notes to go out of the grand jury because of grand jury secrecy.

It was thought to be suspicious that for a time—I think we gave up on this eventually, we looked like a badly retreating army on grand jury notes. Eventually we said, OK you want to take your notes home, take your notes home. But understandably we don't like notes going out of a grand jury.

Senator **Hatch.** Did the various grand jurors keep notes during this proceeding?

Mr. **Heymann.** I know that Mr. Ulmer kept extensive notes. I don't know who else.

Senator **Hatch.** Do you know who has those and where they are?

Mr. **Heymann.** I think that we do not. I do not know, Senator Hatch. I could find out for you.

Obtaining information was part of the dispute about who runs the grand jury. The foreman or others would say, we want this now, we want that now and we would say to the FBI, go get this now, go get that now. After a while, down the chain, it starts getting slow when all you're doing as far as you know, it's part of the inherent conflict as to who's running it, is servicing somebody's demands.

You start to feel, if you don't understand the reason for the demand, you start to feel a little bit like a waiter or waitress, rather than an FBI agent or prosecutor. But again, and to the best of my knowledge everything was——

Senator **Hatch.** On that point, that you bring out from your own memorandum on Government rules regarding grand juries, on page four. It says in the final analysis the grand jury's wishes control.

Mr. **Heymann.** And that's correct——

Senator **Hatch.** You said in that statement.

Mr. **Heymann.** And that is the way we——

Senator **Hatch.** You were trying to fulfill his and other grand jury——

Mr. **Heymann.** It got to the place where we would require a vote and the vote would sometime go one way and sometime go the other in the grand jury. But all of this goes to the allegations that I have dwelled on. One, of trying to keep the grand jury from having a quorum, just seems to me to be bizarre. I can't imagine, you'd have to get more detail, I can't remotely imagine why somebody would be giving out different dates to different grand jurors.

Senator **Hatch.** Let me ask you this, Phil. Your explanation——

Mr. **Heymann.** If I could just give my funny punch line, then I wouldn't have anymore to say about this and I could get out of your hair.

Senator **Hatch**. OK.

Mr. **Heymann**. In this context, the complaint that we were changing prosecutors too often, is very much like the child who murders his parents and complains about being an orphan.

We were changing prosecutors because we couldn't maintain any sort of a normal relationship and a normal sanity. And we did eventually.

Senator **Hatch**. There were seven prosecutors.

Senator **Biden**. You're a lot better prosecutor than you a are comedian.

Senator **Hatch**. Phil, if I could just have a second. Perhaps the answer to this is maybe we'd better get Mr. Ulmer, subpena him, get him in here and have him testify. Now, if he has notes, then he can testify from his notes so that he can say whatever he wants to say. I'm more interested in resolving what appears to be a blight or blot on the Justice Department than I am in proving Mr. Ulmer's contentions to be true or otherwise. But I am interested in a number of other matters. You're not through yet, though, are you?

Mr. **Heymann**. I'm through on this one and I think I would like to say something about——.

Senator **Hatch**. The other problems.

Mr. **Heymann**. Yes; about a couple of the other——

Senator **Hatch**. Let me at this point.

Mr. **Heymann**. Maybe we should go to Ritter next, when you're ready we'll go to Ritter next and let Jack Keeney——

Senator **Hatch**. Let me at this point put into the record, Federal Times letter about Henderson by you, which I think backs up what you've said here today that to the degree that you believe in Mr. Henderson dated April 7, 1980.

Then there have been some very sensitive articles written about Mr. Henderson's conduct of the public integrity section. One of them is written by Inderjit Badhwar and Sheila Hershow. It's in the Federal Times, March 17, entitled "Sensitive Cases Left Hanging."

I think what I ought to do is put this in the rcord. Are you aware of this article?

Mr. **Heymann**. Sure, those are the cases, there have been a couple of those and those were the cases that led me to come up with sort of outraged testimony saying, How do you expect the prosecutor to do his job when he's going to be attacked? And those are the cases that we're prepared today or tomorrow or whenever you like to respond to very fully.

Senator **Hatch**. I'd like to see that done. Let me put that in the record also.

Senator **Biden**. Fine, without objection——

[The Badhwar and Hershow article and an article by Mr. Heymann can be found in the appendix.]

Senator **Hatch**. But I want to say one other thing. I've got a problem today, because I've got this argument on the floor at 2 o'clock and I need to do some preparation for that, but I appreciate, see this is what I want to get, but I still think, I appreciate you're sincere and you're telling testimony with integrity.

I have no problems about you and never have. I supported you. I think you know that and I've supported the Justice Department time after time. I've been right there with you and I think I've been fair.

And when I've opposed anything that you've brought up here, I think I've been fair in that too. I would intend to be fair. You agree with that, don't you?

Mr. **Heymann.** I agree that you've always been fair, Senator.

Senator **Hatch.** OK. Well, I think that I have been and I would try to be in this matter. But it still comes down that I would like to listen to all of you. If you'd like to do it first or after Tom Henderson, fine. And I still think that to clear this up, I guess, let's put the Anderson article also in the record, so we'll have that. I've got my notes on my copy; do we have another copy?

Senator **Biden.** I think I have a clean copy. Without objection, it shall be included in the record.

[The Anderson article can be found in the appendix.]

Senator **Hatch.** All I'm saying is let's get it cleared up. But there are some other problems that also I would like you to discuss, if it's all right with you, Mr. Chairman, because of my pressures today, if we could meet again. I think we ought to start with maybe the Vesco case and let Mr. Ulmer come in.

I would respectfully ask at this point that our committee subpena Mr. Ulmer and whatever notes he has and if it becomes necessary, any other grand jury member and whatever notes they have. Get the thing out in the room and let the members of this committee make a determination ——

Senator **Biden.** Why don't you let me respond for a moment?

Senator **Hatch** [continuing]. Whether Mr Ulmer is right or not.

No. 2, I think that if Mr. Henderson testifies, then I'd be more than happy either before he testifies or after he testifies to listen to everything you have to say and give. I'm sure I'll give the highest credibility to it.

I feel confident, I'm positive of that. But I still think it comes back to our basic question and that is how do you clear up these problems, that are in major articles, one at least all over the country, without at least talking to the man who, as an attorney, ought to be able to justify anything that he's done and ought to be able to talk at least as responsibly and responsively as you have here today.

I don't see any problem with that and I assure you that I'm not going to be jumping out of my chair at him, trying to hurry him or cause him any difficulty, but I will ask some tough questions and I presume he'll be able to answer them. But I think the only way to get to it is get the principals in here and get the matter resolved one way or the other.

And hopefully it will be resolved in favor of the Justice Department, but if it isn't then let's face it, that may be a good result, who knows.

Mr. **Heymann.** Senator Hatch, I take it that's not meant to be inconsistent with what Senator Biden suggested earlier, which is that we go through all of this first and see if there are real questions left.

Senator **Hatch.** Well I would ——

Mr. **Heymann.** I predict there would not be real questions left.

Senator **Hatch.** That will be fine with me, but on the other hand, at the end of that if we feel like we need Mr. Henderson, I hope you won't ask us to subpena Mr. Henderson to come up here and give his own testimony. If you do, I would have to ask our committee to do that and then instead of a lynching, I would have to call it a coverup at that point. Now, I don't think it should be. I don't think you should be put in the position where it looks like you're trying to cover up some problem that has been effectively raised, rightly or wrongly, by a national syndicated columnist.

Mr. Heymann. What it looks like to everybody, Senator Hatch, depends very much on what it looks like when we're through testifying. That's why I think that the proposal is so very sensible.

Senator Hatch. It will never look right to anybody, if the man who is accused doesn't have a chance to say why that's wrong.

Mr. Heymann. He may not——

Senator Biden. I am going to in my vast experience as chairman gain control of the chair here.

Senator Hatch. You never lost control.

Senator Biden. And pursue. I'm not sure, I never lost control over you, Senator Hatch, but I think I lost control of the witness.

What I would like to suggest is that we proceed and at the end of the day, whatever the wishes of the committee are, we will pursue.

I have some specific questions. First of all, why was the grand jury not able to directly interview the President of the United States. Can anyone at this table answer that question?

Mr. Heymann. Nobody at this table knows the answer, Senator Biden, and there is some question as to whether those who do know the answer, the District of Columbia prosecutors, can tell it without a rule 6(e) order involving grand jury information.

Senator Biden. Who would know the answer, whether or not they could tell it, who would know the answer?

Mr. Heymann. The acting U.S. attorney at the time, Carl Rauh. The prosecutor who was working with the case then, Benner is his last name. A number of people like that would know. Judge Bryant would know.

Senator Biden. To the best of your information or any of the witnesses at the table, were any other members, other than the foreman of the grand jury, Mr. Ulmer, dissatisfied with the way the grand jury was treated.

Mr. Heymann. It is my belief that there were at all times a few, maybe a changing few, who, whatever issue it was, would have agreed with Mr. Ulmer that they should have it or not have it, whatever it was. So I would not say that it was only Mr. Ulmer.

Senator Biden. Mr. Mullen, you're with the FBI, correct. The Assistant Director?

Mr. Mullen. That's correct, Senator.

Senator Biden. Mr. Mullen, would you have any firsthand knowledge of the grand jury investigation in the Vesco case?

Mr. Mullen. No, sir, no firsthand knowledge other than that whenever we had a request for investigation, we complied with that request.

Senator Biden. Was the assertion made earlier that the, as I understood it, that the FBI became, I believe the word was, tired, of some of the requests being made. Let me put it another way. To the best of your knowledge did you consider some of the requests being made as being superfluous or nagging or unwarranted?

Mr. **Mullen**. Senator, I'm not that familiar with all of the requests that were made, but to my knowledge, no, we did not feel that way, but I can't speak for the agents who were conducting the investigation.

Mr. **Heymann**. Senator Biden, if I may; the only example I was thinking of is one that involved an allegation that I believe the Federal Government had blown up Mr. Herring's farm equipment and since it was that we had blown up Mr. Herring's farm equipment, I think that was the problem. It would have gone to Alcohol, Tobacco and Firearms, which is where we do investigations of those things—not to the FBI.

Senator **Biden**. I see. Did you blow up his equipment?

Mr. **Heymann**. I refuse to answer on grounds—my constitutional privilege.

Senator **Biden**. I would suggest that they don't record the laughter in these hearings. They laughed a great deal.

Mr. **Heymann**. I did not; we did not.

Senator **Biden**. I think that questions that have been raised in this article warrant being answered very specifically. You did acknowledge that the grand jury foreman, as quoted in the article, had to fight, fight, fight, end of quote, for 17 days to get critical transcripts of proceedings released for grand jury review. Is that correct?

Mr. **Heymann**. I have no idea how difficult it was during the 17 days.

Senator **Biden**. But I think you said there was a fight.

Mr. **Heymann**. I think it took some period of time before we agreed to make transcripts available to a grand jury which——

Senator **Biden**. So that Mr. Ulmer's assertion—the foreman's assertion—that he had to fight to get them released is accurate, is it not?

Mr. **Heymann**. If you allow fight to have some breadth. He had to urge it, demand it——

Senator **Biden**. Let me put it this way: you would not have come forward and released those transcripts to the grand jury were it not for the persistent efforts of Mr. Ulmer.

Mr. **Heymann**. I believe that's correct.

Senator **Hatch**. Just one question in point. Had you ever done that before, given transcripts to a grand jury?

Mr. **Heymann**. I would have to check that. I'm not a great expert as to what goes on in the grand jury. I was told it was quite unusual. I wouldn't be surprised if there are no examples that we, but we could certainly try——

Senator **Hatch**. Is anybody here a great expert——

Mr. **Heymann**. Jack Keeney would know.

Mr. **Keeney**. I would join Phil's answer. I never heard of it, but it wouldn't surprise me if it's been done once or twice in the past.

Senator **Biden**. But it is not—your assertion is, Mr. Keeney, it is not the general practice?

Mr. **Keeney**. Clearly not the general practice.

Senator **Biden**. And to the best of your knowledge, it would be an exceptional practice when such transcripts are made available?

Mr. **Keeney**. Very exceptional.

Senator **Biden**. Now the reason I wanted to pursue this question about the transcript is that, as I read that, it disturbed me a great deal, because the implication was not, I assume, that the transcripts we were talking about are the transcripts of the grand jury proceeding. Is that correct?

Mr. **Heymann**. That's correct; that's of what was going on in the grand jury itself.

Senator **Biden**. So that the grand jury would ask for transcripts from a grand jury, that same grand jury's consideration of this matter from 2, 4, 10 days, 3 weeks whatever, some previous time?

Because when I read it and I'm glad that's cleared up, that doesn't clear it all up, but I assumed that the allegation was that there were transcripts in other areas of the Government, relating to the Vesco case, which were purposely being withheld from the grand jury.

Mr. **Heymann**. It is my understanding that it would be as if you were trying to get the record of the hearing——

Senator **Biden**. Today.

Mr. **Heymann**. Today, correct.

Senator **Biden**. Now your explanation of the reason why there was a reluctance to come forward and give these transcripts is, first, it was not the general practice; and second, that there was in fact an already existing conflict between the foreman and the prosecutor, if not in terms of the direction of the case, at least in terms of the personalities and the question of who would call the shots?

Mr. **Heymann**. I don't want to overstate the conflict. There was a clear difference in understanding as to who led, and then there came a time during the grand jury proceedings, Senator Biden, when the foreman came up and seemed to us to be accusing a young attorney of corrupt or improper activities. And at that point, the foreman feels that he was thrown out of one of our offices; we feel he was asked politely to leave. It was not an officious development in relations.

Senator **Biden**. Now with regard to the quorum called, times, conflicting times being given. Who determines when the grand jury will be called and recalled, when it recesses and when it is called the next day or later that same day?

Mr. **Heymann**. The prosecutors do.

Senator **Biden**. The prosecutors do. And how is that done? Is it done by way of a verbal announcement at the close of business—do you know how that's done?

Mr. **Heymann**. Jack Keeney could tell you better, but let me start.

It's best done by verbal announcement at close of business. Frequently in this case, it was not done in that way and so there had to be some way of reaching 23 scattered human beings; how that's done, I don't know.

Mr. **Keeney**. The attorney in charge then would have one of the clerks or the clerk's staff, or the U.S. attorneys office communicate with all of the grand jurors on a short notice; it would be by telephone.

Senator **Biden**. Now the Justice Department, it is alleged, conducted the investigation in a haphazard manner and the sustaining evidence for that in this article at least is that it constantly shifted prosecutors. You mentioned why prosecutors were shifted.

Were there an unusual number of prosecutors in this case, and if so, why?

Mr. **Heymann**. If I had known what a poor comic I was, Senator Biden, I would have given a fuller account of the number of prosecutors.

We started out with besides Tom Henderson, with two prosecutors, one named Schroeder and the other named Boucher. During the early course of the investigation Boucher's name was sent up to be an Inspector General of the Small Business Administration. He immediately disqualified himself from any further participation—this was a year ago, at least—and simply walked away. I thought he was right, he could have nothing further to do with it.

Schroeder's wife moved to Seattle and being less strong willed than we like our prosecutors to be, he went too and became an assistant in Seattle.

That left us with Tom Henderson and no supporting staff. We then brought in two attorneys named Bob Tignor and Kathy Voelker. They went for a while and at that point, I believe, but I would like to check the record on this a little bit, Mr. Ulmer went public, and announced that there was a gigantic coverup going on, or at least we thought he was planning to do that.

We then went through a series of rather elaborate decisions trying to figure out what we could do, just so the investigation could proceed so that the investigation of the charges against people in the White House and people in Georgia could proceed.

And after a variety of meetings with the grand jury, with the judge, in the Department, we transferred the entire matter to the U.S. attorney's office with the same Kathy Voelker, plus Harry Benner. That's correct. They saw it through to the point where the grand jury voted there was nothing there. So we got Benner, Voelker, Tignor——

Senator **Biden**. So the rationale is that the original two of the original prosecutors, one left because he received another appointment. The other left because his wife left, and the next two left, or at least one other who, the reason for the second switch related to the accusations, at least informally, if not formally by Mr. Ulmer that there was a coverup. Your explanation is that there was an effort to make this cleaner than clean so then you brought in the U.S. attorney, transferred it and brought in another prosecutor and that's where the matter was concluded.

Mr. **Heymann**. That's exactly right.

Senator **Biden**. That's your rationale.

Senator **Hatch**. May I interrupt you again? My understanding is you had Schroeder, Boucher, and Henderson, the originals.

Mr. **Heymann**. At the beginning I think that's right, Senator Hatch.

Senator **Hatch**. Then you brought in Bob Tignor and Kathy Voelker, or Levits.

Mr. **Heymann**. Voelker, I believe that's right, but we'll correct that.

Senator **Hatch**. You'll correct that. Any after that, that's five.

Mr. **Heymann**. That was five and then when we had accusations of coverup and impropriety by Mr. Ulmer in the press, I decided that I wanted to transfer the entire operation to someplace else, turn it over, tell them go get'em, see if you can lock up somebody and leave it. At that stage it happened that Voelker, if I've got her name right, had the misfortune of having transferred to the U.S. attorney's office a few weeks before I did this.

The U.S. attorney brought in Harry Benner to run it and he said, isn't it nice that we have a young assistant who's already done some work on this case, Kathy Voelker and he brought her in.

Senator **Biden**. And Henderson was out and the other prosecutors were out?

Mr. **Heymann**. That's correct.

Senator **Biden**. And that is the point that you, head of the Criminal Division, went to the grand jury and said——

Mr. **Heymann**. I can't say exactly what I said before a grand jury, I'm afraid.

Senator **Biden**. No; but I mean that's——

Mr. **Heymann**. I did talk to the grand jury several times and tried to explain exactly what we were doing. I tried to explain as I've tried to explain to you and to Senator Hatch——

Senator **Biden**. But my point is that you've already testified this morning, that at one point you said, and I think I'm quoting, "go nail the bastards" or something——

Mr. **Heymann**. Not to the grand jury.

Senator **Biden**. To whom did you say that.

Mr. **Heymann**. I was talking to the prosecutors in the U.S. attorneys office. I said go get'em.

Senator **Biden**. So that is your explanation as to why there were so many prosecutors. Another allegation made was that the early prosecutor, Thomas Henderson, Chief of the Public Integrity Section, "tried to lead the jury by the nose." What is your explanation for that? How would you respond to that?

Mr. **Heymann**. My response to that is I have no guess as to what set of specifics is involved there, but I can readily imagine the accusations because prosecutors generally do lead the grand jury in terms of deciding what evidence will be heard next until the end, where they say to the grand jury, "is there anything else that you would like" and on this particular grand jury there was a strong sense by the foreman that that should not be so.

Senator **Biden**. Let me ask you another question in terms of timing. Obviously the focus of concern in this subcommittee among some of the members is not only the case generally, the Justice Department, generally, but Mr. Henderson, specifically.

Was Mr. Henderson the chief prosecutor of this case at the time that the dispute over the transcripts was raised?

Mr. **Heymann**. Yes.

Senator **Biden**. Was he the prosecutor at the time that the conflicting times for the grand jury were allegedly given, to the best of your knowledge?

Mr. **Heymann**. I doubt that that happened.

Senator **Biden**. Well, how long in terms of duration of time, and if you don't know it now, for the record, would you submit that each of the parties whom you named as being involved in the prosecutorial side of this case, the date they got on the case, and the date they got off the case.

Mr. **Heymann**. We can certainly submit that and I don't remember it well enough, Senator Biden, to guess.

[The material referred to above appears at the end of today's hearing.]

Senator **Biden**. How do you respond to the charge made that Henderson's initial tactic was to rush the investigation by the grand jury and when that didn't work, he turned to bullying the jury?

Mr. **Heymann**. I would be guessing as to what——

Senator **Biden**. You'd need more specific accusations as to what was meant by that?

Mr. **Heymann**. He did one thing there, Senator Biden, that I guess I ought to mention. There were two aspects to the investigation. There was always—and I'm not revealing any grand jury secrets—there was always a Georgia aspect and a Washington side, kind of like two cities or two locations.

He began with the Georgia side, perhaps without an adequate explanation to the grand jury that in due and steady course, he would get equally into the Washington side. In retrospect, I would have begun with the Washington side and then everybody would have relaxed.

Senator **Biden**. The investigation began by focusing on the accusations relating to the Georgia side.

Mr. **Heymann**. Rather than events in Washington. It had to do both. I would have done them in the opposite sequence. There was some confusion, probably created by focusing on Georgia, when people knew there were big events in Washington or allegations.

Senator **Biden**. No one at the table can testify in the first instance to whether or not Mr. Henderson tried to lead the jury by the nose? That accusation without even knowing more information, or because you were not there; is that correct?

Now——

Senator **Hatch**. Did you say yes?

Mr. **Heymann**. I'm sorry; yes, there's no one at the table who would know enough about it to know exactly what was being alleged.

Senator **Biden**. Now, with regard to the matter of the President being involved and whether or not he was legally, whether he in fact had, was aware of large sums of money being offered and the other accusations relating directly to the President.

There is the implication, at least raised here in this article, that there was an attempt to withhold, or prevent the President from appearing before the grand jury and answering directly the question as to whether or not he, in fact, did the things that were accused.

Mr. **Heymann**. The form that the President's testimony would take was decided upon and arrived at by a set of factors that I can't even name, long after I had lost purposely, anything remotely like, detailed contact with the investigation and I'm sure after Tom Henderson no longer knew what was going on at all.

It had by then been transferred to the U.S. attorney's office.

Senator **Biden**. Now, I, at this point, at least have no further questions on the Anderson article. I do have other questions on articles, on cases raised by the Federal Times article.

Mr. **Heymann**. I'd welcome them.

Senator **Biden**. But maybe my colleagues would like to ask more questions about the Vesco case.

Senator **Thurmond**. Could I make an observation?

Senator **Biden**. Surely.

Senator **Thurmond**. Mr. Heymann, I was just thinking and I don't think you need to have any concern by whoever testifies here is getting an objective hearing. I'm just wondering, from a standpoint of Mr. Henderson; this article here makes some rather serious charges, I think, from his standpoint.

If I were in his shoes and an article like this came out, I believe I would want to go and refute that article from my own standpoint. To go before a body like the Senate here, this particular committee. Don't you think you might want to ask him if he would care to come up here of his own accord and answer these things? You see, here's a foreman of a grand jury making these charges.

Senator **Hatch**. If the Senator would yield on that point, may I ask a question, a procedural question?

Senator **Thurmond**. Yes.

Senator **Hatch**. Is Mr. Henderson due before a Senate committee for confirmation on his other appointment?

Mr. **Heymann**. Yes, he is, and that's an additional concern. We basically have two concerns in the Department. To me, the more important is the one I've expressed to Senator Hatch, but there are those in the Department who feel that it is terribly unwise and unfair to run someone through the equivalent of two confirmation hearings and that all these questions ought to be addressed to Mr. Henderson by these gentlemen, simply joining in the confirmation hearings rather than running him through it twice. My own feelings are much more on the other argument.

Senator **Thurmond**. I was thinking, would it be to his advantage if he came before this committee and answered these so-called charges and refuted them, as you say he would do, before he goes before the other committee? Wouldn't this be to his advantage?

Mr. **Heymann**. Senator Thurmond, it might be to his advantage and the Department might simply order him not to do it, if we felt strongly enough about it as a matter of principle.

But it's tricky to figure out for me whether it's to his advantage or not and the reason is that we fear—and again, this isn't my concern, but some others' concern—that this is a situation where allegations that there is smoke, claims that there is smoke will be enough, or may be enough or could be enough to deny Tom Henderson a fair hearing on his Presidential appointment—a fair hearing.

And it is for that reason that I'm trying to make sure that people see whether there's any smoke there or not. It's my contention that if we talk more, if we talk about these cases, if we go through them, you'll see that there's no smoke there.

Senator **Hatch**. Phil, would it be better—let me see if I could help.

Senator **Thurmond**. Well, let me get through.

Senator **Hatch**. Excuse me, would you yield to me for one——

Senator **Thurmond**. Just let me get through and I'll turn him over to you. Now he's coming before the Governmental Affairs Committee later?

Mr. **Heymann**. That's correct, Senator.

Senator **Thurmond**. Now as long as this charge here is pending, as long as any statements here stand uncontradicted by him, and the foreman of the grand jury is subpenaed to come here and testify under oath about these charges, don't you think that the next committee, the Governmental Affairs Committee, that he's going before, don't you think that they would be interested in knowing what the feeling of this committee is about his response to the charges of the foreman of the grand jury?

Now if that's not done, I look for the chairman of the next committee that's going to confirm him to go into all this thing there, but this would be the proper committee it seems, to come here, because this is a judiciary committee, and clear himself here, if you want to use that word or remove any possible insinuations about him at all.

Mr. HEYMANN. Senator Thurmond, I guess what I think is if this committee has real concern about whether there was a coverup or a whitewash in that Vesco matter, you ought to address the concern as an issue and I probably ought to be the one to testify on it.

If the committee is concerned about Tom Henderson's performance such as did he bully the grand jury, did he rant and rave and shout and break windows and storm around, if they're concerned about Tom Henderson's character, that belongs in the Government Operations Committee as part of the confirmation process. So it really depends on what the issue is and one of them gets me naturally and the other gets Henderson naturally.

Senator THURMOND. That's right and I think it breaks down just that way, just like you stated. For instance this first charge here, the Justice Department conducted investigations in a haphazard manner. That goes to your department; I think you ought to answer that, instead of him. The next one is the foreman said he had to fight, fight for 17 days to get critical transcripts. If you're familiar with that, I think you ought to answer that or if you're not, whoever is.

And next, that there was a concerted effort by the Department of Justice to prevent the grand jury from attending quorum times. Well, that would appear, if the Department of Justice did that, you ought to answer that.

One of the other prosecutors, Thomas H. Henderson, Chief of Public Integrity, tried to lead the jury by the nose, in other words that's an insinuation that he tried to impose his will on them. A grand jury ought to be perfectly unbiased, ought to be perfectly objective, when they act on indictments, when they act on any matters that come before them. Now it seems to me that Henderson himself would have to answer that, don't you think?

Mr. HEYMANN. I suppose that he, Senator Thurmond, like the rest of us would want to know a little bit more what the reference to leading the jury by the nose means.

Senator THURMON. If this man testifies, the foreman of the grand jury testifies, then that will be brought out I'm sure and he could answer it.

Now the next one says that Henderson's initial tactic was to rush the investigation by the grand jury, but when the jurors balked at this after learning of possible White House involvement, Henderson turned to bullying the jury. Now that's a pretty serious charge against Henderson himself. The next one, Henderson would harass, badger and embarrass jurors. Now that's against Henderson himself.

And then the next says that a key witness was Carter himself, and so forth. That's about seven charges here. Three of them seem to go directly to Henderson's knowledge, not to your knowledge because you wouldn't know about that. This is charging Henderson himself with bullying the grand jury. You were not on the grand jury were you?

Mr. HEYMANN. No.

Senator THURMOND. So, therefore, he's the only one that could answer that, isn't he? Then there's the charge about, Henderson's initial tactic was to rush the investigation by the grand jury. Well, you were not present there so you wouldn't know about that, and so you could hardly speak with firsthand knowledge where Henderson could. And the concerted effort, in other words, tried to lead the jury by the nose.

There're three charges here that concern Mr. Henderson, not just the Justice Department, except his being a part of it. It concerned him, it seems directly.

It would appear that he would wish to answer and I just wondered if you wanted to talk with him and see if he wanted to come up and answer those; he wouldn't have to answer these other things about the Justice Department, you could answer those.

But on those things, which he has knowledge, nobody else does in the Justice Department, then it appears that he is the one that ought to answer those. That's the observation that I wanted to make to you.

Mr. HEYMANN. Thank you, Senator Thurmond.

Senator THURMOND. There's just one more question. Are you familiar with Operation Leviticus?

Mr. HEYMANN. Yes, sir. Not fully, but I know what it is.

Senator THURMOND. Was this particular grand jury involved in that operation?

Mr. HEYMANN. Not at all.

Senator THURMOND. Thank you.

Senator HATCH. Mr. Chairman, perhaps I could help you a little bit here.

It's apparent that some of these answers to very substantial questions and substantive questions, only Mr. Henderson can answer, none of the five of you would be able to answer. But perhaps, Mr. Chairman, the way we should go about this is subpena, Mr. Ulmer first, let him bring his charges before this committee, subpena any notes that he may have.

Let me ask you this, were the proceedings before the grand jury, were they taken down?

Mr. HEYMANN. Of course.

Senator HATCH. Maybe in camera we might want to look at that. If there was any badgering or bullying of the jury or whatever.

It seems to me that would save, I'm willing to do this procedure first and if I'm convinced that Mr. Ulmer is not telling the truth or there was no, and these allegations were wrong and that the Anderson column, some of which were told to us, all of which were told to us, plus additional that I think only Mr. Henderson can answer, then I don't care if Tom Henderson never comes in.

If we find that there's some credibility in what Mr. Ulmer has to say and in his notes and in the stenographic matter, I think we can look at that in camera, outside of the public view, so as to protect those minutes.

I don't think we'll deal with Mr. Ulmer in camera, I don't see any reason for that, I think that would have to be in public so people could see it, but I'm saying that as far as the grand jury's stenographic——

Senator **Biden**. May I interrupt?

Senator **Hatch**. That may be the approach to take, they don't want to produce Mr. Henderson, I think maybe in fairness, let's go through the other approach.

Senator **Biden**. With all due respect to the Justice Department I don't care what they think in terms of the procedure that we should follow. The procedure that we should follow, whether or not we subpena Henderson and/or Ulmer, whether or not we should reopen the whole Vesco case, should be a decision that we should make and quite frankly I don't want the opinion of Mr. Heymann or anyone else on that and I wish Mr. Heymann and everyone else would remain silent on that, because I don't care what they think.

If we decide we want to open the Vesco case, that is our prerogative and we should move forward with it. What I would like to suggest rather than, to expedite what is an authorization hearing, in order to expedite the matter is that we should proceed at this point with the remainder of the allegations and the number of questions that I have. I hope you don't plan on having lunch, because I plan on asking these questions.

I have a number of questions relating to the substance and operation of the Criminal Division, which is the reason why we're here. And if after, if I may finish, if after we've finished, I would suggest that you, myself, signatories of that letter and the remaining committee sit down in the committee room and/or in my office or the chairman of the full committee's office and discuss how we think we should proceed as a committee.

But I don't mean this disrespectfully and I'm serious, the Senator and I have sometimes strong disagreements, and I don't mean this in any disrespectful way, but I think this is a matter the committee should resolve, not a matter that should be resolved with the input from the Justice Department. It seems fairly clear that the Justice Department is not of a mind, at this point, to voluntarily suggest that the former prosecutor come up.

So with that and in the interest of moving on both in terms of your 2 o'clock appointment and my next 8 to 10-day schedule and the need to proceed with the matter, I would like to ask—

Senator **Hatch**. I'm not through, Joe, I didn't even get a chance to ask any questions.

Senator **Biden**. Oh, OK, sure then I'm delighted but let's please ask questions and let policy be made by us and not by the Justice Department.

Senator **Hatch**. I understand that, I just suggested that might be a reasonable way to approach, but we can make that determination in the committee. I would suggest we subpena Mr. Ulmer, look at what he has to say, look at his notes, if he has any, get an in camera review of the actual minutes of the proceedings. I suggest this is a reasonable way to approach it and we can make our own determinations on whether or not these allegations are true to a degree.

I still think it probably would be essential to have Mr. Henderson, but certainly the full committee can make that decision. I do think we ought to do this just because of our oversight responsibility.

Senator **Biden**. I don't necessarily disagree with that.

Senator **Hatch.** I know you don't, I'm just making that as a suggestion, since Phil has been concerned about it as he has. Now, with regard to Leviticus, was R. L. Herring or Spencer Lee, where they involved in the Leviticus investigation?

Mr. **Heymann.** I may be making some sort of terrible mistake. I think of Leviticus as a jointly funded LEAA project for a number of States. Am I right on that? Is there any reason why I shouldn't say what it goes into?

Mr. **Keeney.** No.

Mr. **Heymann.** It's a federally funded, largely State, somewhat Federal set of investigations into the coal——

Senator **Hatch.** It was 22 States, but Vesco was certainly involved in that and so was R. L. Herring and Spencer Lee.

Mr. **Heymann.** I don't know——

Senator **Hatch.** It's a part of that total investigation.

Mr. **Heymann.** I don't have any idea what the reference is to.

Mr. **Keeney.** If you're talking about Herring's involvement in that type of activity, that antedated what we're talking about now, Senator Hatch.

Senator **Hatch.** I understand that, but Herring was involved in that, Lee was involved in that, Vesco was involved in that——

Mr. **Keeney.** He was involved in something that might be considered similar, but when you add that if it had occurred now, what we're talking about now are ongoing Federal and State investigations and the coordinations so that we don't trip over each other in the course of the investigations.

Mr. **Heymann.** I think we just funded it, I think Mr. Herring, for example, was long in jail by the time we funded it.

Senator **Hatch.** Well, OK, let me ask you some of these questions. One conflict between my conversations with Mr. Ulmer and yours here is that you've named six prosecutors and he said there were seven.

Mr. **Heymann.** It's quite possible I've mislaid one, Senator.

Senator **Hatch.** OK would you look over your notes and provide all seven names. Let me ask you this, with regard to Schroeder, Boucher, Henderson, Tignor, Kathy Voelker, that's her name, who was the last one.

Senator **Biden.** Would it have been Mr. Rauh? Was he involved in the case?

Mr. **Heymann.** I don't know if Mr. Rauh ever went before the grand ury but he was the acting U.S. attorney throughout most of the time.

Senator **Hatch.** What was the name of the last one. Harry——

Mr. **Heymann.** Benner, I believe B-E-N-N-E-R.

Senator **Hatch.** What was the experience factor with these, let's say Schroeder and Boucher.

Mr. **Heymann.** How much experience do they have?

Senator **Hatch.** Prosecuting?

Mr. **Heymann.** I'm not sure I can answer, maybe Mr. Keeney.

Senator **Hatch.** If you can, it can be approximate too.

Mr. **Heymann.** I'd like to say one thing about Boucher though, that is, I specifically asked for Boucher to be on it because Boucher—we were stealing him from a Deputy Section Chief role—because Boucher had a reputation as our best, most incisive investigator. He had done a series of investigations which were highly regarded.

Maybe Jack can tell you something about how——

Mr. **Keeney**. I'm looking. We provided the Senator with some material background of the various attorneys and I think he had left by that time.

Senator **Hatch**. I see.

Mr. **Heymann**. And of course the same experience led to Boucher being considered.

Senator **Hatch**. While he's working that up. We asked you earlier in the hearing today about making transcripts available to the grand jury and I think Mr. Keeney said that is very unusual, but probably has been done in the past.

It isn't unusual for grand jurors to ask to review matters of the record, especially in an investigation of a grand jury like this that went on for, how long, 18 months. It's not unusual for them to want to go back in the record and see what various witnesses have said and so forth is it?

Mr. **Keeney**. I wouldn't say that would be unusual. That would have——

Senator **Hatch**. That would be usual.

Mr. **Keeney**. In a long-term investigation if you're dealing with something, say a perjury charge, or something where specificity is required, a grand jury might want to see it and it might be very appropriate.

Senator **Hatch**. Or anytime when they think that a witness' testimony may have been important to review.

Mr. **Keeney**. Yes, sir, but what we were saying before is that routinely the grand jury transcripts are not made available for review by the grand jury.

Senator **Hatch**. But you say that it probably has been done in the past and in this case it was done because you felt that it was appropriate in this case.

Mr. **Keeney**. Well, you made a good point here, with respect to portions of the transcripts in certain areas. I'm sure its done on occasion, certainly.

Senator **Hatch**. OK. Have you had many other cases where you've had six or seven prosecutors during the grand jury proceeding?

Mr. **Heymann**. In the Lance case, which is out and was a 3-year matter, we were again attacked for too many changes in prosecutors. But it's an unfortunate fact of life with us that at the rate people come and go in the Justice Department or the U.S. attorneys offices, if you have a 3-year investigation, there will likely be a number of changes.

Senator **Hatch**. How many did you have in the Lance case?

Mr. **Heymann**. Again, my voice of wisdom would have to remember.

Mr. **Keeney**. One of them was Jay Johnson, he left because he was offered a job as Regional Counsel for the SEC in Texas. Another left and I can't remember who it was, Senator, and we put finally four people on the trial team, but I have missed one or two in there, I just can't figure them off hand.

Senator **Hatch**. I see. The ——

Mr. **Keeney**. One is Walter Barnes who was on it at one point, he's a Deputy Section Chief in Fraud and we gradually put other people in because he wasn't the appropriate person to keep on for a long term.

Senator HATCH. I see. Mr. Ulmer apparently, I can tell you one thing he said to me, I can't give it to you exactly, I'll have to go back to my notes which are not here.

But he indicated that when he asked for these transcript records that he was denied them and put off for 17 days. Repeatedly asked for them though, now you indicated, Phil, that that was, you were trying to make a decision in the Department so that could very well explain that, but he said he was very verbally mistreated by Henderson in asking for them.

Verbal is probably not the word, but harshly treated and demeaned in his repeated request for the transcripts until he was finally able to get them. Only Mr. Henderson can testify as to that and you know his attitude toward Mr. Ulmer. I will tell you this. I've met Mr. Ulmer on at least two or three occasions and he appears to be a very straight-shooting person.

He's a very religious man, has worked for the Federal Government for years; in fact, he's a retired Federal employee and I don't think has any real ax to grind except he really does believe these allegations and I believe would lead anybody to believe that he's not only sincere, but talking from experience.

Mr. HEYMANN. Let me ask you a very difficult question, Senator Hatch. This one really is very tough.

Senator HATCH. Sure.

Mr. HEYMANN. If you were going to try and resolve whether Tom Henderson was abusive to Ralph Ulmer or Ralph Ulmer was abusive to Tom Henderson and whether Tom Henderson was a difficult guy in general because he didn't get along with, or rather Ralph Ulmer was a difficult guy to get along with, what you're going to have to do is you're going to have to talk to a number of people about Tom Henderson, and you're going to have to talk to a number of people about Ralph Ulmer.

There's no other way of doing it. And this isn't an argument about whether Tom Henderson should appear or not, but if Tom Henderson were here today and he said, I was sweet as sugar and I went out of my way and I did everything I could for Ralph Ulmer and I used to make his bed every morning, it would still be a conflict of two people. You're going to have to talk to a lot of people about Ulmer and to a lot of people about Henderson.

Senator HATCH. Well in that case——

Mr. HEYMANN. And you're not going to want to do that in open hearings, but if you go into it, you're going to have to send somebody out, or the other committee is going to have to send somebody out and ask about each of these people.

Senator HATCH. Well, Phil, the only reason I brought that last point up, it's not because it's that significant, standing in and of itself, but only because Mr. Ulmer said that Mr. Henderson was stacking up the defense, that he was trying to get through the hearings with no indictable counts. That's a serious charge.

Mr. HEYMANN. It's not in the newspaper, but he said that separately.

Senator HATCH. He said that separately to me. He believes that Mr. Henderson was obstructing. If I'm repeating it correctly. In general, he feels Mr. Henderson obstructed the grand jury proceeding, and that he was trying to have it reach the ultimate outcome it really did.

Mr. Heymann. I want simply to suggest that one step you might want to take is, ask some questions about how each of them——

Senator Hatch. But see, I wouldn't approach it that way, I would want to see both of them and I would think——

Senator Biden. Gentlemen, we're once again discussing how we're going to proceed. I would respectfully suggest, Mr. Heymann, be a better witness and let's get on with the questions. I'm personally tired of talking about how we're going to proceed. Let's ask the question. It's not going to be resolved.

Mr. Heymann. I'll comment no further on how the committee should proceed, under any circumstances.

Senator Biden. I think it will be wise.

Senator Hatch. The point I'm trying to make is similar to Senator Thurmond's. I'm not going to go out and ask Mr. Henderson's friends or enemies, what kind of a guy is he. I'll make my own decision on that and I think other members of the committee will do the same.

Same thing with Mr. Ulmer, Mr. Henderson may not like Mr. Ulmer, Mr. Ulmer may not like him, I don't know. Who cares? But what Mr. Ulmer has charged is that there was a concerted effort by members of the Justice Department, to bring back no indictments in this particular case. Which Anderson seems to imply means a coverup of the potential liability of the White House and various people around the President and perhaps even the President himself.

Be that as it may, you've indicated that Mr. Henderson should not have to come in and answer these questions, that you should answer them, but like Senator Thurmond brought out, there are a number of issues here that you can't answer and you admit that you can't answer, but only Henderson can.

Now I would suggest these, and I'm doing this as well for your benefits as for my colleagues on the committee, instead of asking questions, I'm bringing up points that I think are important and I'll ask some questions afterward, if I have time.

The charges by Ulmer are haphazard conducting of the grand jury proceeding, procedural disruptions, confusion. You can't answer that, only Henderson can. Or the other prosecutors, but in this case Henderson handled it longer than any other person, as far as I can see. As far as the transcript is concerned, you've answered that to the best of your ability. Whether or not there was animosity between Henderson and Ulmer, the only way we'd know is to ask them.

The concerted effort by the Justice Department to prevent the grand jury from obtaining a quorum at times, I would think that the transcript of the hearings themselves would tell us that or at least help us to know that.

And perhaps the notes of the grand jurors themselves. And his allegation the jurors were given conflicting times, as to when the jury was meeting. I think you'd have to agree that comes down to testimony of the grand juror himself and perhaps other grand jurors and Mr. Henderson, and nobody else, or the other prosecutor.

He claims that Mr. Henderson was behind this. The trying to lead the jury by the nose, I think the transcript itself may give us some knowledge about that, Mr. Henderson's testimony, I presume will deny that. But Mr. Ulmer's would be that he tried to do that.

That he tried to rush the investigation by the grand jury, I think the only one that can answer that is Mr. Henderson. Mr. Ulmer would have to explain what he means by that, but nevertheless without Mr. Henderson in here would never have the answer. Whether or not this committee ever brings him in, we'll never have the answers if we don't.

This matter of Henderson bullying the jury, I don't know what that means. All I can say is that the only two who can answer that, the only ones that can answer that are the 23 members. Weren't there 23 members of the grand jury in this case? The 23 members of the grand jury and I presume Mr. Ulmer would be the person to start with and Mr. Henderson.

That he would harass, badger, and embarrass jurors who tried to ask the witnesses hard questions; you can't answer that, whether he has or whether he hasn't done that. It seems to me that only the 23 jurors, Mr. Ulmer to begin with since he's made the charges and Mr. Henderson can answer those things.

Moreover, Ulmer claims that Henderson refused to answer questions by the grand jurors and refused to obtain information requested by the grand jurors.

Partly you've tried to answer that here today, and that there were repeated requests, you asked to FBI, you asked others, but as I understand your testimony, that was not a repeated thing with you. There weren't repeated requests for you to supply investigative——

Mr. **Heymann**. I spoke only from my knowledge on that; I'm not totally familiar with the grand jury proceedings and what the investigators——

Senator **Hatch**. But these particular proceedings, do you know anything further than what you gave us here today?

Mr. **Heymann**. No sir.

Senator **Hatch**. Were there any other requests other than the one that you mentioned here today?

Mr. **Heymann**. Not that I know of. I did not familiarize myself with it before I came today.

Senator **Hatch**. Well, you know, that can be viewed two ways, it seems to me. Either Mr. Ulmer didn't make all these requests and the jury didn't make all these requests or Mr. Henderson didn't ask the followup to be made.

And I think that can only be resolved by having Mr. Henderson here. When I looked at your other statement that you know, that this committee should look into the technical legal matters and the Governmental Affairs Committee look into Henderson's credibility for integrity as Chief of the Public Integrity Section, I think we both should.

We should look into it from the standpoint of whether justice was done in this matter and whether the office was upheld in this matter or whether this juror is off base. And I think we ought to look at both sides as carefully as we can in this matter. But again we can't do that without Mr. Henderson.

Senator **Biden**. Senator, it would seem that you're making a very good case, but we also cannot do it with Mr. Henderson alone and maybe what we should decide is what this committee should do. So far you've named Henderson, the agents and, the prospect of all the grand jury coming before us.

Senator **Hatch**. No, just Mr. Ulmer and if you feel that it's essential to have more, then that's up to this committee, but——

Senator **Biden**. Right.

Senator **Hatch**. And I mean the real issue here is whether or not the Vesco was mishandled. I suspect that if Mr. Henderson was here, it comes down to a conflict of Mr. Henderson and Mr. Ulmer, and we may decide that we want to have other grand jurors in here.

Senator **Biden**. That's right.

I would like to suggest that unless there is something specific you want to ask today, I'm very anxious to get forward with the authorization question.

Sentor **Hatch**. Well, let me suggest this——

Senator **Biden**. Does it relate——

Senator **Hatch**. There's a lot of other stuff that I'd like to go through just on Ulmer and then we have a whole bunch of other things. Now I have to leave because of my commitment on the floor, which you're fully aware of.

Senator **Biden**. If we have to stay here until midnight, we're going to finish the authorization part of this thing.

Senator **Hatch**. Well, that's fine. I have no questions with regard to the authorization part; I had some, but I won't ask those.

Senator **Biden**. Fine.

Senator **Hatch**. But I would like to ask you Mr. Chairman to ask Mr. Heymann, I'd prefer to do it this way and I think I'd like to have it brought up in committee. I would prefer to bring Mr. Ulmer in, subpena him, subpena his records. I think that's the way to do it. That might put the whole thing to bed, I don't know.

And perhaps that would give you the edge that you would like to have. If he has notes, let's subpena them, I believe he does. Then we can listen to that testimony and see what he has to say, make the notes available.

No. 2: I think this is something we can do as a committee, subpena the grand jury record of the hearings, of the grand jury proceedings. I don't think that should be made public, but we can certainly, I wouldn't have any objections to it being made public, but we can certainly look at it in camera. I think our staff should have the availability to that as well as ourselves.

No. 3: I think that we ought to then, if we decide that Mr. Ulmer is sincere and that he may be telling the truth and his notes help bear that out, if it's essential to bring any other grand jurors in, fine. That's fine with me. But I don't think it would be. But I'd be happy to sit through the hearings and to see that that occurs.

No. 4: I would like to have both Mr. Heymann and Mr. Henderson subpenaed. We don't have to subpena Mr. Heymann, but if Mr. Henderson will not come voluntarily, then we ought to subpena him and ask him to come up and answer these questions.

But I would be willing to interrogate Mr. Heymann personally on this in detail concerning all the complaints that have been made about Mr. Henderson while he has been Chief of the Public Integrity Section.

That would take a little bit of time, more than I have today. I would be prepared to do that. We would expedite it and we would do it in a reasonable and fair manner and try and get to the bottom of this.

But I think the key is to start off with Mr. Ulmer and see what he has to say. If we don't feel that he has much to say or if we don't feel that these allegations are correct or we don't feel that his notes are very important, then we probably wouldn't want to go any farther. But if we do, then I think we ought to go and follow this thing through right to the end so that if there are people who have been maligned here, we can get rid of that. If there have been people who've been mistreated here, we can get rid of that.

If there has been a coverup in the grand jury proceeding in the Vesco matter, we can follow up on that. If there has been an improper approach toward the grand jury proceeding, we can follow up on that.

Mr. Chairman, since I do have to leave, I would like to ask at the very least that we have another hearing where at least Mr. Heymann comes up, he's willing to do that, where I can come back and ask questions concerning all of these matters.

Otherwise I would have to spend well into the evening, this evening with you and I'll be happy to.

Senator **Biden**. Well I don't have the authority, nor would I agree to another hearing. If the committee wants another hearing and the majority of the committee wants another hearing and wants to open up the Vesco case and get the notes and all these things, then that's fine with me. This is an authorization hearing, relating to the Criminal Division.

Senator **Hatch**. I'm willing to come back this afternoon, then after, I take it I won't be through until about 2:45 or 3 o'clock—probably 3 o'clock and I'll spend all night tonight and all day tomorrow or as long as it takes to ask every question that I have, if you're unwilling to bring him back.

Senator **Biden**. Fine, let's just go straight through the——

Senator **Hatch**. Then, I'll be back at 3 o'clock.

Senator **Biden**. All right, that's fine with me, but in the meantime I'm going to continue the hearing and we will have questions. I will ask my questions as they relate to the substance of this issue, which is not whether or not we open the Vesco case, which maybe we should do, I don't know, but whether or not the Division is run the way in which the taxpayers are paying their money to have it run. With regard to that, let me begin.

Mr. **Heymann**. Do you think we could have a short break, Senator Biden, if we promise to return?

Senator **Biden**. Yes; yes we can. My questions won't take very long.

Mr. **Heymann**. Then, why don't we go ahead.

Senator **Biden**. And the Senator can be back here at 3:30. We can reconvene at 3:30 and go on.

Senator **Hatch**. I prefer doing it at another time.

Senator **Biden**. Why? Let me ask the Senator a question. Why do we have to do this in the context of this authorization hearing?

Senator **Hatch**. This is the only context that we have.

Senator **Biden**. We certainly don't. We have the context of the committee calling up these fellows anytime that we want for any reason we want, at any point in time.

Senator **Hatch**. As long as I'm assured that Mr. Heymann will come back on these issues, I don't care.

Senator **Biden**. He'll come back for these issues, won't you?

Mr. **Heymann**. If you promise to make it Heymann, I'll come back whenever you want. Everybody has been calling me Haymann, Senator Hatch. If you promise to call me Heymann, I'll come back whenever you like.

Senator HATCH. Have I been calling you Haymann? I apologize.

Senator BIDEN. All right then we'll set a time to have you come back, but we'll not delay the authorization portion.

Senator HATCH. I'm not interested in that.

Senator BIDEN. Good. So we can finish. You'll probably be able to get a late lunch; we'll finish the authorization hearing and the committee will set another time for you to come back and anyone else who wants to come back to discuss everything and anything I have no interest in.

Let me begin by pointing out that this is a full committee hearing, this is not a subcommittee hearing. I don't know if I will be the fortunate one to have the opportunity to preside over this matter when you come back, as it relates to these cases and other cases, because my interest relates to the committee. Let me get on with the business and let you get on with lunch.

The first question that I have is that the guidelines for undercover operations seem to me should be in existence by now. I asked a year ago whether or not they were being formulated, and what they would be and the Department of Justice, I assume has made that decision.

Can you tell me whether or not you have formal guidelines on so-called sting operations, undercover operations and if so, what they are and if you have them and they are formally put down, you could save yourself some time and an extra bite of your sandwich, if you'd submit them to the record.

Mr. HEYMANN. The status of undercover guidelines as of a number of others, Senator Biden, is that they have been substantially agreed upon at the working level which goes up through me and through Bud. They are presently in the hands of the Deputy Attorney General and the Director of the FBI on their way to the Attorney General.

Senator BIDEN. When in terms of a time frame do you anticipate that they will be either approved or disapproved, rewritten or altered or accepted as written by the principals involved here. I assume that means the Director of the FBI and the Attorney General. Do you have an estimate as to when that will be?

Mr. HEYMANN. I really don't, Senator Biden. It will be affected a little bit by whether it could have any effect on the Abscam litigation, on anything in Washington. It's not that there's much work to be done on them, it's really a question——

Senator BIDEN. Were these guidelines used, the ones that you proposed, have they been used thus far in the Abscam affair?

Mr. HEYMANN. Abscam began well before we had these guidelines.

Senator BIDEN. All right now. I would respectfully request, as I did a year ago that those guidelines be made available to the committee as rapidly as possible because unlike questions of whether they're substantive or not substantive, of who harassed who in the jury, I can promise you I will harass you all on this point, as it relates to the money that you get for your operation. Because I think we should have had those already. I think they should be in place. I personally am very concerned about those and I think they go to the question of the conduct of the Division.

Now with regard to a second set of guidelines that I assume you may have spoken to, and that is the declination guidelines for U.S. attorneys. Do you have any formal guidelines that have been set out or put forward, with regard to how a case is dismissed and under what circumstances and why?

Mr. HEYMANN. I think almost all of the U.S. attorneys have separate formal guidelines for what they will and will not prosecute. We collected those at the request of the committee, last year. I think they've been made available to the committee.

We then went over them to see if we thought any of the 94 or 95 U.S. attorneys were doing anything out of line, allowing for geographical and population demographic differences and we were satisfied that they were not.

Senator BIDEN. So your position is that the guidelines for the declination of alleged violations of Federal criminal laws which was published in November 1979 that did show discrepancies in terms of how they were handled based on districts, that those discrepancies were warranted based upon the geographic or caseload, or particular circumstances in that district?

In other words, you stand by the guidelines that are as set out in the November report, is that correct?

Mr. HEYMANN. That is correct. We'll give you a little bit more on that within a month or two, but that will be our position.

Senator BIDEN. Have the sting-type operations been supervised by the Criminal Division, since you've begun the reorganization last year? Is that where they're handled? Are they supervised?

Mr. HEYMANN. Supervised isn't right and you ought to hear a little bit from Bud Mullen on it.

What happens is the proposals generally come up from the FBI in the field and though we're talking mainly about FBI stings, although there are other stings, Agriculture, Customs, et cetera.

It goes from the FBI man in the field, generally to the U.S. attorney at that time to determine whether the U.S. attorney would prosecute if it were successful. Then it gets sent into FBI Headquarters, where I have three Criminal Division attorneys, Tom Henderson, one of them; Gerry McDowell; and Bill Hendricks, sitting on a group of about six or seven people who review the finished product, the FBI having by then checked out financing, legality, and a lot of dimensions. If there's any disagreement among the group it would come to me and the Director. If not, not.

But from then on, and that seems to be really what you're referring to, Senator Biden, it would be handled almost completely in the field. It would be approved, and then it would be largely in the hands of the FBI, but I take it that an assistant U.S. attorney would be assigned to work closely with the undercover operation.

Mr. MULLEN. That's correct, Senator. In addition we review each undercover operation on a monthly basis at FBI Headquarters. It receives continual daily review by a Bureau Supervisor at Headquarters and each operation is reviewed up through channels, up through my level on up to the Executive Assistant Director level.

Senator BIDEN. You testified, Mr. Heymann about the economic crime units, white-collar crime units and you indicated that in the written statement that the program in only about a third implemented.

I am very interested in the very difficult task your Division has, the Justice Department overall has, deciding with limited dollars what your priorities are. And that holds to the FBI, obviously, too. All departments, the FBI and Criminal Division fall under my jurisdiction, so I have a personal concern.

Give me an idea of what priorities relate to white-collar crime and the organized-crime efforts. In other words, has white-collar crime as an object of the Bureau and the Department been superseded or is it significant. How does it fit into the scheme of things in terms of allocation of resource dollars, without being specific, in a general way? And how do you picture that relative relationship 2 and 3 years down the road as your reorganization is in full swing?

Mr. **Heymann.** Either Bud or I could tell you now, Senator Biden.

Senator **Biden.** Yes, I'd appreciate it now, if you'd give me——

Mr. **Heymann.** For the FBI the figures are in the neighborhood of 20 percent of total investigative resources on each of organized crime and white-collar crime. Is that right, Bud?

Mr. **Mullen.** Organized crime would be about 23 percent of our total investigative effort with organized crime at about 18 percent.

Senator **Biden.** With white collar 18 and organized crime——

Mr. **Mullen.** No white collar having the larger resources of about 23 percent, organized crime of about 18 percent and that would be very close. It may vary a percent in a change or something——

Senator **Biden.** There's slightly more emphasis on white collar than organized crime.

Mr. **Mullen.** That's correct, but often Senator, the two programs intermesh and we may have a public corruption case involving organized crime, but that's the current breakdown.

Senator **Biden.** But there have not been a whole lot of those.

Mr. **Mullen.** Public corruption and organized crime?

Senator **Biden.** Yes.

Mr. **Mullen.** There have been a whole lot of those.

Senator **Biden.** Relative to the total amount of investigation you have underway?

Mr. **Mullen.** Well, in any organized crime case we find we're going to have some form of public corruption because organized crime, we have found, cannot exist without some form of corruption. So we do have programs, cases that start off under the organized-crime program which will lead into white collar crime types of cases. Very common.

Senator **Biden.** Got you. How about the Criminal Division?

Mr. **Heymann.** The trouble with saying anything about the Criminal Division is that we spread out in a strange way with the U.S. attorneys. The Criminal Division is responsible for all the organized crime which as we said earlier may entail 160 authorized positions. The Fraud Section has 50 authorized positions, the Public Integrity Section has in the neighborhood of 40, but no U.S. attorneys office does any significant amount of organized crime, but they all do a significant amount of white-collar crime.

So if you add it up, you'd find that we, too, were giving much more attention to white-collar crime in terms of dollar resources, man-years.

Senator **Biden.** I don't know whether or not I share the view of, whether my view is held by the rest of the committee. I think it's a fundamental mistake that has been made, that we've made in terms of allocation of our resources, in attempting to deal with the criminal justice system in this country.

I know that's not necessarily a decision issue that you've made and I know that my view won't necessarily change it, but I just want to be on the record as suggesting that I think that is a misallocation of our resources and I'm sure that there will be some who will suggest that because I'm a U.S. Senator, I am less concerned about white-collar crime and the answer is that I clearly am much less concerned about white-collar crime than I am about organized-crime because of what it does to the fabric of this country in a very organized way.

But that's again not a matter for argument. I just want to put it on the record because over the next year or several years, I will be back to you all in varying degrees on that subject. Let me ask you, do you have in the FBI a specific definition of what constitutes white-collar crime? I mean, what do we mean by white-collar crime, as the FBI views it and as Justice views it and is there a difference?

Mr. MULLEN. Basically, the definition is the same and it normally involves an otherwise legitimate individual using illegal means for financial gain, not usually involving the force of violence as associated with the violent crime.

Mr. HEYMANN. We're doing a rather mammoth job that I am about nine-tenths promising you in the next month or 6 weeks will be a major expansion of our description or definition of white-collar crime.

Senator BIDEN. And so as a practical matter, even though it's not 100 percent sure yet, the trend is continuing under the expansion of white-collar crime efforts and scope rather than diminishing. Is that a fair statement or should I not attempt to generalize on that?

Mr. HEYMANN. I think the FBI is relatively stable over the last few years.

Mr. MULLEN. I think we've stabilized and I do not envision in the near future a reduction or an increase in the effort. For example, the public corruption cases seem to have stabilized and the last count we dropped seven cases. We count the cases every 3 months and I believe we've dropped from 1,192 to 1,185, so I see a stabilizing of the program.

Senator BIDEN. Now, and I promise 5 more minutes, fellows. You referred in your testimony, Mr. Heymann, about a letter from Director Webster in reference to Mr. Henderson. Would you be willing to submit that to the record. I think that in light of what else has gone in, it would be worth putting that in the record.

Mr. HEYMANN. Of course we would; thank you, Senator.

[The material referred to above can be found at the end of today's hearing.]

Senator BIDEN. But let me conclude with one question that relates to testimony from last year's hearings that forfeiture provisions within the law have been underused and the Department's attorneys were under instruction to consider forfeiture in every RICO case and in every major narcotics case. Have any improvements resulted from this change in direction and could we have copies of any training material that you have generated?

Mr. HEYMANN. There has been a relatively little improvement and in order to get improvement there is a brand new training manual that is supposed to come out July 1 and there's work being done on it. If satisfactory, it'll appear July 1 and I can't claim that we're doing much better with forfeitures in the meantime.

Senator **Biden**. Well, I have been holding oversight hearings with DEA and again, I apologize for being so parochial about this. We all have that tendency to think that we've become myopic in our concerns. I find I'm doing a great deal more, the longer I'm here, on foreign policy and international questions and I find it all starts to dovetail and maybe that's the reason for my concern with drug trafficking in organized crime.

I have strongly urged DEA, who insists that they are doing better with regard to RICO statute implementation, to do even better than they are. We are going to, my subcommittee, not this full committee which I'm chairing now, will be holding hearings on implementation on that act as we go down the line and I would suggest that the sooner you get, and it is presumptious of me to make these suggestions, I realize the separation of powers and the separation of expertise, but if that, there is such a guideline or manual coming down in July, the sooner the better, because, let me tell you fellows, in our brief investigation of this matter, most folks don't use it because they don't know how.

And there is a need for us in terms of your commendable organization, Mr. Heymann, of the Criminal Division, there is a need in my opinion for us to also augment DEA and within Justice, the technical expertise that FBI has on board more than the rest of you do, with regard to the accounting background, knowledge of the banking industry, knowledge of financial transactions and a whole range of other things.

The one thing that I have become convinced of in my 8 years in the Senate, and prior to that in the few years that I practiced law, is that we all tend to go to what we know best. I'm good out campaigning on the stump and I find that when a campaign comes up I spend my time out of the headquarters and not in the headquarters. Other people are wiser to spend their time in the headquarters instead of out.

I think that you all, and I mean that in an editorial sense, are tending to do that with regard to that statute, which I think is woefully under utilized.

Mr. **Heymann**. I agree with you.

Senator **Biden**. A list of 13 programs of the Criminal Division is included in the authorization request. Has the reorganization of the Division been completed, the Criminal Division?

Mr. Heymann. Yes.

Senator **Biden**. What are the major benefits, as you see them? Don't answer this now, but I want to read it into the record. I'd like an expanded answer on this.

I'd like to know what benefits you believe have been realized as a consequence of the reorganization and if any, and what portion of your plan, Phil, remains to be fulfilled. You mentioned some of them, but if you could name what needs to be flushed out in your reorganization and what have the benefits been thus far, I think it would be very useful for us to have.

Mr. **Heymann**. I'd be happy to.

[Material referred to above can be found in the appendix.]

Senator **Biden**. Unless any of you have something you'd like to add, I am going to not recess, but close the hearings on the authorization request.

Mr. **Heymann**. Senator, as we were getting to the close, I was wondering, do you know what would happen to us if we interrogated a witness for 3½ straight hours?

[The prepared statement of Mr. Heymann follows:]

PREPARED STATEMENT OF ASSISTANT ATTORNEY GENERAL PHILIP B. HEYMANN

Mr. Chairman and members of the committee, last year I described to this committee a major reorganization then taking place in the Criminal Division. That reorganization was successful—in my opinion, at least—and has contributed to a number of changes in what we do and how we do it. Those changes, particularly in the area of white collar crime and public corruption, are my main topic for today. To provide a context for that discussion, I would like to begin by summarizing for you how I have come to think, after nearly 2 years as Assistant Attorney General, about the mission of the Criminal Division.

The Criminal Division's mission is best described in terms of two things: first, the functions that the Division performs; and second, the other agencies with which it works. Let me start with the latter, which I usually describe in terms of five categories of actors:

First, there are some 1,800 attorneys in the 95 offices of the U.S. Attorneys. They spend somewhere between half and three-quarters of their time on criminal cases.

Second, there are over 20 major Federal investigative agencies. They include the Inspectors General in 15 Executive departments and agencies as well as the Federal Bureau of Investigation, Drug Enforcement Administration, Customs Service, Secret Service, Postal Inspectors, Internal Revenue Service, and Bureau of Alcohol, Tobacco and Firearms.

Third, there are a variety of Federal regulatory agencies, such as the Securities and Exchange Commission, the Environmental Protection Agency, and the Mine Safety and Health Administration, whose enforcement activities may reveal criminal offenses.

Fourth, there are literally thousands of investigators and prosecutors at the State and local level. They have concurrent jurisdiction over many offenses that can also be prosecuted as Federal crimes.

Finally, there is the host of other organizations, public and private, who affect law enforcement even though it is not their principal concern. Federal program agencies are especially prominent in this group, since their operations often create opportunities for criminal activity. In addition, their policy concerns are a factor in decisions on enforcement strategies and sanctions.

Within this diverse array of actors, the Criminal Division possesses a unique combination of characteristics: litigative talent, relatively large size, a strong Washington base, and mobility in the field. As a result, I believe it makes for a sensible division of roles and responsibilities for the Criminal Division to emphasize four major functions:

The first major function of the Criminal Division is to develop and litigate cases, either independently or jointly with the U.S. attorneys, in which specialized expertise, central coordination, or a national perspective is needed. Although most of the responsibility for prosecuting Federal criminal cases properly belongs in the field with the U.S. attorneys, there are certain cases that cannot be handled effectively in such a dispersed, decentralized way. For example:

Major organized crime cases often involve lengthy, complex, multi-district investigations using electronic surveillance, undercover operations, or other sensitive techniques, and sometimes requiring the participation of several investigative agencies. Each of these factors, but especially the combination of them, creates a need for central coordination and close liaison with the investigative agencies in both Washington and the field.

The Office of Special Investigation's cases against alleged Nazi war criminals require special knowledge and diplomatic contacts. These would be difficult or impossible to develop if the cases were handled by a large number of assistant U.S. attorneys, each having only one or two cases.

The espionage cases handled by the Internal Security Section often raise delicate issues involving relations with foreign countries or the release of classified information. They need to be supervised by attorneys who are in close contact with the national security agencies and the State Department.

Major cases in the Courts of Appeals also require a national perspective—though of a different sort—because their consequences extend far beyond the districts in which the cases originated. As a result, the Appellate Section is becoming increasingly involved in work at the Circuit Court level.

The Division also has a special responsibility to develop the prosecutive and investigative techniques needed to address new problems and implement new statutes. For example, the Narcotic and Dangerous Drug Section has joined with the Tax Division and the U.S. Attorney for the Southern District of Florida to lead a multi-agency task force that will use new techniques of financial investigation to develop cases against major drug traffickers. The Section's experience in using these techniques will be disseminated to prosecutors and investigators across the nation.

A second major function of the Criminal Division is to exercise leadership in policy development and implementation within the field of law enforcement. Many issues that critically affect criminal investigations and prosecutions have not been adequately addressed in the past. Part of the problem is that no single actor in the array I described earlier is charged with responsibility for those issues or has the authority to speak for investigators and prosecutors as a group. This is an area, however, in which the Criminal Division, with its Washington base and its broad experience in law enforcement, can and should play an increasing leadership role.

Our efforts to do so are reflected in the Division's current activities in several areas. For example, the Division is seeking to analyze and develop solutions for systemwide legal issues, such as grand jury reform, the scope of the RICO statute, and relations with the Internal Revenue Service in the disclosure of tax information. Second, the Division is representing the interests of the law enforcement community in general, and especially of prosecutors, in legislative matters, including the proposed Criminal Code, the graymail statute, and the Stanford Daily legislation. Third, the Division has mounted a major effort to develop priorities, objectives, and declination policies to guide the allocation of federal law enforcement resources. I will have more to say on this below in discussing a project to set priorities in the area of white collar crime and corruption. Fourth, the Division is collaborating with other law enforcement agencies in developing and evaluating programs and strategies designed to deal with specific law enforcement problems, such as the rising incidence of automobile theft and the increasing importation of heroin from Southwest Asia. Finally, in support of all these efforts, the Division is seeking to maintain close contacts and exchange information with other prosecutors and law enforcement agencies.

The establishment of the Executive Working Group on Prosecutorial Relations, which includes representatives from the National District Attorneys Association and the National Association of Attorneys General, is one recent initiative in this area. Another is the Division's memorandum of understanding with the Law Enforcement Assistance Administration—now the Office of Justice Assistance Research and Statistics—which provides for the Division to consult with that agency on its priorities for the funding of innovative programs and research projects in areas of mutual interest.

A third major function of the Criminal Division is to provide legal advice, technical assistance, and training to the U.S. attorneys and investigative agencies. The Division has traditionally provided support services and backup resources for the U.S. attorneys, helping them with research on legal issues, conducting training programs in specialized enforcement areas, and providing attorneys on a short-term basis to staff cases that a U.S. attorney's office is unable to handle. These kinds of support and backup are particularly valuable to the smaller U.S. attorney's offices, which sometimes lack the attorney resources and expertise to handle a large or complex case that occurs only rarely.

In its support function, the Division concentrates on services that take advantage of our special abilities and position. This is especially true with respect to training programs, where we make use of the Division's ability to draw together expertise from many sources—both Washington and the field—in new areas of law enforcement, new statutes, and sophisticated investigative techniques. For example, over the past several years the Narcotic and Dangerous Drug Section and the Drug Enforcement Administration have jointly conducted a number of very successful training seminars for assistant U.S. attorneys and DEA agents. These seminars have emphasized the use of the Continuing Criminal Enterprise and RICO statutes to make cases against major drug traffickers. More recently, the seminars have emphasized new techniques for obtaining and using financial information in the investigation and prosecution of drug cases.

To supplement its training efforts, the Narcotic Section began a year ago to publish a monthly newsletter on recent cases and other developments related to drug law enforcement. The newsletter is widely circulated among U.S. attorneys, investigative agency field offices, and state and local law enforcement agencies.

The fourth major function of the Criminal Division is to review and coordinate the use of the most sensitive statutes, investigative techniques, and judicial processes. Certain statutes, investigative techniques, and judicial processes require centralized administration because they are novel or complex, because they require consistent and uniform ways of relating to a non-law enforcement agency or to a foreign country, or because their misuse would pose special dangers to civil liberties. The Criminal Division has long played a role of review and coordination in these situations, a role that it is well suited to play because of its central location and legal expertise. At present, for example, the Division reviews and approves requests for electronic surveillance, reviews and approves proposed indictments under the RICO statute, manages the witness relocation program, and reviews requests to subpoena members of the press.

The Division also works closely with the Federal Bureau of Investigations in reviewing and authorizing requests to initiate undercover operations involving FBI agents. With regard to the international aspects of criminal law, a newly important and rapidly growing area, the Division's Office of International Affairs coordinates the requests of U.S. attorneys and State and local prosecutors for international extradition of fugitives and for judicial assistance in gathering evidence from abroad.

The above discussion of the Division's principal functions provides some sense not only of the activities carried out by the Division, but also of the rationale for those activities. What it fails to do, however, is to demonstrate how the Division's four functions are interrelated in practice, that is, how they are used together in addressing a given area of law enforcement. I would like to illustrate those interrelationships by describing in somewhat greater detail a number of initiatives that the Division is pursuing in the priority areas of white collar crime and public corruption.

ECONOMIC CRIME FIELD UNIT PROGRAM

The Economic Crime Field Unit program is intended to establish special units focusing on white collar crime and public corruption in 27 to 30 major districts across the country. These units will be located in the offices of U.S. attorneys, and will be staffed jointly by several Assistant United States Attorneys and one or more Economic Crime Specialists form the Criminal Division. The Division's Office of Economic Crime Enforcement will provide central coordination and direction for the program.

The Economic Crime program was initiated by order of the Attorney General in February 1979, and it is now perhaps one-third of the way to full implementation. Sixteen districts now have units, and 17 Economic Crime Specialists are in place. We expect to bring the total of Economic Crime Specialists to 23 by the end of the current fiscal year. Our budget request for fiscal year 1981 includes 10 more attorneys for the program, plus one nonattorney position. This is the only program for which we have requested an increase in personnel.

The key to the functioning of the Economic Crime Units is the role of the Specialist. To understand that role, one must first understand the special challenges posed by that broad and rather diffuse area of law enforcement that goes under the label "white collar crime and public corruption." One of those challenges is the need to coordinate the many investigative agencies—an unusually large number—that work in this area. Gaps in enforcement must be identified and filled, and duplication of effort must be avoided. Second, since the various investigative agencies differ widely in their sophistication in dealing with white collar crime and corruption, there is sometimes a need to stimulate their attention and train them in the necessary investigative techniques. Third, since white collar crime and corruption is a relatively new area for even the most sophisticated agents and prosecutors, there is a critical need for the development and dissemination of new techniques and the sharing of experiences. Fourth, since public awareness of white collar crime and corruption is still relatively low in many industries and geographic regions, efforts at prevention and detection have been seriously hampered. Outreach programs, especially to the business community, are urgently needed.

These are not challenges that we can reasonably expect local U.S. attorneys and investigative agencies to deal with by themselves. Faced with rising caseloads, they have neither the time nor the special skills required. That is the reason for the Economic Crime Specialists. The Specialists, like the assistant U.S. attorneys assigned to each unit, will handle priority cases involving fraud and public corruption. However, case preparation and trial work, which will wholly absorb the Assistants, is only part of the Specialists' job.

Much of the Specialists' time will be devoted to other activities. These include (1) meeting with investigative agencies, regulatory authorities, and state and local officials in order to assess the white collar crime and corruption problem in the district and the effectiveness of existing efforts to deal with it; (2) disseminating, both within the district and to other districts, any information about new fraudulent schemes or forms of corruption, about particular criminal groups whose operations extend to other regions, and about successful investigative and prosecutive techniques; (3) assisting the U.S. attorney in determining white collar crime and corruption priorities for his or her district, communicating those priorities to the investigative agencies, and evaluating progress in each priority area; (4) working with the investigative agencies to coordinate their enforcement programs and resolve jurisdictional disputes; (5) conducting or arranging for training in such areas as auditing and financial analysis for those investigative agencies where weaknesses have been identified; and (6) working with program agencies and the business community to increase their awareness of fraud and corruption and assist them in undertaking efforts to detect or prevent such problems.

In Economic Crime Units where there is only one Specialist, which is virtually all of them at present, the work of the specialist is limited primarily to the district served by the United States Attorney in whose office the unit is based. In most cases, however, the investigative agency field offices have substantially larger jurisdictions. As additional Specialists are added to a unit, it will be possible—and desirable—to serve adjoining judicial districts as well. The program will then become more truly national in its impact.

WHITE COLLAR CRIME PRIORITIES PROJECT

Another significant initiative of the Criminal Division is the white collar crime priorities project. In the order that established the Economic Crime Unit program, the Attorney General also called for the establishment of national and district priorities within the area of white collar crime and corruption. As noted above, one task of the Economic Crime Specialist is to assist the U.S. attorney in establishing priorities at the district level. We had originally envisioned that the information collected through the Economic Crime Unit program would provide a basis for determining national priorities as well. However, recognizing that the program would not be fully implemented until the end of fiscal 1981, we decided earlier this year that the need for priorities was too urgent to wait.

As an interim measure, the Division's new Office of Policy and Management Analysis, assisted by the Public Integrity, Fraud, and General Litigation Sections and the Office of Economic Crime Enforcement, began last November a massive effort to collect and analyse data concerning white collar crime and corruption on a nationwide basis. We had rather modest expectations for this project when it began, but it now seems likely to produce quite meaningful results. I am pleased to predict that it will be a significant success.

Briefly, what we have done is to collect a rather staggering amount of information about what federal prosecutors and investigators throughout the country perceive to be the extent, nature, and importance of different kinds of white collar crime and corruption. This detailed information has come from a total of 238 respondents, including the Economic Crime Units, special Fraud or Corruption Units in U.S. attorneys' offices, the Inspectors General, other divisions within the Department of Justice, and the field offices or regional offices of major investigative agencies and the Securities and Exchange Commission.

We are now conducting an analysis of the collected information. This includes an effort to assess the relative significance of the various white collar crime problems that have been identified. To do so, we are examining a number of factors, such as: (1) the scope and frequency of the problem, (2) the nature of the victims and the size of their losses, (3) the kinds of individuals involved as perpetrators or accomplices, (4) the connection, if any, with organized crime, (5) the feasibility of prevention or self-help by the victims, (6) the ability of state and local law enforcement to combat the offense, and (7) the costs and likely success of increased federal law enforcement efforts.

The analysis will be completed shortly, and we expect to make recommendations to the Attorney General within the next month. Provided that he approves the issuance of national priorities, we will then begin to assist each U.S. attorney in establishing more specific priorities for his or her district within the broader national priorities.

This project has taken a great deal of work so far, and there is much more to be done in the future. Is it worth all that effort to establish priorities? I think, for at least three reasons. First, white collar crime and corruption is, as I remarked earlier, a very broad and diffuse area, encompassing almost every offense committed through deceptive and non-violent means. In setting priorities, we will be beginning, for the first time, to give specificity and coherence to what heretofore has been a very "mushy" concept, one that means greatly different things to different people. Second, and this point is related to the first, the fact that we will now have a set of priorities—a framework—will help to improve coordination between prosecutors and the investigative agencies. By communicating which cases we regard as most important, we will help the investigative agencies to use their resources more effectively. Third, I expect that the framework provided by national and district priorities will be integrated into the Department's infromation and recordkeeping systems, and this will enable us to do a much better job in the future of measuring our performance and ensuring that significant problems do not go unaddressed in any area of the country. None of these results is guaranteed, of course, but I think we are making substantial progress in accomplishing them.

Having talked at some length about the Economic Crime Unit program and the white collar crime priorities project, let me now discuss more briefly a number of related initiatives and the reasons why the Criminal Division is pursuing them.

SUPPORT FOR THE INSPECTORS GENERAL

The Criminal Division is currently playing a lead role in support of the Executive Group on Fraud and Waste in Government, which was created by the President in May 1979. The function of the Executive Group is to implement the Inspectors General Act and address other government-wide fraud and corruption problems. Its membership consists of the Inspectors General, representatives from the Department of Justice and the major investigative agencies, and certain other officials. The group is chaired by the Attorney General.

Over the past year, the Criminal Division has worked actively with the Executive Group to deal with common issues facing the Inspectors General. Among the issues being addressed at present are the use of the Inspector General subpoena power; ways to increase the availability and quality of audit personnel through recruiting and training; use of data from different agencies in matching programs to detect fraud; and relations between the Inspectors General and the major investigative agencies, especially the Federal Bureau of Investigation. As noted above, the Division is also consulting the Inspectors General in the white collar crime priorities project, and we plan to work closely with the Executive Group to implement whatever priorities are established.

COMMODITY FRAUDS

Commodity frauds are a relatively new, rapidly growing problem that the Criminal Division is just beginning to address. Playing on public concern about rising prices, con-men who operate out of telephone "boiler rooms" have found they can sell almost any sort of bogus commodity investment that promises a hedge against inflation. Efforts by local law enforcement to combat these con men have so far been sporadic and relatively ineffective, for reasons that are readily understandable. First, boiler rooms have proliferated because they are relatively easy to set up and operate. Almost any swindler can run one. Second, the boiler rooms are highly mobile. They can close down in Florida one week and open up in Texas the next. Third, since the sales are made by telephone, the victims of boiler room commodity frauds are geographically dispersed. They often live in states halfway across the country from where the boiler room is based.

The Division's Fraud Section is now seeking to establish a task force with the Postal Inspectors, Federal Bureau of Investigation, and Commodity Futures Trading Commission to attack the boiler room problem. Although this project may be hampered by a shortage of travel funds, it is precisely the kind of initiative I want the Division to undertake. Boiler rooms are a new problem, and the Fraud

Section is well equipped to draw on expertise from anywhere in the country, develop new strategies and techniques, and then disseminate those strategies and techniques to prosecutors and investigators everywhere.

Boiler rooms are also a multi-district problem, and the mobility of Fraud Section attorneys will help ensure that the cases are developed in a coordinated fashion. Finally, boiler rooms are a problem that is best attacked by several investigative and regulatory agencies working together, and the Fraud Section is able to develop those working relationships in Washington as well as in the field. All these factors argue for a strong Criminal Division role, and I am eager for the project to go forward.

CRIMINAL REGULATORY OFFENSES

About a year ago, the Criminal Division launched a major effort to develop new approaches to enforcing federal health and safety regulations. This initiative is the responsibility of the General Litigation and Legal Advice Section, which is working closely with such regulatory agencies as the Nuclear Regulatory Commission, the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Mine Safety and Health Administration. Our immediate objective is to identify and successfully prosecute the most serious, willful violations of health and safety regulations. Although such violations have rarely been prosecuted criminally in the past, they can have severe and sometimes long-term impacts on workers and the public. This has been amply demonstrated by several highly publicized industrial disasters and environmental incidents in recent years.

As a pioneer in the regulatory area, the General Litigation Section is seeking to develop and demonstrate new investigative and prosecutive techniques by bringing—and winning—significant regulatory cases. In addition, the Section is also working in other ways to build the capacity and commitment of the regulatory agencies and the U.S. attorneys. One of the major problems we face is that agency lawyers and investigators are relatively inexperienced in criminal investigations. As a result, the Section is arranging with the agencies to provide training in evidence gathering, interviewing, and other investigative techniques. The Section is also negotiating memoranda of understanding with the agencies to agree on what kinds of cases should be referred for criminal prosecution, and it is seeking to streamline the traditional case referral processes to ensure that cases do not become stale. Much remains to be done, but I am encouraged that we are on the right track.

INTERNATIONAL ASPECTS OF LAW ENFORCEMENT

The ease of international travel and communication have made crime an increasingly international business. White collar criminals, in particular, take advantage of national borders to escape detection and evade law enforcement. They employ foreign corporations in conducting their fraudulent schemes. They hide their illicit revenues in foreign banks, protected by bank secrecy laws. And they flee to other countries when their activities are discovered.

The Office of International Affairs was created in 1979 to provide a focus for the Division's increasing concern about the international aspects of criminal law enforcement. As a coordinator and source of expertise, the Office serves the United States Attorneys and state and local prosecutors as well as the Division's litigating sections. One of its major responsibilities is to provide assistance in obtaining evidence from foreign countries, usually through the process of letters rogatory. The Office is also responsible for processing extradition requests, including extradition requests from state and local prosecutors that formerly were processed by the State Department. In addition, the Office participates in treaty negotiations to obtain better procedures and more favorable provisions. Treaty revision is especially important in relation to white collar crime. For example, some of the older treaties now in effect do not recognize white collar offenses, such as mail fraud or wire fraud, as a basis for extradition.

Another of the Division's international initiatives is the Interagency Study Group on International Financial Transactions. The Study Group is chaired by the Chief of the Narcotic and Dangerous Drug Section and staffed by attorneys from that section. Among the participants are representatives of the Comptroller of the Currency, State Department, Federal Reserve Board, Customs Service, Drug Enforcement Agency, Postal Inspection Service, Central Intelligence Agency, Internal Revenue Service, Federal Bureau of Investigation, and Securities and Exchange Commission. The initial objective is to develop and exchange information about the use of offshore banks and other financial institutions for criminal purposes, including white collar crime and corruption.

TRAINING PROGRAMS

The Fraud and Public Integrity Sections have been active over the past several years in conducting training programs for prosecutors and investigators. These training efforts have taken three forms. First, one-day "mini-courses" on white collar crime have been developed for insertion in training programs run by the investigative agencies for their own personnel. Second, Division attorneys have given a twelve-hour block of instruction in the two-week white collar crime course offered by the Federal Law Enforcement Training Center at Glynco, Georgia. Third, the Fraud and Public Integrity Sections have conducted annual seminars for assistant U.S. attorneys assigned to fraud and corruption units. Agents from the Federal Bureau of Investigation also attended the two most recent seminars. Joint training of prosecutors and investigators is something we will continue to encourage, since it helps to develop the close working relationships that are essential in complex cases.

I have been quite impressed by the Division's accomplishments in the area of training. According to our most recent figures, over 1,000 agents have been given one of the mini-courses, some 700 agents have attended the course at Glynco, and a total of 500 prosecutors and agents have participated in the white collar crime and corruption seminars. These activities are essential to progress in combatting white collar crime and corruption, and they effectively complement the Division's other responsibilities.

Mr. Chairman, I have not described all the white collar crime and corruption initiatives underway in the Criminal Division, but I should by now have given you a reasonably good sense of our deep commitment to this area and the innovative spirit with which we are attacking it. Before closing, let me just briefly mention one other development that should interest the Committee because of your considerable interest in improving litigation management systems. We share your interest, and the Public Integrity and Fraud Sections are now in the vanguard of a project by the Office of Policy and Management Analysis to install an automated case management information system throughout the Division. A pilot test of the new system began last month in the Public Integrity and Fraud Sections with the strong backing of each section's management. It will take time to refine the system and tailor it to the needs of the other litigating sections, but I am quite hopeful about the project's ultimate success.

Mr. Biden. You know, you'd be in real trouble and, quite frankly gentlemen, I am not always proud of the way that the U.S. Senate conducts its overview. I have been basically feeling outrage about the way in which this committee and other committees made up of lawyers have such a total disregard for civil liberties of people and the way in which we on occasion, use hearsay statements. If I were practicing law again, I would rip to shreds a prosecutor who would attempt to treat my clients the way in which we sometimes treat nonadministration witnesses and on occasion, administration witnesses.

My efforts today have been to try to keep this on focus. I don't know whether or not the Department handled properly or improperly any of the cases in question. My strong inclination is that they were handled properly.

It seems to me that there's always someone, somebody who has a problem. I have never heard the press, this is not a criticism of the press, it's their function, I have never heard the press herald and compliment the closing of an investigation, particularly if it's a white-collar crime matter or involving a Government official. I mean I've never heard anybody say, yippee it makes sense to close that case. That's not the tendency. And of everything you've said here today, the thing that I most agree with is your statement that it takes more courage to close than to open.

And I quite frankly wish, having nothing to do with Government officials or Abscam or Vesco or these other Nard or Neid or whatever the name was, or these judges, I personally wish and my one desire wanting to get on this committee and the reason I'm interested in grand jury reform is because of the cavalier way in which some State, local, and Federal prosecutors proceed, and fail to exercise the courage to never open or once open, to close.

We public officials have to be willing to take the heat in the interest of people's civil liberties. The public is never going to understand the complexities of the fifth amendment for example.

I mean, it's hard enough to teach it to people in law school and why it is such a fundamental part of our English jurisprudential system. And half of my colleagues once they learned it in law school forgot it, when they left law school. So the public's never going to understand the Constitution in that context.

We spend 3 years badly training lawyers on what the first 10 amendments mean. So it seems to me that the function of the system and the function of myself as a U.S. Senator, especially someone on a committee as involved as this, is to make sure that those civil liberties, to make sure that those 10 amendments are adhered to very rigorously.

You think they don't have confidence in you all and you worry about whether you will take heat when you close an investigation or a case. Can you imagine the heat that it takes for people who have to stand for office to decide that they are in effect going to close a subject of inquiry.

And I'm sure everyone would love what could be substantive, but may be a circus. Because there isn't anybody in the press that's going to say, hey, don't go ahead and do that, that's silly. I don't expect there is.

But anyway, I appreciate your time and your effort. Before I say anymore and get myself in any more trouble, I am going to close these hearings.

Hearings are closed.

[Whereupon at 1:33 p.m., Tuesday, April 23, 1980, the hearing adjourned.]

APPENDIX

QUESTIONS OF SENATOR BIDEN AND RESPONSES OF DEPARTMENT OF JUSTICE

JUN 10 1980

Honorable Joseph R. Biden, Jr.
Chairman
Subcommittee on Criminal Justice
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

At the April 23, 1980 authorization hearing, you requested (Transcript at p. 8) that we submit for the record a description of the Organized Crime and Racketeering Section, including total number of attorneys, how it is organized, and how cases are handled. Enclosed please find a three-page statement responding to that question.

You also asked (Transcript at pp. 167-168) in regard to the recent reorganization of the Criminal Division, for a description of what benefits have been realized as a result of the reorganization, and whether any portion of the reorganization plan has yet to be completed. An answer to that question also is enclosed.

Please contact us if there is any further information we can provide.

Sincerely,

Philip B. Heymann
Assistant Attorney General
Criminal Division

By:

John C. Keeney
Deputy Assistant Attorney General
Criminal Division

Enclosures

cc: Honorable Dennis DeConcini
Honorable Orrin G. Hatch

Organized Crime and Racketeering Section
Criminal Division
Department of Justice

The Department's organized crime program is directed at those organized criminal groups that pose the greatest threat to the economic, political and social well-being of the country. Most of the attorneys in this program are assigned to Strike Forces and Field Offices located in 26 major cities where organized crime is most influential. As of May 28, 1980, the Organized Crime and Racketeering Section (OCRS) had 131 attorneys on board, distributed as follows:

Office	No. Attorneys
Atlanta Field Office	2
Boston Strike Force	7
Brooklyn Strike Force	14
Buffalo Strike Force	6
Camden Field Office	1
Chicago Strike Force	9
Cleveland Strike Force	6
Dallas Field Office	1
Detroit Strike Force	8
Honolulu Field Office	1
Kansas City Strike Force	6
Las Vegas Field Office	2
Los Angeles Strike Force	7
Miami Strike Force	10
New Haven Field Office	2
Newark Strike Force	7
New Orleans Strike Force	2
Philadelphia Strike Force	8
Phoenix Field Office	1
Providence Field Office	2
Puerto Rico Field Office	1
Rochester Field Office	1
San Francisco Strike Force	5
Strike Force 18 (Washington, D.C.)	13
Syracuse Field Office	1
Tampa Field Office	2
Headquarters	6
Total	131

The Organized Crime Section's Washington-based office is responsible for overseeing the activities of the Strike Forces, and ensuring that they comply with the four priority areas established for the program: labor-management racketeering, business infiltration, public corruption and narcotics trafficking. The policy guidance provided to the individual Strike Forces is also tailored to accommodate special regional considerations which arise within different Strike Force jurisdictions.

Just as the Washington office provides central, national coordination of all the Strike Forces, each individual Strike Force is responsible for coordinating the federal effort against organized crime within its assigned region. In cooperation with the U.S. Attorneys and with state and local authorities, a Strike Force identifies the major organized crime activities, coordinates the appropriate investigations, and prosecutes the offenders. Each Strike Force consists of Criminal Division attorneys, investigators from virtually every federal agency concerned with organized crime, and, in many cases, representatives of state and local agencies. This interagency approach means that more information is shared; that competition among agencies and duplication of effort are reduced to a minimum, thereby conserving resources; and that the expertise of a variety of disciplines is marshalled for a unified, more comprehensive approach to the problem.

Attorneys in the Strike Forces are brought into an investigation at its inception to determine whether the case has sufficient merit to be continued, in light of the established priorities, and to ensure that the conduct of the investigation both complies with all applicable legal requirements and takes advantage of the most effective statutory tools available. This close monitoring is essential not only to avoid losing cases due to legal deficiencies, particularly in the course of developing evidence, but also to devise innovative approaches, sometimes through new legislation, to meet ever-changing needs. The complexity of using some of the most effective criminal law enforcement weapons--undercover operations, witness immunization, Title III electronic interception, consensual monitoring, the Racketeer Influenced and Corrupt Organization (RICO) statute, the Dangerous Special Offender statute, the witness protection program--requires sophisticated legal expertise throughout both the investigative and prosecutive stages.

The Washington office is also responsible for assessing the relative needs of different cities and districts for Strike Force attention. A slackening of organized crime activities in one region might indicate that a Strike Force presence is no longer needed, just as a significant increase in another area might warrant additional resources or the opening of a new Strike Force. The existing Strike Forces and the many federal investigative field offices throughout the country provide the information needed to track the movement of syndicate activities, so the distribution of organized crime program resources is determined according to demonstrable need.

In conjunction with the National Organized Crime Planning Council, the Organized Crime Section's managers perform regularly scheduled, formal, on-site reviews of each Strike Force. Active cases are reviewed for significance and for procedure; problems are aired both in group discussions and in individual agency meetings. In addition, each Strike Force maintains ongoing, day-to-day consultations with the Deputy Section Chief responsible for its particular area. This provides the Strike Forces with continual guidance and feedback concerning their operations. Each Deputy is a former Strike Force chief.

Although there have been some jurisdictional disagreements over the years between U.S. Attorneys and Strike Forces located in their jurisdictions, the overall level of cooperation has recently been very good. In the vast majority of cases, close working relations with U.S. Attorneys and with state and local authorities have led to significant coordination of effort. State and local investigators actively participate in many Strike Force investigations, evidence is shared with district and state attorneys prosecuting organized crime cases, and federal cases have been jointly prosecuted by Strike Force and U.S. Attorneys. A significant part of the Strike Force chief's role is to foster such cooperation, and the headquarters office is on hand to furnish support from Washington when necessary.

Strike Force and other personnel are notified on both a formal and informal basis whenever new legislation or new techniques for investigation or prosecution are developed. The Division is continually involved in the drafting of innovative and remedial legislation to assist in the organized crime effort, and Strike Forces are constantly required to be creative in devising new ways to meet their prosecution mandate. For example, the development of innovative undercover operations over the last few years has led to some dramatic successes.

Effective liaison among all federal agencies involved in organized crime law enforcement is being accomplished at two levels. First, the fact that each of the Strike Forces is composed of representatives of virtually all these agencies means that liaison is maintained at the working level through day-to-day, on-the-job contact. Prosecutors and investigators work side-by-side on their joint cases, and Strike Force heads are in constant communication with the managers of the investigators' respective agencies. At the national level, the chief of the Organized Crime Section chairs the National Organized Crime Planning Council (NOCPC), which meets almost every month. The members represent all the federal agencies combatting organized crime, and the primary purposes served are achieving a consensus on planning national efforts, evaluating Strike Force activities, maintaining liaison among federal agency directors, sharing information, and identifying and resolving common problems. Subcommittees have been used to study particular issues and make recommendations for Council action.

Strike Force 18 is being reactivated in Washington and the Labor Unit, which will retain its identity but become a part of Strike Force 18, will continue to perform its vital role. Strike Force 18 is the only Strike Force which has a national jurisdiction, and its primary mission is to handle major cases which are multi-district in scope. It will also assume substantial cases in geographic areas not covered by existing Strike Forces in the field. Including the Labor Unit, it will be staffed by 15 attorneys.

The Labor Unit is devoted to matters of labor-management racketeering, welfare and pension fund violations, and other major labor-related offenses such as benefit fraud schemes and public corruption. This unit directly supports U.S. Attorneys by providing legal advice and attorneys to assist in labor investigations and prosecutions. These services are also supplied to the Strike Forces throughout the country; roughly one-third of its work is in support of U.S. Attorneys, and two-thirds for the Strike Forces. The unit also serves as the central clearinghouse for labor matters in the Department and develops policy guidelines for both the investigation and the prosecution of labor cases.

BENEFITS OF THE CRIMINAL DIVISION REORGANIZATION

The Criminal Division's reorganization in March 1979 produced the following major changes in the Division's organizational structure:

-- Executive supervision. A fourth Deputy Assistant Attorney General position was created to oversee and coordinate the Division's policymaking and managerial functions. In addition, the assignments of the other three deputies were adjusted to emphasize functional similarities among the sections and offices that each deputy is responsible for supervising.

-- Office of Policy and Management Analysis. The Office of Policy and Management Analysis was created to assist the Division in carrying out its responsibilities for program planning and evaluation, priority setting, and management improvement. Prior to creation of this office, the Division had no specialized analytical capacity to perform these functions.

-- Office of Enforcement Operations. The Office of Enforcement Operations was created to centralize responsibility for authorizing use of the most sensitive investigative techniques available to federal law enforcement, including electronic surveillance and witness relocation. This function had previously been performed in the Division's enforcement sections.

-- General Litigation and Legal Advice Section. The General Litigation and Legal Advice Section was created to centralize responsibility for litigation and legal support to U.S. Attorneys outside of the Department's major enforcement areas (organized crime, fraud, public corruption, drug trafficking). It was formed through consolidation of the General Crimes, Special Litigation, and Government Regulations and Labor Sections.

-- Office of International Affairs. The Office of International Affairs was created to centralize responsibility for coordinating the international aspects of criminal law enforcement, such as extradition of fugitives, mutual assistance in obtaining evidence, and treaty negotiation. These responsibilities had formerly been dispersed throughout several offices and sections within the Division.

-- Office of Legal Support Services. The Office of Legal Support Services was established to perform a number of functions previously performed by the various enforcement sections, such as processing requests for grants of immunity, reviewing tax disclosure requests, responding to Freedom of Information Act and Privacy Act requests, and coordinating the collection of criminal fines and bond forfeiture judgments by the U.S. Attorneys' offices.

Assistant Attorney General Heymann and Attorney General Civiletti, who formerly headed the Criminal Division, have both stated that they regard the Division's reorganization as successful in all major respects. By separating different functions, the reorganization has created a management structure in which more emphasis and closer supervision have been afforded to certain functions that were given insufficient attention when combined with the Division's litigating responsibilities. This is particularly true of the policy and management function, but is also true in varying degrees of those functions now assigned to the Office of International Affairs, the Office of Legal Support Services, the Office of Enforcement Operations, and the General Litigation and Legal Advice Section. In addition, by allowing greater specialization, the reorganization has led to more efficient use of attorney personnel, especially through the greater use of paralegals to perform work formerly done by attorneys. This beneficial impact has been most apparent in the Office of Enforcement Operations and the Office of Legal Support Services, both of which centralized a number of functions that were previously dispersed among various enforcement sections.

Examples of the beneficial effects of the reorganization include the following:

-- The new Office of Policy and Management Analysis has greatly strengthened the Division's planning and evaluation capabilities by attracting a first-rate professional staff with expertise in economic analysis, management systems, program evaluation, systems analysis, and other analytical techniques. During its initial year, the office has contributed invaluably to the Division's efforts to establish enforcement priorities for white collar crime and public corruption; develop more effective caseload information and tracking systems; evaluate the declination policies of the U.S. Attorneys; implement improved processes for budgeting and expenditure control; and develop innovative strategies to combat the importation of heroin from Southwest Asia.

-- The Office of Enforcement Operations has significantly reduced the processing time required to approve requests for electronic surveillance. This change has been noticed in recent months by the Federal Bureau of Investigation and other investigative agencies, and they have complimented the office highly for its prompt, responsive servicing of their requests.

-- Formation of the General Litigation Section has given the Division increased flexibility to concentrate resources and undertake initiatives in response to new problems. Currently the section is leading the Division's efforts to increase the prosecution of serious regulatory violations endangering public health and safety. Attorney morale in the section has been stimulated by the opportunity to work in challenging new areas and by the increased emphasis on litigation.

-- Creation of the Office of International Affairs has enabled a relatively small staff to efficiently handle the rapidly expanding amount of work related to international aspects of criminal law enforcement. Valuable contacts have been established with law enforcement authorities in foreign countries, and prosecutors' views and needs have been presented more effectively in international negotiations, such as the recent negotiations relating to mutual assistance treaties with Columbia and The Netherlands.

-- The Office of Legal Support Services has been able to increase the efficiency with which necessary support services are provided to the Division, U.S. Attorneys, and investigative agencies. For example, the office has reduced from twelve to seven the number of workyears required to perform four processing and review functions that formerly were handled by the enforcement sections. Despite the substantial reduction in personnel devoted to these functions, there has so far been no apparent deterioration in the timeliness or quality of the work performed.

The reorganization proposed in the plan submitted to the Congress in January 1979 has now been essentially completed. Further changes in the Division's structure may be necessary in future years, of course, since new problems and needs are likely to arise from time to time. It should also be recognized that the 1979 reorganization is only one of several initiatives undertaken by the Criminal Division's management to provide for better use of the Division's resources, improve the Division's litigative capabilities, and increase its leadership in policy and program development for the criminal justice system. Certain of these initiatives require basic changes in the Division's operational capabilities and, consequently, in the kinds of skills possessed by the Division's attorney personnel. Such changes are likely to require a number of years for full implementation.

United States Department of Justice
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
WASHINGTON, D.C. 20530

JUN 10 1980

Honorable Joseph R. Biden, Jr.
Chairman
Subcommittee on Criminal Justice
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

When we testified before the Committee on April 23, 1980, you requested (Transcript at pp. 161-162) that we submit for the record the letter sent by Director Webster to Thomas H. Henderson, Jr., concerning Mr. Henderson's nomination as Special Counsel to the Merit Systems Protection Board. A copy of that letter is attached.

In addition, you and Senator Hatch posed questions concerning those attorneys in the Department who were involved in the Vesco grand jury investigation. You asked for the names of all those attorneys and the dates during which they were involved in the case (Transcript at p. 118). For your information, the case was transferred to the Office of the United States Attorney for the District of Columbia on August 21, 1979. Assistant United States Attorneys Benner and Voelker worked on the case after it was transferred. As we stated at the hearing, Ms. Voelker had worked on the case when she was with the Public Integrity Section, left the Public Integrity Section to join the United States Attorney's Office, and was subsequently assigned to the case when it was transferred. Set out below are the names of the attorneys involved and the time during which they worked on the case:

Attorney	Period of Involvement
Thomas H. Henderson, Jr.	9/13/78 to 8/21/79
Paul Boucher	9/13/78 to 1/11/79
Stephen C. Schroeder	9/13/78 to 3/5/79
Robert S. Tignor	2/21/79 to 7/2/79

Kathleen E. Voelker	4/17/79 to conclusion of grand jury's term
Harry Benner	8/21/79 to conclusion of grand jury's term

Senator Hatch also asked (Transcript at p. 134) what was the experience of Mr. Boucher and Mr. Schroeder. Briefly, their experience is as follows:

Paul Boucher - Experience:

1964 to 1970:	Special Agent Naval Investigative Service
1970 to 1972:	Staff Legal Advisor Naval Headquarters
1972 to 1974:	Attorney, General Crimes Section Department of Justice
1974 to 1975:	Assistant General Counsel Government Printing Office
1975 to 1976:	Attorney, General Crimes Section Department of Justice
1976 to 1979:	Deputy Chief, General Crimes Section Department of Justice
1979 to present:	Inspector General Small Business Administration

Stephen C. Schroeder - Experience:

1974 to 1977:	Special Attorney, Organized Crime and Racketeering Section Department of Justice
1977 to 1979:	Attorney, Public Integrity Section Department of Justice
1979 to present:	Assistant United States Attorney Western District of Washington

- 3 -

Please contact us if there is any further information we can provide.

Sincerely,

Philip B. Heymann
Assistant Attorney General
Criminal Division

By:

John C. Keeney
Deputy Assistant Attorney General
Criminal Division

Enclosure

cc: Honorable Dennis DeConcini
Honorable Orrin G. Hatch

OFFICE OF THE DIRECTOR

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535

April 9, 1980

Mr. Thomas H. Henderson, Jr.
Chief
Public Integrity Section
Criminal Division
U. S. Department of Justice
Washington, D. C. 20530

Dear Tom:

I wish to extend to you my congratulations on your recent nomination as Special Counsel of the Merit Systems Protection Board. It is indeed gratifying to see that an individual of such demonstrated outstanding capabilities is selected for such an important and prestigious position. Your presence as Chief of the Public Integrity Section will be missed, as the degree of cooperation between the Section and the FBI has never been greater.

Should you find it necessary, an FBI official can be made available to testify before the U. S. Senate Committee at your upcoming confirmation hearing.

I wish you the best of luck in your new endeavor, and appreciate your past achievements and efforts in fostering the spirit of cooperation that now exists between the FBI and the Public Integrity Section.

Sincerely yours,

Bill Webster

William H. Webster
Director

FEDERAL TIMES
WASHINGTON, D.C.
MARCH 17, 1980

HOW HENDERSON OPERATED

Sensitive Cases Left Hanging

By INDERJIT BADHWAR
and SHEILA HERSHOW

Thomas H. Henderson Jr.'s controversial record at the helm of the Justice Department's Public Integrity Section has sparked concern about his future performance in the most sensitive investigative job in the federal bureaucracy — special counsel to the Merit Systems Protection Board.

As the first and only chief of Public Integrity, Henderson was assigned to crack down on white-collar crime by federal, state and local officials. As MSPB special counsel, he will be expected to enforce merit rules throughout the federal government, protect whistleblowers from agency reprisals, and punish federal officials who commit illegal personnel actions or cover up fraud and mismanagement.

President Carter nominated Henderson for the special counsel post recently. The Senate Governmental Affairs Committee has not yet scheduled a date for the confirmation hearing.

After the Henderson appointment was announced, *Federal Times* reviewed his handling of significant Public Integrity cases over the past four years. These cases involve allegations of criminal misconduct by federal executives, Pentagon generals, governors, federal judges and minor officials.

The records often revealed delays, little or no investigative work and a reluctance to bring cases before a jury despite considerable evidence of white-collar crime.

In a series of interviews, FBI agents, U.S. attorneys, assistant U.S. attorneys and congressional investigators complained that, under Henderson, Public Integrity was slow and slipshod in its conduct of major investigations.

"I found Henderson's shop unresponsive, unconcerned, with a curious inability to pursue cases that seemed to me obvious," a Capitol Hill investigator said. And a prominent U.S. attorney said that numerous lawyers who attended a San Diego workshop for federal prosecutors were openly critical of Public Integrity.

He said, "The general impression was that if you want a case properly prosecuted and handled, give Public Integrity a wide berth. Go it alone."

None of the sources interviewed by this newspaper suggested that Henderson is corrupt or venal. One assistant U.S. attorney described him as "polite, personable and charming."

Others with first-hand knowledge of his operation said that Public Integrity is a lightweight outfit, staffed by novice lawyers, and, in one well-respected prosecutor's words, "long on public relations and short on legal analysis."

"The trouble with that shop," he said, "is that Tom hired people with very little legal experience who know nothing about preparing for trials. And Tom has no ability to teach or train them. I think it's a question of his competence and his desire to bid up cases in order to make his numbers look good and then not take them to trial."

The following cases are often cited by Henderson's critics. They say the records illustrate Henderson's lack of judgment, lack of prosecutory zeal and willingness to back away from politically sensitive issues.

File Languished

On June 19, 1978 the Energy Department's inspector general asked the Justice Department to consider leveling criminal charges against William S. Heffelfinger, DoE's director of administration. The case was sent to the Public Integrity Section.

Investigations by the DoE inspector general, the House energy and power subcommittee, other congressional panels, and *Federal Times* had disclosed evidence that Heffelfinger falsified his job resume, lied under oath to Energy investigators, served as a Nixon administration hatchetman at the Department of Transportation, threatened Transportation contractors, condoned merit violations, ordered the shredding of government documents and bullied members of the independent National Transportation Safety Board.

The Heffelfinger file languished at Public Integrity for more than a year and a half. While awaiting the Justice Department decision, DoE took no administrative action against Heffelfinger.

On February 15 Henderson wrote a one-paragraph letter to DoE Inspector General J. Kenneth Mansfield declining prosecution of the Heffelfinger case. He said he was refusing to bring criminal charges because "no prosecutive merit exists in regard to any of these allegations."

Henderson did not explain why it took Public Integrity 19 months to reach this conclusion.

Three-Year Delay

On October 1, 1979, Henderson personally recommended that the Justice Department drop efforts to bring criminal charges against Kenneth L. Dupuy, a former Federal Energy Administration regional chief who accepted gourmet meals, rental cars, airplane trips, board for his horse and dog, a sojourn at a plush Florida beach house and the frequent use of an apartment from oil companies he was assigned to regulate.

The Dupuy case was under review at the Justice Department for three years before Henderson turned it down.

In a memo he argued that criminal charges were inadvisable because a jury might believe Dupuy "actually advanced government interests" by taking gifts from companies seeking to curry his favor "and then leaving them high and dry."

Henderson added that a jury might even view Dupuy "in a favorable light" for "teaching these oil companies a well-deserved lesson."

The Dupuy case was referred to the Justice Department by Michael F. Butler, then FEA general counsel. The referral cited evidence that Dupuy accepted gifts including the rent-free use of an Atlanta apartment from William E. Corey, a gasoline retailer. According to sworn statements, Dupuy visited the liquor-stocked flat twice a week between December 1974 and May 1975 for sexual liaisons with his administrative assistant and also with an FEA secretary.

In return for Corey's generosity, Butler wrote, Dupuy ordered revisions in FEA rules that gave Corey's company "substantial increases" in gasoline allocations during the oil-scarce period following the Arab oil embargo. Allocations for one gas station leaped from 432,000 gallons a year to three million gallons and in another case from 1.02 million gallons to three million gallons.

The gratuity section of the federal bribery law bars a public official from accepting "anything of value . . . for, or because of, any official act performed or to be performed by him." The penalty is two years in prison, a $10,000 fine or both prison and a fine.

When Butler learned that Henderson had tossed out the Dupuy case on the grounds that a jury might approve of Dupuy's actions, he said, "You've got to be kidding." A Capitol Hill investigator who reviewed the FEA file on Dupuy called Henderson's refusal to prosecute "an outrage."

The congressional agent charged that the Justice Department "did not want to go after Dupuy because they were afraid of raking up information that would be politically damaging to President Carter." Evidence in the Dupuy file indicates that Lewis Spruill, who was appointed Georgia state energy chief by then-Governor Jimmy Carter, accepted gifts from Corey and gave preferential treatment to gas stations owned by Corey and Billy Carter, the President's brother.

Dupuy, Spruill and Billy Carter have denied any wrongdoing.

Uranium Probe

On March 19, 1978, the deputy inspector general at the Department of Energy asked the Justice Department to consider bringing perjury charges against Robert W. Fri, the former chief of the Energy Research and Development Administration.

The DoE referral said that Fri "may have made intentionally misleading statements" to the House energy and power subcommittee when he testified that significant quantities of bomb-grade uranium had never been diverted from a nuclear plant in the United States.

Fri gave his sworn testimony in August 1977 after at least one U.S. intelligence agency had reported that enough government-owned high-grade uranium had been taken from an Apollo, Pa., nuclear plant in the mid-1960's to fuel all the nuclear weapons believed to be in Israel's arsenal.

The Fri matter was considered politically sensitive because several members of Congress had accused ERDA, DoE and the Nuclear Regulatory Commission of downplaying U.S. vulnerability to nuclear theft by terrorists, criminals and foreign agents.

On April 27, 1978, Deputy Assistant Attorney General John C. Keeney, Henderson's boss, declined to prosecute Fri on the grounds that the DoE referral "contains insufficient evidence." The Justice Department's Public Integrity section never interviewed Fri, never questioned subcommittee members or staff, and apparently never made any effort to add to the "insufficient evidence" forwarded by DoE.

Federal employees who "knowingly and willfully" make false statements to Congress may be punished with a $10,000 fine and five years in prison.

CSC Involved

In 1976, following an exhaustive investigation of widespread merit system violation, favoritism and corrupt personnel practices within the federal bureaucracy — stemming from the Watergate investigation — the House Post Office and Civil Service Committee forwarded a report to the Justice Department for prosecution.

Among the allegations contained in that report were that high officials of the then-Civil Service Commission who had participated in illegal patronage practices had perjured themselves and destryed documents that may have shed more light on these practices.

The Public Integrity Section under Henderson sat on the case for nearly two years without investigating despite repeated congressional prodding. It was only after a politically embarrassing story was published, a story pointing out that CSC officials whose names had been forwarded to the Justice Department were involved in writing the President's civil service reform legislation, that Public Integrity ordered an investigation.

The probe was assigned to [illegible] FBI agent shortly before the statute of limitations ran out. The agent speedily established that thousands of files had been stripped of damaging information and took the matter before a grand jury. The agent was not allowed to testify before the grand jury. And, according to reliable sources, all chances for indictments were dashed when the Justice Department — with Henderson's concurrence apparently — persuaded the heretofore eager grand jury to drop the case.

Fitzgerald Saga

The 10-year old saga of A. Ernest Fitzgerald, the Air Force whistleblower who revealed a multibillion-dollar cost overrun on the C-5A aircraft, took an unexpected turn in 1978 when the FBI launched an investigation of perjury, falsification of official records, and concealment of material facts involving top Air Force officers.

In particular the inquiry focused on Gen. Hans Driessnack, who is now Air Force comptroller. New information had come to light indicating that Driessnack may have doctored an affidavit to conceal his role in leveling false and defamatory charges against Fitzgerald in 1969 in a covert campaign designed to smear Fitzgerald and drive him from his job. The Driessnack affidavit directly conflicts with the versions of events given — in some cases under oath — by at least five other Air Force officials. And the affidavit conflicts with a draft version of Driessnack's sworn statement found in the Air Force files.

According to FBI sources, the agent in charge of the investigation was told at every turn by Justice officials that the case against the general was a "hot potato." The agent was dissuaded from pursuing it, sources say. The agent persisted, interviewing Driessnack and other principals in the case. While the agent was in the process of writing his report, a senior Justice official, Donald Campbell, and the U.S. attorney for the District of Columbia, Earl Silbert, re-interviewed Driessnack and wrote an opinion exonerating him.

Sensing a cover-up, the FBI sought the help of Rep. John D. Dingell, D-Mich., to pressure Justice to reopen the matter. With Dingell's backing, the FBI made a second try and submitted a report of the investigation directly to Public Integrity hoping, a source said, "that Public Integrity would give it a good shake." But Public Integrity sat on the FBI report and recommended later that no action be taken. Shortly thereafter, Driessnack, who had been nominated for his third star, received his promotion.

Blanton Accused

The FBI successfully investigated this public corruption case despite Public Integrity's initial reluctance. In early 1979 the FBI arrested three top aides to former Tennessee Governor Ray Blanton — in a scandal that rocked the entire state — and charged them with accepting money for freeing state prisoners convicted of serious crimes. The case could have surfaced earlier had Public Integrity not dragged its feet.

The man who had begun the investigation, Charles Hill Anderson, the Republican U.S. attorney, could have obtained indictments as early as 1977 if Public Integrity had acted swiftly. Anderson, who is now adjutant general of the state's national guard, told *Federal Times* that he had sent a report to Public Integrity summarizing his evidence and recommending indictments shortly before he left office.

"I got no negative feedback from them," Anderson said, "but I just don't know what they did with my report. As far as I know no action was taken." The Washington Post reported last year that a grand jury looking at the evidence in that case expired without returning indictments "because the Justice Department refused to approve proposed indictments being pushed by the FBI because the evidence was not strong enough." Notwithstanding this setback, FBI agents continued their probe and were later able to make arrests on their own.

Shapp Funds

The Milton J. Shapp Campaign Corruption Case allowed Public Integrity to boast of its effectiveness.

Some fund-raisers for former Pennsylvania Governor Shapp were convicted in 1978. But this newspaper's investigation indicates that Henderson — acting at the behest of then-deputy attorney general Ben Civiletti — personally interceded in the probe. This action had the effect, according to sources, of limiting the damages in the case whereby the major figures — including Shapp who was, at one point, not even subpoenaed after Civiletti's personal intervention — went free while minor functionaries were indicted.

The Shapp case was the first test of whether the criminal provisions of the new federal election campaign laws could be enforced. The investigation stemmed from charges that Shapp fraudulently entitled himself to matching federal money for his 1976 presidential campaign by issuing false reports about money collected by his fund raisers. Shapp later had to reimburse the government $300,000.

Sources close to the investigation said that the U.S. attorneys in Philadelphia and Pittsburgh — who had laid the groundwork in the case and had the best trained FBI agents and the most experienced prosecutors — were completely excluded from the case. The case was transferred to the Harrisburg-Scranton area where prosecutors, one source said, "had never done a major political corruption case before."

Washington — through Public Integrity — assumed overall jurisdiction of the investigation. "The case was just yanked," one federal prosecutor remarked.

According to this source, U.S. attorneys from Pittsburgh and Philadelphia were told by Henderson that there was to be "no interference" from them in the case. They were precluded not only from assisting but also from providing information they were willing to offer that could have helped indict more people.

"We were effectively cut off at the case," said Blair Griffith, who was then U.S. attorney in Pittsburgh. "I suspect a political motivation. The investigation's pace was slowed down which at least afforded the potential defendants time to get their acts together to resist it. Public Integrity is supposed to be an ongoing aid to prosecutors. In this case, it was a deterrent."

According to documents obtained by this newspaper, FBI agent Neil Welch who was then in Philadelphia and who later ran the Abscam sting operation, criticized the movement of the case to Harrisburg on the ground that his best agents would no longer be able to handle it, and he said he was frustrated by delays and lack of direction from Washington.

Plot Charged

Jack Nard is a private contractor and a Pittsburgh resident. For eight years he has been trying to force the Justice Department to investigate charges that he is a victim of a criminal conspiracy involving a federal judge, a large corporation, and Pennsylvania Gov. Richard Thornburgh as well as the subject of harassment by the Internal Revenue Service. Nard and Armour and Co., meat packers — a subsidiary of Greyhound bus system — had sued each other over a breach of contract involving timetables and cost overruns on construction projects Nard was handling for Armour in Pittsburgh and Sioux City, Iowa.

Pittsburgh Judge Joseph Weis found both Armour and Nard were to blame but penalized only Nard with a heavy fine. A Senate investigator for Sen. Orrin Hatch, R-Utah, found after a year-long study of that decision that the judge had ignored relevant evidence in that case. Nard charges that he is a victim of the Pennsylvania political machine created by former Sen. Hugh Scott. Scott appointed Judge Weis who, Nard says, ruled in Armour's favor because it was represented by a law firm with important Republican connections. Some of the evidence Nard presented was used by the Justice Department to prosecute Greyhound in an unrelated case.

But Nard's other charges — influence peddling with a federal judge, perjured testimony during his trial, that Thornburgh, as former U.S. attorney in Pittsburgh helped direct the IRS probe against him — were dismissed by Justice as unsupportable following what Thomas Henderson has characterized as a "thorough and exhaustive investigation."

Thornburgh later became head of Justice's Crime Division with Senator Scott and, Nard charges, pressured a U.S. attorney in Iowa to drop an investigation of Nard's case. This Iowa probe was based on charges of corruption made by Nard that stemmed from his business dealing with Armour in Sioux City.

A new U.S. attorney in Iowa, James Reynolds, is now presenting evidence in the Nard case to a grand jury in that state. According to reliable sources, Reynolds, like his predecessor, was also pressured by Justice Department officials to drop the case when he insisted on interviewing Thornburgh. Even though Henderson maintains he had nothing to do with investigating the Nard case he participated in the meeting during which this alleged pressure was put on Reynolds to back off.

The curious twist in this case, according to sources is that assurances by Henderson once given to Reynolds that the case had been exhaustively investigated before being dismissed and that the investigative files would be turned over to Reynolds Public Integrity did not have over the appropriate files. A source revealed that the investigative files cannot be found. "They were either never there or they have disappeared," he said. Also missing, according to reliable sources, are the files on Senator Scott and his government patronage-related activities that were turned over to Justice by the Watergate prosecutor. The files are believed to be relevant to the Nard case.

Justice Department officials also apparently provided false information to the Senate Judiciary Committee in a critical area of the Nard investigation last year. They said that as part of their investigation of the case they had interviewed Thornburgh. But later, in a written response to questions from Senator Hatch, Justice officials changed their story and said they had not interviewed Thornburgh.

Lobbyist Probed

On May 4, 1978, the DoE deputy inspector general asked the Justice Department to investigate conflicting statements made under oath by three Energy Department employees and an American Petroleum Institute lobbyist who routinely obtained advance copies of DoE pricing rules from his agency sources.

Sen. Howard M. Metzenbaum, D-Ohio, had conducted hearings on the DoE leaks. When the DoE referral was sent to Public Integrity, Metzenbaum urged then-Attorney General Griffin Bell to give "top priority" to probing possible perjury by John Iannone, the oil industry lobbyist, and his DoE contacts.

Henderson informed the DoE inspector general's office on July 28 that "prosecution for perjury would be inappropriate due to several practical considerations." He explained that "many of the statements are not actually conflicting, those statements which do conflict involve an 'oath against oath' situation . . . and one of the sources of the inconsistencies is a letter from the API employee . . . that does not appear to have been prepared under oath."

Henderson never interviewed Iannone or his DoE contacts. He limited his investigation to reviewing documents sent to him by the inspector general's staff at DoE.

Despite this apparent lack of investigative zeal, Keeney, Henderson's boss, assured Metzenbaum that the "highest priority" had been given to the Iannone case because of the "immense importance of the issues" raised.

Salt Lake Inquiry

In 1977, Public Integrity was asked to supervise two investigations of Salt Lake City District Judge Willis Ritter. The first was an embezzlement case involving Judge Ritter's personal secretary who allegedly was paid a salary while absent from work. The second case, according to Justice Department documents, indicates Ritter "may have committed criminal violations" by giving preferential treatment to clients of a prominent law firm, and who had allegedly falsified the time and attendance records of his personal secretary.

Public Integrity at first dropped the embezzlement case without a comprehensive investigation but was forced to revive it after the U.S. attorney in Salt Lake City, Ramon Child, wrote a letter of complaint to Henderson that he had dropped the case without even examining all the relevant files.

Greg Rushford, a Washington writer, who investigated the situation, said that FBI agents were preparing to crack the case during the second go-around by using the technique of simultaneous interviews of court house employees, but were dissuaded from doing so by Henderson, who then quashed the case without the judge's connections with the law firm ever being investigated. No reason was given.

Record Altered

Columnist Jack Anderson revealed last year that District of Columbia federal Judge John H. Pratt had covered up an impropriety on the bench by altering an official court report and then tried to cover up the investigation by pressuring the FBI to call it off. Even though Anderson did not subsequently report this, he learned from FBI sources that a comprehensive inquiry of Pratt's alleged illegal conduct was "stalled" under direct orders from Public Integrity.

Concealment Alleged

An investigation by the inspector general of the Treasury Department determined last year that several highly-placed employees in the Bureau of Government Financial Operations may have violated 18 U.S.C. 1001 (2017) — criminal concealment, removal, or mutilation of records and reports — in order to dodge a Freedom of Information request filed by the National Treasury Employees Union. Treasury referred the matter to the Justice Department for prosecution.

But Henderson "declined to prosecute," a Treasury memo says, "indicating that his office had determined that the facts as developed in this matter did not warrant further criminal investigation . . ."

Federal Times -- April 7, 1980

LETTERS

About Henderson

WASHINGTON — In the March 17 edition of your paper, you printed an article raising questions about the record of Thomas H. Henderson Jr. as chief of the Public Integrity Section of the Criminal Division [Department of Justice].

The thrust of your article — that the Public Integrity Section has failed to pursue vigorously meritorious cases — is, in my opinion, wholly inaccurate.

The Public Integrity Section, under Mr. Henderson, has handled extremely sensitive cases fairly and effectively. The section is staffed by able attorneys of all experience levels, including a number of career prosecutors with extensive trial experience, and it has been responsible for a great many successful corruption prosecutions — many against high-ranking federal, state and local public officials. I have continuously assigned sensitive cases to this section with full confidence that they will be handled in a thorough, fair and professional manner.

From the large number of cases handled by the Public Integrity Section, your article lists several in which you suggest prosecution was improperly declined. I am satisfied that the section, under Mr. Henderson, has impartially investigated and reviewed all cases before it and prosecuted only where it was justified to do so on the merits without regard to political or any other extraneous considerations.

In sum, your expressed fear that Mr. Henderson may be too "politically pliable" to serve effectively as Special Counsel [of the Merit Systems Protection Board] is wholly without basis in fact and contrary to the outstanding record of impartiality and accomplishment compiled by the Public Integrity Section. Mr. Henderson will, I am sure, be a vigorous and effective Special Counsel who will be sorely missed at the Department of Justice.

PHILIP B. HEYMANN
Assistant Attorney General
Criminal Division

Department of Justice

SUPPLEMENTAL STATEMENT

OF

PHILIP B. HEYMANN
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
DEPARTMENT OF JUSTICE

BEFORE

S-2377

THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

APRIL 23, 1980

Mr. Chairman, I would like to enter for the record my main statement on the Criminal Division's mission. Let me take a few more minutes, however, to discuss how we have performed one essential part of our mission -- the investigation, evaluation, and, where appropriate, prosecution of public corruption cases.

First, I'll review the rather dramatic record of the last few years, and give some reasons the number and quality of public corruption prosecutions has increased. Second, I'll discuss how it is that out of any 100 initial allegations, most will not and should not lead to a prosecution -- that is, why declinations occur. Third, I'll talk about some possible causes of misunderstanding about the nature of declination decisions. Finally, I'll talk about why the courage to close cases -- and it does take courage -- is as important as the courage to bring cases. Occasionally, I will touch on recent criticisms -- in my view, unfounded criticisms -- of several of our declination decisions in the last few years.

I. The Growth in Public Integrity Cases

A. Some Statistics

Over the last few years there has been a remarkable burst of activity in tackling public integrity cases on the part of the federal law enforcement system. To the best of our knowledge, 43 federal officials were convicted for corrupt activities in 1975. In 1979, that number more than doubled to 102. In 1975, state and local officials convicted for misuse of office numbered 112. For 1979, the number was 182, a 63 percent increase. To keep government honest, you also have to police the private individuals who seek to corrupt public officials. There too, the growth has been striking: in 1975, 24 private individuals were convicted in cases involving public officials; in 1979, the number was ten times greater. To show what is in the pipeline, let me cite an FBI statistic. In February 1978, the Bureau had underway 574 public corruption investigations, involving everything from crooked cops on the beat, to school board members taking kickbacks, to persons at high levels of state and federal government. In December 1979, the public corruption investigations underway numbered 1,192.

B. Causes of the Growth

To account for this increase is not hard. I don't think it means that public officials are more or less honest than they ever were. Instead, it is a satisfying result of a deliberate change of focus in law enforcement policy.

The centerpiece in the growth was Attorney General Bell's decision in early 1977 to place public integrity cases among the Department's top four criminal enforcement priorities, and Attorney General Civiletti's continuation of that priority. The creation of a priority area has meant that more agent hours and attorney hours are devoted to the cases, and that more sophisticated analysis is done to develop an effective enforcement strategy.

A second cause of growth has been the creation of new operating units. The FBI created a Public Corruption Subunit within its White Collar Crime Unit. In 1976, Attorney General Levi created a Public Integrity Section in the Criminal Division -- drawing together for the first time an enforcement program that had been scattered among the Fraud, Labor, General Crimes, and Organized Crime Sections. Our Public Integrity Section has grown from an initial staff of 9 attorneys to a current complement of 28. With these new units at the FBI and the Department, it has been possible to develop collective experience in running investigations and in using statutory tools of enforcement such as relatively new prosecutive theories under the Hobbs Act, the RICO statutes, and the wire fraud statute. The FBI has developed a team approach to its investigations, consulting with the U.S. Attorney early on so as to develop cases most effectively. Our Public Integrity Section has exercised leadership among the U.S. Attorney's offices through training programs, consultation, and joint prosecutions.

A third source of the growth is the plain enthusiasm of FBI agents, newspaper reporters, government program agencies, and prosecutors, for developing public corruption cases. In the decade after Watergate, these cases are perceived as important and urgent, contributing directly to the public welfare. As in the competitive world of journalists, so in the competitive world of law enforcement agencies, detecting and proving a case of major public corruption is a highly valued achievement.

The fourth cause of growth -- and the greatest catalyst for continued growth -- is the iron-clad policy of independence adopted under the last two Attorneys General. This policy has insulated the Department of Justice from influences that should not affect decisions in any criminal case. Under a rule announced by Attorney General Bell in September 1978 and re-promulgated by Attorney General Civiletti last year, the prosecuting attorneys in the Department -- whether at the Assistant Attorney General, Section Chief, or staff lawyer level -- are forbidden to have any contact or communication with the White House or the Congress concerning open cases. Another part of the policy says that prosecution decisions will be made at the Assistant Attorney General level or a level below that. If the Deputy Attorney General or Attorney General wishes to overrule a particular decision, the overruling must be committed to writing, including a statement of reasons. This puts the matter clearly on the record for future examination. The reasons for the overruling are to be publicly disclosed if law enforcement considerations and the rights of persons or organizations under investigation permit. Once a case is closed, it is also our policy to make the case files available on request to Congressional committees charged with oversight where law enforcement considerations permit. Thus, whenever we make a case decision, it is our working assumption that the matter is likely to be scrutinized after the fact.

This policy of delegating decisions to the career prosecutors, of insulating them from any possible outside pressure, of making decisions on the record, and of welcoming later Congressional oversight, insures that case decisions will be made carefully and completely on the merits. The iron-clcd policy of independence is extremely healthy, both symbolically and operationally, and reinforces the nonpolitical character of a nonpolitical Department.

C. The Quality and Types of Cases

Statistics can be misleading, and an observer should rightly ask what kinds of cases we have brought -- whether our focus has only been minor government employees, or whether we have addressed corruption and misconduct at higher levels of government. The record here is quite impressive.

In the last three years, the Department has obtained indictment and conviction of five Congressmen for corrupt acts connected to office -- Richard Tonry, for agreeing to accept improper campaign contributions and promising federal benefits in exchange for contributions; Richard Hanna, for conspiracy to accept bribes and defrauding the United States; Charles Diggs, who was chairman of the House Committee on the District of Columbia, for mail fraud and false statements in connection with a salary kickback scheme; Joshua Eilberg, who was chairman of the House Judiciary Subcommittee on Immigration, for violating a criminal conflict of interest statute; and Daniel Flood, who was chairman of the House Labor-HEW Appropriations Subcommittee, for a six-year-long conspiracy to elicit contributions from persons seeking to do business with the federal government. We also sought and obtained indictments against three other Congressmen, although we did not succeed in obtaining convictions. There were the Passman, Galifianakis, and Leach cases. We are currently proceeding with the Abscam investigation.

The investigation of persons close to the White House has been extensive and painstaking, so much so that the Washington Post last Saturday ran a news story speculating whether the potential costs of legal defense would not discourage some people from public service. We have just finished the Lance trial. We appointed a Special Counsel to investigate the finances of the Carter Warehouse. We conducted an 18 month long grand jury investigation to follow every strand of an allegation concerning Robert Vesco's fugitive status and a White House official. We requested appointment of a Special Prosecutor by the U.S. Court of Appeals to investigate alleged cocaine use by the White House chief of staff. The Post story mentions other similar investigations, each conducted without regard to administration membership or political party.

The Public Integrity Section had full or shared operational responsibility for many of these cases. There are also lesser known cases of federal officials in which the Section has had an operational role. These include the conviction of a representative to the Great Lakes Regional Commission for using Commission funds to aid Democratic Farmer Labor candidates; of a federal co-chairman of the Coastal Plains Regional Commission for official acts affecting a personal financial interest; of a former American Ambassador to the Dominican Republic for using government personnel and materials to build a private home; and of a former Assistant Director of the Bureau of Engraving and Printing for criminal conflict of interest. We are proceeding to trial in the next few weeks against the former chief of the Federal Highway Safety Commission.

At the state and local level, the Public Integrity Section has also been active. Over the last three years we have participated in the indictment and conviction of a Mississippi State Senator who was one of the most powerful members of that body, for conspiracy to defraud the United States; of a prominent Pennsylvania State Representative for election law violations; and of the Sheriff of Madison County, Illinois for fraud and false statements in connection with a wide-ranging shakedown scheme. Add to that the conviction of the

Sheriff and First Deputy Sheriff of Randolph County, Alabama, for vote-buying and the Sheriff of Perry County, Mississippi, for RICO violations. And the conviction of the East Chicago, Indiana Building Commissioner and Sanitary District Commissioner; the former police chief of Houston, Texas; the Insurance Commissioner of Florida; a county judge in St. Francis County, Arkansas; the chairman of the State Liquor Control Commission in Iowa; the chairman of the Board of County Commissioners in Knox County, Tennessee; the police chief in Gary, Indiana; and the former Mississippi Director of Highway Safety. We recently indicted two prominent members of the Washington State legislature for allegedly accepting corrupt pay-offs from undercover agents who posed as persons pressing for legalization of gambling in the state.

The list could go on. If I were to include cases handled solely by U.S. Attorneys around the country, the list would be far too long to read to you. But the point is clear. Our activity as prosecutors has been far-reaching, productive, and wholly impartial in ferreting out public corruption. If an observer took the trouble to check the party affiliation of the defendants in all these cases, the nonpolitical independent character of our activity would be immediately apparent. The record is one I'm proud of. The FBI and the attorneys in the Criminal Division are proud of it. It is a record that has been developed in large part under the leadership of Tom Henderson as chief of Public Integrity.

II. Declinations and the Prosecutor's Task

A. Why Declinations Occur

Winning convictions is only half of a prosecutor's job. Equally vital is to sort out which cases to prosecute and which to decline.

Declinations are the rule, not the exception. Of 171,000 criminal matters referred to federal prosecutors in Fiscal Year 1976, 108,000 were declined -- a declination rate of 63 percent. Many other uncounted declinations are made by the investigative agencies, in accord with guidelines agreed on with federal prosecutors.

Cases are declined for a variety of reasons. The first is scarcity of resources; the federal system cannot handle every allegation of a federal criminal violation generated in a country of 200 million people. We try to make our resources have the most effect by selecting areas where deterrence is especially important, where the federal interest is the greatest, cases of the greatest culpability and cases where we have a good chance of winning. To conserve resources, we will often defer to state and local prosecution, or in appropriate cases of lesser culpability, to administrative discipline by a suspect's employer or professional association.

The more important reason for declining is lack of merit in the prosecution. Often, upon investigation, we discover that there simply is no evidence supporting the initial allegation. In other cases the available evidence turns out to be weak; there is a vast difference between making an allegation and mustering sufficient proof to convince twelve jurors beyond a reasonable doubt. Declining a weak case is part of the prosecutor's duty of fairness, for the burdens of indictment and trial were never intended to be a form of curbstone punishment to be used without a reasonable chance of securing a conviction. Declining weak cases is also important because too many losses at trial would seriously weaken the credibility of the Department's future prosecutions.

Attorney General Bell suggested that we should seek an indictment only where the available evidence would be at least likely to produce a conviction. I have found that to be an extremely sensible standard.

Judging what is a weak case is partly a technical evaluation of the evidence -- what witnesses are likely to be available, what they will testify to and with what credibility. It is also a matter of gauging whether the jury is likely to be impressed by the wrongfulness of the defendant's conduct. The phenomenon of jury nullification is not unknown in the federal system and elements of a crime such as "corrupt intent" provide another way for jurors to act on their assessment of the wrongfulness of conduct.

Many declination decisions are clear calls. If a government employee cheats on his sick leave, almost all prosecutors would decline prosecution in favor of administrative discipline. In the case of a major embezzlement from a federal program, the opposite call is equally clear.

But if we are doing our job right, there will always be tough calls, close cases, where the decision on how to proceed could go either way. Every prosecutor faces numerous such close decisions, which depend on his evaluation of the adequacy of the evidence, the jury appeal of the case, the federal interest in the case, the need for deterrence, the availability of alternative sanctions. Out of the 100 or more criminal matters reviewed yearly by a typical federal prosecutor, there will be a sizeable number on which reasonable prosecutors could differ. It is a prosecutor's obligation to call those cases on the merits, in good faith judgment, based on his own evaluation of the case.

It is important to have public support and understanding of this part of the job of prosecutors and investigators. If prosecutors are afraid to call cases on the merits and to decline prosecution when appropriate, the criminal process will be susceptible to serious abuse. Yet at the moment, in the post-Watergate era, all the outside pressures that operate on law enforcement push in one direction only -- in favor of not declining cases, at least in the area of public corruption. Declining, even on a case where there is no evidence, is likely to lead to charges, by somebody, somewhere, of cover-up. And there will always be close cases on which reasonable prosecutors could differ; in such close cases, where a political figure is involved, declining will permit a suggestive charge that politics was the deciding factor. A law enforcement person belongs to a profession that powerfully demands adherence to the law and impartial pursuit of violators, and for him such a charge is anathema. Without public understanding of the declination function, the temptation always will be to prolong investigations that deserve to be closed, to reveal information that should be kept a confidential part of the investigative process, even to charge and prosecute where no indictment deserves to be brought.

B. Recent Debate

One example of misunderstanding of the declination function is the recent mild flurry of assertions about the prosecutorial record of a man whose rectitude is beyond question. The chief of our Public Integrity Section, Tom Henderson, has been a stalwart and steadfast chief since the creation of the section. He has led the Public Integrity Section for four years in creating the impressive string of prosecutions and convictions I described. He has a reputation for complete independence, for bending to no political wind, for having the guts to call cases both ways, completely on their merits. He has shown tough-mindedness and independence of judgment in every matter we have handled together, and has never once changed his view to suit the front office.

The questions that are asked about a few recent cases may be legitimate; but the answers that some have given to the questions are out of touch with a very simple mathematical reality. Out of the hundreds of matters the Public Integrity Section considers each year -- and it does consider hundreds -- any observer could find a dozen or so on which reasonable prosecutors could differ. Every case the Public Integrity Section deals with involves governmental or political figures. There has to be a class of cases, for any prosecutor, in which a call could go both ways. The Public Integrity Section thus must decline prosecution of political figures in at least some close or debatable cases. To conclude from the legitimately debatable nature of a handful of declination decisions, and from the fact that they involved governmental or political figures, that the declinations are a sign of nonindependence or political pliability, would be foolish.

The particulars in the assertions about Tom Henderson's prosecutorial record more than bear out my point. The observers who have put forward a list of a supposed "debatable dozen" -- declinations another prosecutor might have called a different way -- face several awkward facts in citing the declinations as examples of anything besides independent judgment. (1) Most of the cases are, upon scrutiny of the full facts, declinations with which no prosecutor would disagree, because the evidence in each was extremely weak or nonexistent. The "debatable dozen" shrinks to the "debatable few." (2) Many of the declined cases concerned transactions by public employees occurring before this Administration, as to which there could be no conceivable motive to go easy in even the most venal world. (3) Most of the declined cases concern people who have no prominence or political power. You and I have never heard of most of them, making it more than a little unlikely that the declination could have been biased to please someone in a position of power.

III. Why the Declination Function Can Be Confusing

The recent characterizations of the significance of a dozen cases -- plucked from among hundreds of cases handled each year by the Public Integrity Section -- have been troubling to lawyers in the Criminal Division and many FBI agents. The fact that Bud Mullen, head of the FBI's Criminal Investigative Division, and Jack Keeney, my senior career Deputy, are sitting here with me today, is some indication how seriously we take this kind of allegation. When assertions are made about Tom Henderson, the bell tolls for every lawyer and agent who has to decide close cases involving political figures and who deeply values his reputation for integrity.

In a sympathetic light, however, there are a number of common reasons why the declination function may have been misunderstood.

First, that declinations are so common an occurrence in law enforcement is a fact frankly unfamiliar to many citizens, legislators and writers. For instance, when GAO published a study two years ago describing the 63 percent declination rate common to federal prosecutors, several Committees in the House and Senate issued a request for a study of "recommendations for improving the percentage of such [criminal] complaints which are prosecuted by the Department."

Second, it can be hard to keep in clear view the difference between scandalous behavior and criminal behavior, and the difference between suspecting criminal behavior and proving it -- particularly when a matter is being discussed in the non-technical confines of a journal or newspaper. When we pursue an investigation, often we find that the suspect behaved badly, may even have acted like a scoundrel, and yet has not committed a federal criminal violation. When a legislative subcommittee omits to put a witness under oath, for instance, we can hardly bring a perjury prosecution against the witness even though he tells untruths. Sometimes we end up at the conclusion of an investigation strongly suspecting that a person _is_ guilty of a criminal offense, but unable to assemble adequate admissible evidence. Keeping these distinctions in mind is essential in understanding that a declination does not amount to approval or condoning of the examined behavior.

Another cause of potential misunderstanding is that we can't talk very much about our declinations. Investigative information is generally to be presented in court or not at all. By law we can't make grand jury information public, and by ethical practice, to protect privacy, we generally refrain from disclosing other investigative information except in the confines of an indictment and trial or in response to oversight requests from the Congress on closed cases. Certainly, as an agency following the rule of law, we have no business broadcasting our "suspicions" or "hunches" about guilt. So the public is often not given any detailed information on the reason for a declination; they simply learn that an investigation of an obvious scoundrel has been closed. This may contribute to suspicion that the real reason for the declination is political.

Another potential cause of misunderstanding is that allegations of criminal conduct often surface in highly charged settings, where people have properly strong feelings about matters of moral conduct or public policy to which criminal law does not give full expression. If a lobbyist gets advance access to inside information from a government department, that cozy situation is a troubling one fully warranting Congressional inquiry and reform. But if we are determining whether the lobbyist committed perjury in testifying about the cozy practice, there is no way around the criminal law's requirement of literal falsity and the two-witness rule. If the Civil Service Commission is discovered to be giving weight to political recommendations in hiring, that is a scandal and heads should roll. But if we are looking at whether a criminal obstruction of justice occurred in the course of the Commission's response to a Congressional investigation of the matter, we have to measure our evidence against the stringent "intent" requirement of the obstruction statute. That we end up declining prosecution doesn't mean we condone the hiring abuse or the inadequate response to a Congressional request. Yet the distinctions between criminal behavior and immoral behavior, and the frequent difficulty in meeting the "reasonable doubt" standard of the criminal law, can be hard to keep in clear focus -- especially when as a society we often have to grope for a suitable sanction against immoral but noncriminal behavior.

A fifth reason for misunderstanding declinations is that the law enforcement business is very competitive, with jousting and bruising between agencies. Each one hopes to make the big case. There will not always be complete unanimity among all the prosecution lawyers, all the grand jurors, all the investigative agents, on what tactics to use in an investigation or whether a case should be declined. There is of course a fair process of review for resolving any serious disagreement; an investigative agency that believes a declination decision in the Criminal Division is in error can appeal the matter to the Assistant Attorney General or even higher. But if an observer is looking for internal dissent on a decision, he often can find it, sometimes even expressed in strong and harsh language. The vocal dissent is part of the roughhouse world of law enforcement. The difference between two reasonable judgments which leads to that dissent should not be hastily converted into a suspicion of partisan cover-up.

The typically slow course of criminal investigations can be a sixth factor in causing misunderstanding of the prosecution function. A criminal investigation often requires sifting through massive financial records, or painstakingly compiling the testimony of witnesses with hazy memories. It can require time-consuming procedures to get tax return information under the Tax Reform Act of 1976 or bank records under the Right to Financial Privacy Act. It may require waiting for the trial of a lesser individual in the hope that he can be "turned" or "flipped" -- that is, induced to cooperate in supplying information on higher-ups. Sometimes the delay comes because we are waiting for the completion of investigative work by another agency, so that we do not stumble over each other's feet. Yet when a reporter inquires about the Congressman XYZ investigation and is told six months later that it is still under investigation, the first impulse may be to think it is a stall or a cover-up. With grand jury secrecy requirements and our confidentiality rules, there will not be much information we can give out to explain the status of the investigation. If the reporter writes an article about the so-called stall, it will likely color the public's perception of any later decision that prosecution is not warranted.

A seventh factor in causing misunderstandings may be simple unfamiliarity with standard methods of investigation, rules of procedure, or the technical definition of particular substantive offenses. For instance, if we receive a referral concerning possible perjury by a government official testifying before a Congressional committee, and after examining the transcript we conclude the testimony was so couched as not to be literally false, then it makes no sense to suggest that we should interview the official or question the Congressional staff who heard the testimony. Under Bronston v. United States, 409 U.S. 352 (1973), a perjury charge requires a showing of literal falsity, and all the interviews in the world cannot fill the gap if the transcript shows that no false statements were made; evasiveness and unresponsiveness are not, Bronston teaches, federal crimes.

Similarly, if a citizen is doing first-time service on a federal grand jury, he may be unfamiliar with the traditional role of the prosecutor in relation to the grand jury in deciding on an order for the presentation of evidence and in formulating questions to ask of the witnesses. Parts of standard operating procedure in many U.S. Attorney's offices -- for example, not supplying transcripts of each previous day's testimony to the grand jurors, or storing the written notes taken by grand jurors in a secure place at the close of each day, both used as standard practice in order to protect grand jury secrecy -- may be unfamiliar to a citizen and seem, on first blush, suspicious to him.

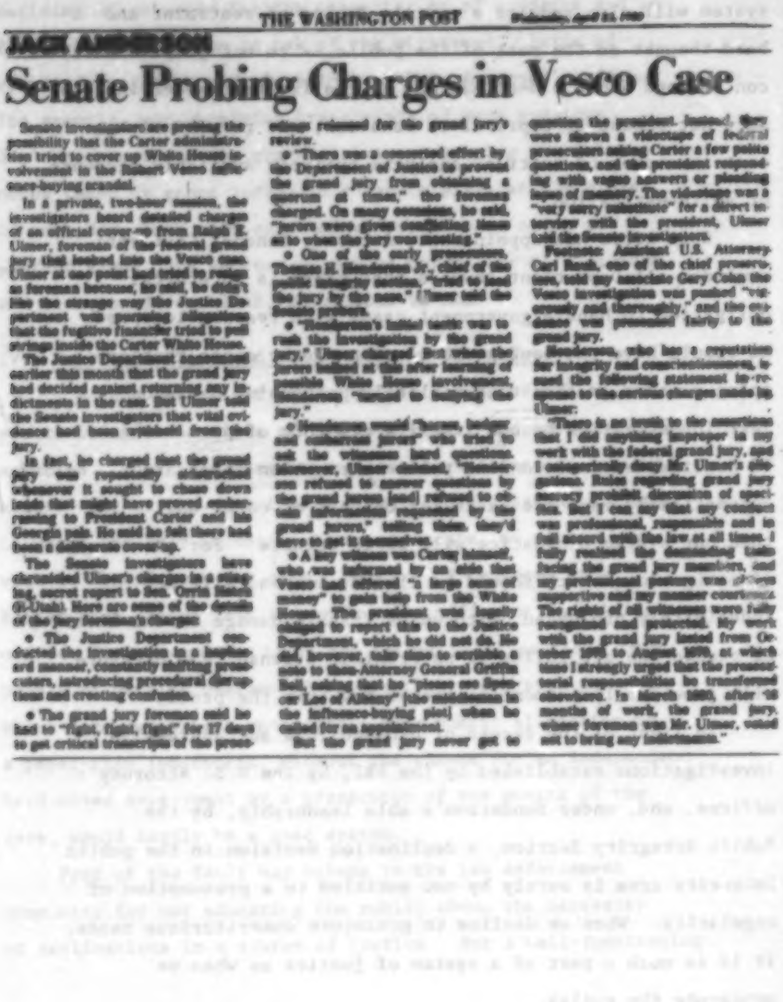
IV. Public Scrutiny and the Courage to Close Cases

I do not make light of the public's responsibility for scrutinizing the actions of law enforcement and prosecutorial agencies. That is a very strong long-term safeguard against abuse. But at the same time, we must avoid creating a system in which the only incentive is to prosecute, no matter how weak or nonexistent the case. Members of Congress know better than anyone that in running for office or in holding office, it is possible to be the target of allegations from people of varying degrees of credibility. A system in which momentum builds unceasingly from public allegation to a paper-thin indictment, without the chance for an independent hard-nosed assessment by a prosecutor of the merits of the case, would hardly be a good system.

Part of the fault may belong to the law enforcement community for not educating the public about the necessity of declinations in a system of justice. But a well-functioning system will also require a certain degree of restraint and hard thought on the part of the public -- to not jump to hasty conclusions about a declination, to realize that a declination does not amount to approval of behavior, and to read with a certain amount of critical analysis publicly available accounts of an investigation.

Soon after his appointment, Attorney General Civiletti reminded all Department lawyers that there is an ethical obligation to handle government cases with reasonable speed. We should have the courage to close unworthy cases that are going nowhere, rather than endlessly postponing decision, lest investigation become itself a new form of punishment. If declination decisions in public corruption cases are automatically made the basis for charges of cover-up, then our system of justice will be in trouble. For then investigations which should be closed, instead will be indefinitely prolonged, with unjustifiable damage to the lives of people who are guilty of no criminal offense, and pressure will grow for indictment no matter how thin the proof.

In light of the record of prosecutions and aggressive investigations established by the FBI, by the U.S. Attorney's offices, and, under Henderson's able leadership, by the Public Integrity Section, a declination decision in the public integrity area is surely by now entitled to a presumption of regularity. When we decline to prosecute unmeritorious cases, it is as much a part of a system of justice as when we prosecute the guilty.



THE WASHINGTON POST Wednesday, April 23, 1980

JACK ANDERSON

Senate Probing Charges in Vesco Case

Senate investigators are probing the possibility that the Carter administration tried to cover up White House involvement in the Robert Vesco influence-buying scandal.

In a private, two-hour session, the investigators heard detailed charges of an official cover-up from Ralph E. Ulmer, foreman of the federal grand jury that looked into the Vesco case. Ulmer at one point had tried to resign as foreman because, he said, he didn't like the strange way the Justice Department was pursuing allegations that the fugitive financier tried to pull strings inside the Carter White House.

The Justice Department announced earlier this month that the grand jury had decided against returning any indictments in the case. But Ulmer told the Senate investigators that vital evidence had been withheld from the jury.

In fact, he charged that the grand jury was repeatedly obstructed whenever it sought to chase down leads that might have proved embarrassing to President Carter and his Georgia pals. He said he felt there had been a deliberate cover-up.

The Senate investigators have chronicled Ulmer's charges in a stinging, secret report to Sen. Orrin Hatch (R-Utah). Here are some of the details of the jury foreman's charges:

- The Justice Department conducted the investigation in a haphazard manner, constantly shifting prosecutors, introducing procedural disruptions and creating confusion.

- The grand jury foreman said he had to "fight, fight, fight" for 17 days to get critical transcripts of the proceedings released for the grand jury's review.

- "There was a concerted effort by the Department of Justice to prevent the grand jury from obtaining a quorum at times," the foreman charged. On many occasions, he said, "jurors were given conflicting times as to when the jury was meeting."

- One of the early prosecutors, Thomas H. Henderson Jr., chief of the public integrity section, "tried to lead the jury by the nose," Ulmer told the Senate probers.

- "Henderson's initial tactic was to rush the investigation by the grand jury," Ulmer charged. But when the jurors balked at this after learning of possible White House involvement, Henderson "turned to bullying the jury."

- Henderson would "harass, badger and embarrass jurors" who tried to ask the witnesses hard questions. Moreover, Ulmer claimed, "Henderson refused to answer questions by the grand jurors [and] refused to obtain information requested by the grand jurors," telling them they'd have to get it themselves.

- A key witness was Carter himself, who was informed by an aide that Vesco had offered "a large sum of money" to gain help from the White House. The president was legally obliged to report this to the Justice Department, which he did not do. He did, however, take time to scribble a note to then-Attorney General Griffin Bell, asking that he "please see Spencer Lee of Albany" [the middleman in the influence-buying plot] when he called for an appointment.

But the grand jury never got to question the president. Instead, they were shown a videotape of federal prosecutors asking Carter a few polite questions, and the president responding with vague answers or pleading lapse of memory. The videotape was a "very sorry substitute" for a direct interview with the president, Ulmer told the Senate investigators.

Footnote: Assistant U.S. Attorney Carl Rauh, one of the chief prosecutors, told my associate Gary Cohn the Vesco investigation was pushed "vigorously and thoroughly," and the evidence was presented fairly to the grand jury.

Henderson, who has a reputation for integrity and conscientiousness, issued the following statement in response to the serious charges made by Ulmer:

"There is no truth to the assertions that I did anything improper in my work with the federal grand jury, and I categorically deny Mr. Ulmer's allegations. Rules regarding grand jury secrecy prohibit discussion of specifics. But I can say that my conduct was professional, responsible and in full accord with the law at all times. I fully realized the demanding tasks facing the grand jury members, and my professional posture was always supportive and my manner courteous. The rights of all witnesses were fully recognized and protected. My work with the grand jury lasted from October 1978 to August 1979, at which time I strongly urged that the prosecutorial responsibilities be transferred elsewhere. In March 1980, after 18 months of work, the grand jury, whose foreman was Mr. Ulmer, voted not to bring any indictments."

DEPARTMENT OF JUSTICE AUTHORIZATION ANTITRUST DIVISION

MONDAY, APRIL 28, 1980

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:40 a.m., in room 2228 Dirksen Senate Office Building, Senator Howard M. Metzenbaum presiding.

Present: Senator Metzenbaum.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. The hearing will come to order.

Today's hearing is one of a series of Judiciary Committee hearings examining the Justice Department's budget request for the 1981 fiscal year which begins this October. This hearing concerns the budget authorizations for the Antitrust Division. Active enforcement of the antitrust laws is essential to maintain competitive forces which can result in a greater variety of products and services at lower prices.

The Congress, with the support of the Antitrust Division, has been active in deregulating and opening up to competitive forces many important American industries, such as airlines, banking, and securities. Currently we are working on trucking and railroad deregulation. If consumers are to benefit from these actions, there must be a continuing and effective antitrust vigil.

Our Nation is undergoing truly outrageous inflation. The Congress has attempted to battle it through the budgetary process. The battle, however, needs other weapons. One of the most important is an active and continuing antitrust effort against price fixing and other anticompetitive tactics that artificially raise prices.

Thus the administration and funding of the Antitrust Division are of particular importance. This year the Antitrust Division is seeking authorization for a budget of some $47 million and 939 positions. Last year, their budget authorization was approximately the same. Frankly, I have always doubted whether an operation of this size—it would not even come close to making the Fortune 500—can effectively police an economy which generates a gross national product of over $2,368 billion.

I have also questioned the Division's performance in recent years and most recently in connection with John Shenefield's confirmation hearings as Associate Attorney General. Those hearings developed information that Antiturst Division case filings had dropped significantly despite increased resources, that productivity had declined, and that morale was not what it should be.

Now we have a new Assistant Attorney General in charge of the Antitrust Division, Sanford Litvack. He has been functioning as head of the Division now for little more than 90 days. Obviously, this is too short a time to make any reasoned analysis of whether Mr. Litvack is providing aggressive and imaginative leadership. I should say, however, that we have been hearing some very good things about Mr. Litvack, particularly about his efforts to improve case control and management, through his direct involvement in strategy and planning, and his efforts to sharpen the litigation skills of staff attorneys. We also understand that morale is up. We also have learned, to our disappointment, that the Antitrust Division decided not to go forward with its only shared monopoly case.

In connection with this January's confirmation hearings of Mr. Shenefield, the Division has provided us with detailed workload statistics and descriptions of management initiatives. These will be inserted in the record and the Division's authorization request for fiscal 1981 will also be inserted in the record.

[Material referred to above is on file with the committee.]

Senator METZENBAUM. Mr. Litvack, we are happy to have you with us this morning. You have a statement. You are welcome to read the entire statement or a summary of it, and we will insert the entire statement in the record.

STATEMENT OF SANFORD M. LITVACK, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. LITVACK. Thank you, Mr. Chairman.

With your permission, what I will do is read portions of it, and request that the entire statement be inserted in the record.

Senator METZENBAUM. It will be inserted in the record at the end of your oral testimony.

Mr. LITVACK. Mr. Chairman and members of the committee, I welcome this opportunity to appear before the Judiciary Committee today to discuss the Antitrust Division's direction and operations for fiscal year 1981.

The Antitrust Division is requesting a 1981 funding level authorization of $47,255,000, 939 permanent positions, and 963 work years. I believe that the proposed staffing level and the requested funding will enable the Division effectively to carry out its mission of preserving and promoting a free competitive economy.

During fiscal year 1980, the Antitrust Division has thus far filed 19 criminal cases and 8 civil cases. Fifteen of the criminal cases and four of the civil cases were filed since I joined the Division, approximately 3½ months ago.

Since joining the Division, I have met with the Division's entire staff, both in Washington and in each field office, in order to acquaint myself with the people and each current matter. My exposure to the people and the internal workings of the Division has solidified my own objectives and given me a good understanding of the Division's present direction.

Briefly stated, my goals during my tenure are to: (1) streamline and sharpen our litigation management efforts; (2) step up our criminal enforcement efforts; (3) emphasize the prevention of anticompetitive mergers; (4) continue our active program of competition advocacy and analysis in regulated industries; (5) focus new attention on the area of vertical restraints; (6) insure that our outstanding decrees are effectively enforced; and (7) augment the professionalism and institutional pride among the Division's attorneys and economists, whose efforts are critical to the Division's success.

Let me comment briefly, if I may, on each of those areas.

First, litigation management. The truth is, a great deal has been written about it and about how to effectively manage litigation. I do not, and would not, suggest that I have any revolutionary ideas. I can tell you what I have tried to do, and am trying to do, in that area.

First: I in fact have held, and do hold, on a regular basis, which is in fact every 30 days, meetings with each of the chiefs of our sections, the assistant chiefs, our operations personnel, the relevant deputy and myself. We hold these meetings either in the morning or evening. The purpose of them is to go over each matter, whether it is an investigation, whether it is a grand jury, whether it is a case, whether it is an administrative proceeding, whatever, and go over each matter and discuss what is involved, how it is proceeding, what is occurring, and how we can best manage it from there on out. We discuss future planning and scheduling, as it were.

In addition to the monthly meetings, I meet with the staff who are involved with cases on the same kind of regular periodic basis, so that they can get to know me and I can get to know them and, hopefully, together we can get to understand what the direction is in which we are proceeding and how best to get there.

Third: At the urging of many of the lawyers, I hold informal meetings with the Division attorneys to discuss general litigation techniques. Topics cover the gamut of antitrust litigation, from how to draft interrogatories to how the defense might prepare a witness. These meetings, I might say, are purely voluntary, but the consistently large turnout has been extremely encouraging to me.

Another thing we have been doing is to continue the more formal training programs.

Senator METZENBAUM. Do I understand you convene these meetings?

Mr. LITVACK. Yes, sir.

Senator METZENBAUM. I just smiled when you say the meetings are purely voluntary. When the boss calls, I think somehow it may not be so voluntary. I am not criticizing you for that at all, but I had to smile when I heard you say that the turnout has been good. If I were working for you, I would come. Do not let me interrupt you.

Mr. LITVACK. I have often thought that might be the case, but I do not take attendance, and I do not know who was there. I think probably it is the coffee and donuts which attracts them most. We also continue the more formal training programs of various sorts of Division employees which are valuable and have been in place for many years.

Finally, in this regard we are trying to improve our filing and reference systems and computer support capabilities. This will facilitate access to materials previously discovered or prepared by Division employees in handling antitrust matters. It will also allow greater and more efficient access to materials prepared by outside sources.

I think, as is apparent and as I have said from the outset, expediting investigation and litigation of so-called big cases is not only one of my highest priorities, it is the highest priority as far as I am concerned.

Some other important priorities which also ought to be identified are my emphasis upon criminal enforcement. Experience has taught me that a serious threat of criminal sanctions, including possible jail terms, is the most effective deterrent to antitrust violations. Since price fixing and other per se offenses impact so heavily upon the consumer, it is my intention—and we have in fact proceeded in such a manner—to seek criminal convictions and maximum penalties, including jail sentences, in virtually every criminal case we bring.

A third area involves anticompetitive mergers. The timely prevention of such mergers is an important area. Case law and the Department's merger guidelines set forth the factors which we consider in determining whether a merger should be challenged. We will, of course, continue to challenge proposed horizontal or vertical mergers whenever they have significant anticompetitive effects.

More importantly, and more relevant, however, to today's merger trends are the conglomerate mergers. We will continue and have continued to challenge those mergers on grounds of untoward entrenchment, elimination of potential competition, and substantial possibilities of reciprocal dealing.

The truth is, however, and I must recognize, as I do, that these challenges have not overall been successful, and we have substantial evidentiary problems in many cases. Nevertheless, I believe the theories are valid, and I am hopeful that through effective presentation of the cases in the courts, we will ultimately prove successful in challenging conglomerate mergers.

Competition advocacy is a program which has been in place for some time. I am aware that in certain industries, or parts of industries, Federal regulation is necessary and operates, at least to a certain extent, in lieu of competition.

We advocate three principles regarding Federal regulation in private industry.

First: Regulation should be substituted for the operation of the market only where it is necessary because traditional competitive forces will not work effectively. The Division has been heavily involved in the administration's attempts to deregulate substantially the trucking and railroad industries. We strongly believe that the result of deregulation would be lower prices and better service than currently exist under Federal regulation.

Second: Where regulation is necessary, agencies should choose the least anticompetitive method of achieving the regulatory goal. Important regulatory objectives can thus be achieved without unnecessary impact upon competition.

Third: A very heavy burden should be placed on proponents of continued or new regulations or antitrust immunities. Laws which permit such immunities should be construed as narrowly as possible. They should also be periodically reviewed to determine whether they are no longer necessary or appropriate because of changing market or economic forces.

One of the principal roles of the Antitrust Division regarding Government regulation is to review administrative or legislative proposals for their potentially anticompetitive effects and to suggest less anticompetitive methods of achieving the desired results. The Division, of course, does not oppose all Federal regulation of business. However, we believe that economic regulation should be resorted to where, because of unusual circumstances in an industry, it is necessary.

In sum, I intend for the Division to continue as a leading advocate for competition in regulated, as well as unregulated, sectors of the economy.

Another important area that I have stressed that I think has received less than full-blown attention over the last several years is the area of vertical restraints. These common anticompetitive practices include hardcore resale price fixing, conduct which, in my view, should be criminally prosecuted. I intend for the Division to pursue most vertical restraints of trade with the same vigorous efforts we focus on horizontal agreements.

Last: judgment enforcement. Even when the Antitrust Division has been successful in achieving significant relief against anticompetitive practices, whether by litigated or consent decrees, there has previously been no systematic means of ascertaining whether defendants were in compliance with the decrees.

Under my predecessor, John Shenefield, the Division started upon the task of trying to gather, code, and analyze these decrees so as to have a more effective means for monitoring our efforts in these areas. I intend to, and am continuing to realize that goal.

We in fact now are undergoing a massive effort to analyze and catalog each decree. Once computerized, which I hope will be shortly, systematic access to this information will enable us to do the vigorous and thorough job of enforcement and compliance monitoring that I believe is essential.

Last: The success of the Division and the effectiveness of its antitrust enforcement depends on the quality and the results of work performed by Division personnel. I have often stated that I believe that the lawyers, economists, and other professionals in the Antitrust Division are as competent and dedicated a group of individuals as anyone with whom I have ever worked. However, the truth is that it is difficult to recruit and retain top quality personnel, top quality professional staff, because we cannot offer the monetary rewards that are available in the private sector. We must therefore offer these people all the support we can to help them perform their work effectively.

To a certain extent, we must rely on a professional pride and excitement in working in the Division, as well as a fundamental commitment to the public interest. From what I have seen so far, Mr. Chairman, I am happy to tell you that those factors are working within the Antitrust Division. I intend to do everything I can to continue to see that they will continue to work.

That concludes my prepared statement. I will be happy to answer any questions you may have, Mr. Chairman, or any other member of the committee.

Senator **Metzenbaum**. Mr. Litvack, my first question is not directly related to the oversight hearing, but it has to do with the subject about which I spoke with you the other day on the telephone. If you do not mind, I would like to repeat that same question here, because the question has been raised. Senator Riegle and I are inviting the heads of General Motors, Ford Motor Co., Chrysler Motor Co., and American Motor Co., as well as Mr. Fraser of the UAW to meet with us to discuss the problem of the American automobile industry and what action, if any, the auto companies as a group can suggest that will be helpful to them in order that they may remain a viable part of the American economic scene. Some have raised the question about the antitrust implications of meeting together.

I called you and asked you whether or not you felt that this would in any way be violative of the antitrust laws, and you indicated that it would not.

Mr. LITVACK. What I indicated, Senator, and what I would reiterate here is twofold. No. 1, any time there is a meeting, of course, of competitors in an industry, they ought to be concerned, and we are concerned. But what I further stated was that under existing law, specifically the Noerr-Pennington doctrine, joint efforts to influence or to have enacted congressional legislation have been declared by the Supreme Court to be immune. Activity and conduct so carefully limited to that area, and that area alone, would most likely, depending on the facts, fall within the Noerr-Pennington exemption.

Senator METZENBAUM. You see no legal problem for them as far as their responding to a request of two U.S. Senators to join in such a meeting, do you?

Mr. LITVACK. Provided, Senator, that they adhere to and remain within the exemption accorded by the law, by the Supreme Court, which enables them to discuss with the Senators, if they choose to do so, proposed legislation.

Senator METZENBAUM. Yes, proposed legislation.

Mr. LITVACK. In that narrow area, yes.

Mr. CHUMBRIS. Would that be before the Antitrust Subcommittee or before the two Senators from Michigan and Ohio?

Senator METZENBAUM. As a matter of fact, I am not convening a meeting as chairman of the Antitrust Committee, but rather convening it personally and for Senator Riegle, because both of us represent States that have major concerns about what is happening in the automobile industry. We intend to invite to the meeting other Senators who have automobile manufacturing operations.

Mr. CHUMBRIS. The reason I raise the question is that, from the ruling of the Supreme Court, if it is before a subcommittee, then it would be immune, according to your view, Mr. Litvack.

Mr. LITVACK. No. What I was saying was, efforts by businessmen or members of the public are protected under the first amendment, and otherwise to the extent that they are directed toward securing or attempting to influence legislation, or indeed, in some cases, executive action, provided, however, that it is bona fide, provided there are no other kinds of communications, provided that it is not a sham effort, but within those confines, the answer is yes.

Senator, METZENBAUM. Thank you very much. I felt that it was a good opportunity, because the question has been raised and I wanted to be certain that your view is on the record.

Mr. Litvack, at your confirmation hearing you testified that you would like to bring a shared monopoly case if you could, and if you could not, you would tell us why. In light of your decision not to file the iron ore case, what can you report to us today?

Mr. Litvack. Well, Senator, what I intended, and what I still intend to do is to report to you when and if we conclude that we cannot bring a shared monopoly case because the law simply will not permit it and there is no viable case to be brought. What I can report to you today is that I have not reached that conclusion. Rather, in more detail what I can tell you is that the iron ore situation represented one investigation, which was done, I might add, meticulously and very carefully by the Cleveland office of Antitrust Division.

I spent considerable time reviewing that situation, reveiwing the facts, reviewing the proposed case. I made the decision that the facts, peculiar to that situation, did not warrant and would not justify a lawsuit under the theory as it was articulated, or under any other identifiable theory.

So I felt that in that case we would not go forward. I can tell you, however, that the program is very much alive, and that we have other investigations. While I cannot say whether any of them will mature into a case, I can say we clearly have not reached the point where I am telling you we will not bring such a case, but rather we will be looking at each one individually.

Senator Metzenbaum. But I take it that a shared monopoly case does not have the same high level of priority for you as it did for your predecessor, Mr. Shenefield?

Mr. Litvack. No, Senator, I do not think that would be a fair conclusion to draw. The bringing of a shared monopoly case is, in my mind, an important goal. I am concerned, however, to be certain that when we bring one, we are bringing one that I am confortable with on the facts and on the law. I am perfectly comfortable with the theory which we have evolved. What I want to be comfortable with is the facts that we have to support it. It is a matter of priority. We are working ahead on several investigations, and we will see what happens. I am hopeful that we will have one.

Senator Metzenbaum. Can you tell us more specifically the factual and evidentiary problems that led you to decide not to file the iron ore monoply case?

Mr. Litvack. Well, more specifically, I guess it is fair to say that I concluded that the factual evidence that we had would not support, in my judgment, a finding of agreement. We were missing essential facts that would lead one to conclude, in my judgment, that we could prove an agreement. When I say missing facts, I do not mean to imply a lack of investigation. We just did not have the facts. They did not exist to prove an agreement.

Senator Metzenbaum. Do you feel that an agreement may be presumed under certain circumstances, absent the finding of a specific verbal or written contractual relationship; that is, do you feel that under certain circumstances an agreement may be presumed, based upon the conduct of the individuals?

Mr. Litvack. Surely, absolutely. That is what we are looking for.

Mr. Metzenbaum. Did you not find something of that kind in this case?

Mr. Litvack. No, I did not feel that we had facts which would give rise to an inference of agreement. You have two ends of the spectrum, Senator. On the one hand, you have absolute proof of agreement. They were all in the room. Everyone testified——

Senator Metzenbaum. Smoking gun.

Mr. Litvack. Smoking gun. On the other hand, you have nothing but similar conduct, and zero, other than that. All you can point to is that company A raised the price and B and C followed.

Senator Metzenbaum. What about interlocking directorates, interlocking relationships with banks, bank directors serving on similar boards. Did you not find some of that existing in the iron ore case?

Mr. Litvack. We had a pattern, or network of joint ventures that existed in the iron ore situation, whereby various companies would be joint venturers with others in a sort of overlapping system. We looked very carefully at that. I would say that if we had facts that supported a feeling of impropriety there, or some wrongful conduct, or if it were part of a broader picture in which you could bring to bear some of the facts, that could be some evidence of impropriety. Standing by itself, we would not get over a motion to dismiss.

Senator Metzenbaum. Did you find interlocking directorates, including the banks?

Mr. Litvack. There clearly are some with banks where you have some interlock between some of the joint venturers and some banks, but the banks were not in joint ventures themselves.

Senator Metzenbaum. I understand that. Let us assume that companies A and B both have board directors that come from the same bank, and that that bank provides the financing. It is not an unusual thing. In fact, it is a customary thing in the business world, where corporations share their plans with their bankers——

Mr. Litvack. The same thing for investment advisers, lawyers.

Senator Metzenbaum. All right. Now, did you not find that to be quite extensive in the iron ore case?

Mr. Litvack. I am trying to recall whether or not that was in fact extensive. I really cannot, Senator. What I do recall is that there was no evidence of any impropriety in that regard. I would go on to say, and volunteer, that the mere fact that they happen to use the same banker, or that that banker is on the same board, standing by itself, in my mind, takes you not very far at all.

Senator Metzenbaum. Let me ask you this question. This gets into the whole question of interlocking directorates.

Mr. Litvack. Sure.

Senator Metzenbaum. I have a banker on my board, and you have a banker on your board, and they both are from the XYZ Bank. At my board meeting, we discuss the fact that we think it would be economically desirable to cut back our production 10 percent, and that bank director goes back to his bank and says my company is going to cut back 10 percent. The other board director goes to your board meeting, and they are talking about this subject, and they know he comes from the bank, and he does not say anything except that, based upon what I know of the competitive factors in the industry, I think it would be good for the company to cut back production 10 percent, and I therefore so move.

Mr. Litvack. If you found, or had a pattern of that, that would be very interesting, and I think very probative, but if all you had was the fact that (a) is on one board and (b) his counterpart, comes to another board meeting, that by itself is not going to take you far.

What you have to look at is, do you have the kind of pattern that you are talking about; that is, do you have that kind of communication, do you have that man making that motion, and do you have the board minutes which reflect participation of that sort, and do you, when you take his deposition, get evidence which substantiates that kind of conduct?

If you do, you may well have something. If you do not, I do not think you have much.

Senator METZENBAUM. Do you know whether or not your regional office inquired into activity of the board members in this connection?

Mr. LITVACK. Yes. I know they did look very carefully at board minutes, board activity, and board conduct.

Senator METZENBAUM. Board minutes and board activities sometimes are just dressing on the cake. It is examined by their lawyers, and quite often, I mean we are not novices about activities in the corporate world. Query: Did they go to the board members where there were interlocking directorates and inquire of them as to whether or not they ever shared any information concerning the other companies with each other?

Mr. LITVACK. They took a host of depositions of people, including board members, and did ask those questions, yes.

Senator METZENBAUM. Mr. Litvack, what is the status of the formal report promised by Mr. Shenefield in the division shared monopoly enforcement program?

Mr. LIVACK. Well, I am not precisely sure as to the nature of what Mr. Shenefield promised, but let me, if I may, sort of tell you where we are, and maybe this will answer it. If not, I will be happy to attempt to answer it further.

We had at the outset approximately 300 screening investigations which encompassed something like 127 industries. Of the 300, we have gone through, or screened, approximately something just short of two-thirds; in other words, something between 175 and 200 roughly. There are another 100 out there that we have not yet screened.

As to the ones which we did do, as to the 175 to 200, I have requested that we evaluate what we have learned from those. I have put a halt temporarily on the other 100 and said, let us see what we have done on the first 200. What have we learned? What have we learned about this technique that we have used? How can it be improved? What can we do? How are we to proceed in connection with the balance?

That report I have requested is being prepared for me now. That is where that stands.

Senator METZENBAUM. You also agreed to check, when you testified before us, at your confirmation hearing, on the high turnover of attorneys and support people in the Los Angeles office. What was the problem, and what have you done about it?

Mr. LITVACK. Let me answer that in reverse order. Since I have been there, which is only 3 months, of course, I do not think we have had anyone leave the Los Angeles office. I guess the turnover rate seems to be stabilizing. We always have some people come and some people go. My sense of the problem in Los Angeles was that the office, at a time in the past, several years ago, whether it is 3 or 4, I cannot really tell you, but several years ago, had had, or was perceived to have had, personnel problems, and was perceived to have needed, for lack of a better word, shaking up and a new direction. For that purpose a new chief was brought in who was given just those instructions, namely to pep up, as it were, that office and to put it on track and to bring in good people, to bring in young people, to stimulate them, to move them in the right direction.

I think, from what I can tell, that that has been done. Inevitably, in that kind of process some people come, some people go, and some people are satisfied and motivated, and some become disgruntled and unhappy. I think that is what happened in Los Angeles.

Senator METZENBAUM. Mr. Litvack, is there any pending legislation that has come to your attention that will have serious anticompetitive consequences, or impair effective antitrust enforcement?

Mr. LITVACK. There are two, Senator, that I know about specifically, that I have looked at and that concern me greatly, that I would call to the chairman's attention, and to the committee's attention.

Specifically, the bottlers bill, the soft drink bottlers bill, would be one with which I know the committee is familiar; and second would be some ocean shipping legislation that has been introduced, as to which we have taken a very vigorous stand in opposition.

Senator METZENBAUM. Concerning the bottlers bill, which is a subject that in recent days has produced what I would call considerable heat, has the Department advised the Congress, other than through appearances at hearings, or is the Division planning to advise Members of Congress as to the serious competitive consequences of this legislation?

Mr. LITVACK. I believe we have advised the Congress both through hearings and also by letter. I may be incorrect on that, but I have a vague recollection that a letter was written before I arrived. I have no hesitancy, in any event.

Senator METZENBAUM. I would like to urge upon you that a letter to the leadership, as well as to Members of the Senate, on this point would be desirable. There are many people in the Congress who do not understand the serious anticompetitive consequences of the bottlers bill, and the sooner the better is all I can say to you. My staff will be prepared to be cooperative in connection with that endeavor.

Mr. LITVACK. Thank you.

Senator METZENBAUM. With respect to the ocean shipping bill, I am not familiar with that; is that pending?

Mr. LITVACK. It is pending. I am trying to think in what committee that is. I would say it is Senator Inouye's committee, whichever committee that is.

Senator METZENBAUM. Pardon?

Mr. LITVACK. Senator Inouye's committee. I cannot tell you precisely which committee it is.

Senator METZENBAUM. I am advised that that bill passed the Senate Thursday, apparently on the Unanimous Consent Calendar. I must say that I am disturbed that we were not alerted to the situation. I am frank to say to you that obviously it came out of a different committee, and it could not have come out of our committee, and any Member of the Senate who is candid will indicate that you cannot keep track of every piece of legislation.

I did not know that there were any anticompetitive or antitrust aspects involved in that bill, because had that been the case, I would have at least made my views known.

Mr. LITVACK. I am disappointed, and I apologize, Senator, for any lack of communication on our part. I am also surprised, although I am just obviously not up to the moment, that it would have passed that way. The administration vigorously opposed it.

Senator **Metzenbaum**. If they vigorously opposed it, I have to say that I am the most shocked person sitting here. I think I am still chairman of the Antitrust Subcommittee. You tell me it would have serious anticompetitive aspects?

Mr. **Litvack**. That is correct.

Senator **Metzenbaum**. I was not, to the best of my knowledge, notified of the administration's position, and certainly, under those circumstances, and had I known about it I would not have permitted it to pass on the Unanimous Consent Calendar. When was the bill introduced; do you know?

Mr. **Litvack**. I am trying to look and see what I can find out about it.

Senator **Metzenbaum**. I understand it was introduced in July 1979, and referred to the Commerce Committee. Frankly, I had no idea that there were any antitrust aspects to the bill.

Mr. **Litvack**. The administration wrote a letter on March 20, 1980, to Senator Inouye, chairman of the Subcommittee on Merchant Marine and Tourism, Committee on Commerce, Science, and Transportation. It was sent by the Department of Commerce, Senator, to Senator Inouye, on March 20, 1980.

Senator **Metzenbaum**. He is the author of the bill?

Mr. **Litvack**. I suppose. It refers in part to a letter from the President dated July 20, 1979, relating to ocean shipping, and it sets forth, as I say, the administration's concerns with the bill and opposition to it. It is signed by Samuel B. Nemirow, Assistant Secretary for Maritime Affairs.

Senator **Metzenbaum**. Mr. Litvack, I think that is a terrible breakdown in communications. You appear this morning, April 28, indicating that it has serious anticompetitive aspects. I have attempted to be very cooperative with the Antitrust Division, and I would certainly have tried to provide some debate. Whether we would have had the votes or not, I do not know, but certainly the bill would not have passed on the Unanimous Consent Calendar.

I think we ought to both learn a strong lesson out of this, that it is not enough to write to the chairman of the committee considering the bill, if there are antitrust aspects in it that we ought to know about. Each committee brings a different perspective to the legislative process.

I would also then ask you, what does the bill do from an anticompetitive standpoint?

Mr. **Litvack**. Well, it does a number of things. It grants broad antitrust immunity to shipping conferences and shipping line activity. It removes, so to speak, the so-called Svenska test, which is a balancing of the public interest between an antitrust test and shipping needs, and it permits broad anticompetitive activity within the conference system.

Mr. **Chumbris**. Did the Antitrust Commission look into that issue?

Mr. **Litvack**. The Antitrust Commission, as I recall it, generally looked into the entire question of shipping. Shipping has been both a subject of the Department of Justice task force report and in the Antitrust Commission itself. The particular bill or proposal I do not think was before them, but a number of similar types of proposals have been floating.

Mr. **Chumbris.** Is that one of the recommendations of the Commission?

Mr. **Litvack.** Oh, no; clearly not.

Senator **Metzenbaum.** I must say that I am terribly disturbed to learn ex post facto of the Antitrust Division's interest in the legislation. Until you told me, until I was told the bill had passed on Thursday, and your views with respect to it, I had been completely unknowledgeable about it.

Mr. **Litvack.** I am afraid I cannot add much, except, Senator, to say twofold: No. 1, I apoligize for that, and it is a lack of familiarity on my part; No. 2, I regret it personally, and on the merits.

Senator **Metzenbaum.** May I urge you then to make a special effort to advise the House, not only the committee that has jurisdiction of the bill, but Chairman Rodino of the Judiciary Committee, and such other persons who would be supportive on the matter.

Mr. **Litvack.** We will assuredly do that.

Senator **Metzenbaum.** I would like to develop a system where this committee could be notified by the Antitrust Division if a proposed piece of legislation has anticompetitive consequences, notify us almost as soon as you learn about it.

Mr. **Litvack.** We will be happy to work with you in that regard.

Senator **Metzenbaum.** Thank you. Now, coming to the question of the budget, the Antitrust budget authorization in the administration's bill is included in the general category of general legal activities. Is that correct?

Mr. **Litvack.** That is correct, as proposed.

Senator **Metzenbaum.** As I understand it, this is the first time in recent years that the Antitrust Division's authorization has not been a separate line item; is that right?

Mr. **Litvack.** That is my understanding, yes.

Senator **Metzenbaum.** Is it not true that if your authorization is included in general legal activities, as opposed to a separate line item, funds can be transferred from the Antitrust Division to other divisions?

Mr. **Litvack.** They could be.

Senator **Metzenbaum.** Is it not therefore reasonable to assume that if we find an administration that is unfriendly to antitrust enforcement, they could practically emasculate the entire Antitrust Division merely by shifting of funds?

Mr. **Litvack.** Well, that is conceptually or conceivably possible. What it does is give the Department the flexibility to move funds from one division to another, and if you assumed, which I do not think is the case with this administration, that an Attorney General wanted to transfer funds over, out of Antitrust, yes, we would have less funds in that situation.

Senator **Metzenbaum.** It is certainly not unreasonable to assume that in some future administration there will be lack of enthusiasm for antitrust enforcement. Therefore, is not this administration setting a dangerous precedent in not having a line item for the Antitrust Division?

Mr. **Litvack.** I do not think that by not having a line item in this particular year the administration is setting any particular precedent for the future. Here the Department wanted flexibility, which this would give them. I do not think that binds either future administrations, future Attorneys General, or future committees in that regard.

The desire here, from the Department's standpoint, as I understand it, was for flexibility.

Senator METZENBAUM. Mr. Litvack, I understand that this administration is not opposed to adequate, effective antitrust enforcement.

Mr. LITVACK. To the contrary, it is actively for it.

Senator METZENBAUM. What I am saying is, once the precedent has been set, then the next administration, or the one after that, is going to use this means of emasculating effective antitrust enforcement. It may be very difficult thereafter to build it up again. Therefore, I have to ask, was this matter discussed by the Division heads with the Attorney General, or with whoever made this decision?

Mr. LITVACK. This was a Department decision.

Senator METZENBAUM. Did you participate in the discussion?

Mr. LITVACK. I personally did not.

Senator METZENBAUM. When you say it was a Department decision, who makes the Department decisions? Is it Mr. Civiletti?

Mr. LITVACK. Ultimately, the Attorney General.

Senator METZENBAUM. What did the Antitrust Division ask for in terms of budget authorization?

Mr. LITVACK. I think our initial request was for a little over 1,000 people and approximately $46 million.

Senator METZENBAUM. A little over 1,000 people and some $46 or $47 million.

Mr. LITVACK. More people, but about the same in dollars.

Senator METZENBAUM. What did you get?

Mr. LITVACK. We have 939 that we are requesting.

Senator METZENBAUM. That is approximately the same as last year?

Mr. LITVACK. Yes, sir.

Senator METZENBAUM. Did OMB tell you where to make cuts?

Mr. LITVACK. No; not specific areas, no.

Senator METZENBAUM. How did you respond to OMB advice, or did you not?

Mr. LITVACK. Well, we proceeded, obviously, to cut back down to a number that was in line with the OMB view.

Senator METZENBAUM. There are no funds in this year's budget for State antitrust enforcement?

Mr. LITVACK. No. There is a $4 million supplemental request, which I believe is still pending from last year, currently pending before the Congress.

Senator METZENBAUM. The Division has requested authorization for 939 permanent positions. How many of those slots are now filled?

Mr. LITVACK. Approximately 900; 913.

Senator METZENBAUM. Will the hiring freeze affect your ability to fill the other 26 spots?

Mr. LITVACK. No; I do not think so, unless it is imposed over a long period of time. We have a number of honor graduates coming on, and they do not count toward that number, and we can hire them. We are committed to them. If the freeze persists over a long period of time, of course, it could have adverse impact.

Senator METZENBAUM. How many attorneys did you lose last year?

Mr. LITVACK. Seventy-one.

Senator METZENBAUM. Are you permitted to fill those 71 slots?

Mr. LITVACK. Provided that we do not go over the maximum number that we are authorized.

Senator **Metzenbaum**. My question is, under the hiring freeze, are you permitted to fill the spots that are vacated due to attrition?

Mr. **Litvack**. My understanding is that there is going to be sort of a one for two; if there are two slots to create, you can fill one. That is my understanding of what has been talked about. As of now, we are not facing it.

Senator **Metzenbaum**. You are not what?

Mr. **Litvack**. We are not facing that problem right now.

Senator **Metzenbaum**. All of the attorneys you lost last year, were they in grade levels GS–11 through 15?

Mr. **Litvack**. GS–11 through 17, Senator. We had one 16 and one 17.

Senator **Metzenbaum**. What is the monetary range for 11 to 17?

Mr. **Litvack**. Eleven, I believe, is $20,611 at the first step. I believe that the maximum salary allowable is $50,112.50.

Senator **Metzenbaum**. $50,000?

Mr. **Litvack**. Yes, I believe so.

Senator **Metzenbaum**. What did beginning attorneys at your law firm receive, before you came here, if you remember?

Mr. **Litvack**. I believe at that time it was $30,000.

Senator **Metzenbaum**. Does that not mean that the Antitrust Division is pretty much in a position of having to settle for less than the best?

Mr. **Litvack**. No. I think it means that we are severely disadvantaged when it comes to competing on dollar-for-dollar basis. There is no question about that. Happily, there are some people out there still who are interested in serving in the Government and interested in the experience that we can offer them and are able, at least for some period of time, to forego the monetary problems that are occasioned.

Senator **Metzenbaum**. Senator Thurmond has a question which I will ask. Both the FTC and previous heads of the Antitrust Division have testified here that the tenure of top lawyers handling the Government's cases has been short, requiring two or three successive teams of lawyers on one particularly long trial.

Does that practice still prevail now, and if so, what do you suggest to avoid the above noted problem?

Mr. **Litvack**. Well, it exists to some extent, depending obviously upon the length of the trial. In A.T. & T. we have, since I arrived, had to replace the lead attorney, who left. That obviously is something that you hope you do not have to do, and you are obviously disadvantaged to the extent that you have to do that, whereas the defense is not.

I think there are a couple of solutions to the problem, at least theoretically. The two solutions that come most to mind are, No. 1, you hope, and it is certainly something, to the extent I can, I would like to influence, that we do not have these long drawn out trials which place tremendous strains and burdens upon the people, and make it more likely than not that we are going to lose some during the course of it.

Second: I would be obviously delighted if we could find a way to keep our people by offering them more inducements, by making the financial remuneration better, by offering them some other kinds of things that the private bar has when they litigate a big case, and that our people do not have.

I am not hopeful of seeing that very shortly, and so the most immediate thing we can do is try to keep the trial moving and try to keep our people interested.

Senator METZENBAUM. We have some other questions along the same line concerning the employment situation, and we may submit those questions to you in writing, and if so, both your questions and the answers will be included in the record.

Mr. LITVACK. Thank you.

Senator METZENBAUM. Senator Thurmond and other members of the committee may have additional questions on the same line.

Mr. LITVACK. Certainly.

Senator METZENBAUM. How many cases or investigations have you found it necessary to disqualify yourself?

Mr. LITVACK. I have disqualified myself on one pending case I can think of, plus the international oil investigation, which I mentioned previously, and a number of other investigations, the number being something like five or six—three to five, something of that magnitude.

Senator METZENBAUM. Would it embarrass you, or for any reason could you not advise us of the names of those cases?

Mr. LITVACK. Well, I would be certainly willing to advise you of the cases. I would be less willing, Senator, to advise you of investigations, because there might be a particular company involved which would result in my disqualification. I think it would be inappropriate to identify companies under investigation, but cases I certainly can identify.

Senator METZENBAUM. Would you be willing to advise the chairman on a confidential basis?

Mr. LITVACK. I prefer not to, simply because I am not sure it would be very helpful to the chairman, and it could be awkward. Again, some may be grand jury investigations where I represented a company before I came with the Division. I do not know anything about what has happened since, and I do not know what would materialize, and I think it would be unfair.

Senator METZENBAUM. All right. Who becomes Acting Assistant Attorney General in such cases?

Mr. LITVACK. Well, technically, of course, no one becomes Acting Assistant Attorney General. What happens is they make the decision——

Senator METZENBAUM. Who is in charge when you are not?

Mr. LITVACK. What happens is that the decision is made at the deputy's level, and is made by the particular deputy in those areas the case or the investigation falls.

For instance, if it were in the energy area, such as the international oil investigation, at least at the Division level, that would be Don Flexner, who is deputy in that area. On the other hand, if it were a case which I have recused myself on, such as the *Pfizer* case, pending in Philadelphia, that would be reported up ultimately to Deputy Assistant Attorney General Dick Favretto, and he would be making decisions on that.

Senator METZENBAUM. They have as much authority as you do in these matters?

Mr. **Litvack.** In those instances, yes, absolutely.

Senator **Metzenbaum.** How do you monitor progress of those cases, even though you recused yourself?

Mr. **Litvack.** Well, I tell them, I want you to go in the room with these follows and make sure you are moving on track, and make sure you are doing the same thing with them on these matters as I am doing on all the rest.

Senator **Metzenbaum.** You state you are determined to step up the Antitrust Division criminal enforcement activity. What steps have you taken and what steps do you plan to take?

Mr. **Litvack.** I think the things I have done so far are really more detailed than global. It is hard to do much globally about it. What I have done is the following:

One: Most importantly, perhaps, I have conveyed to the staff and to the public my commitment to that.

Two: What I have done is I have met, as I have indicated, with each of the chiefs, and go over each preliminary investigation, each grand jury, each matter, to make sure (*a*) that where there is a possible criminal problem we are proceeding along those lines, and (*b*) once we are proceeding, that we are proceeding expeditiously.

So I think that the goals, as far as I am concerned, are to convey a sense of commitment to the staff and then to hopefully monitor our conduct to make sure that we are proceeding along those lines.

Senator **Metzenbaum.** It has also been reported that you intend to increase the Division's efforts against vertical restraints, particularly resale price maintenance. What steps have you taken in that area?

Mr. **Litvack.** Well, I have taken a couple of steps in that area; three, I guess, I could identify specifically.

One is similar to what I have just said; namely, reiterating, because I am not the first person who has said it, but reiterating the Division's commitment to this area, and our intention to bring, or pursue, criminal cases on hardcore resale price maintenance. I feel very strongly about that.

As I say, I am not the first. Others before me have said it. We have had speeches on it, and people are on notice.

The first thing I did, I suppose, is say it, and make sure everyone is on notice.

The second thing I have done is I have actually authorized, and am authorizing, criminal investigations in that area.

The third thing I have done is I have asked for, and I am carefully looking at, a possible program or policy statement which will deal with exactly, in detail, how we are going to proceed in that area.

Senator **Metzenbaum.** What other types of vertical restraints do you intend to challenge?

Mr. **Litvack.** Obviously, resale price maintenance is the one that leaps most readily to mind. There are others, as well; most specifically in the per se area, of course, are tie-ins, which have been banned and branded as per se by the courts. We would continue to look at other kinds of vertical restraints, territorial and otherwise, but they, of course, have been held by the Supreme Court to be subject to the rule of reason inquiry.

We will look at them, but the ones that we are talking about specifically in the criminal area are primarily price fixing, as well as other hard core, perhaps tie-ins, but more likely they too would be looked at in the rule of reason light.

Senator METZENBAUM. The workload statistics indicate that the case filings and productivity of the Division have fallen sharply in recent years despite increased resources. In the last 3 years, 1977 to 1979, the number of total cases filed dropped by 10 percent, as compared with the preceding 3 years. The number of civil cases filed declined by 20 percent, and the oligopoly and monopoly cases fell from 20 to 5. At the same time there was a 28-percent increase in resources.

According to the Division authorization request, case filings and investigations are not expected to rise in 1980 or 1981. At his confirmation hearing, your predecessor, John Shenefield, testified he was concerned about the falling off of case filings. He said that it is important for the head of the Division, for the Attorney General, and for this committee closely to watch the number of cases filed, because it has to do with productivity.

I take it you share this concern?

Mr. LITVACK. Well, I think I probably would state it a little differently. Case filings are, in my judgment anyway, not a wholly reliable or accurate barometer of productivity. It is, to be sure, a factor which someone can look at. It is, in many ways, perhaps even the most readily identifiable factor, but it is not necessarily the best, most reliable test of productivity.

I think there are a lot of other ways of trying to test productivity, which is really, in my mind, more importantly a word for efficiency. How efficient are you? What are you doing, and how effective are you? You could file twice the number of cases being ineffective, or half the number and be effective. It depends.

The Division is doing lots of things besides filing cases. I will not bother to detail what all those things are because I know the committee is familiar with them. We do do a host of things, some of which are congressionally mandated, some of which are practically required, and some of which have a very, very important effect on competition, but are in cases and proceedings before administrative agencies, competition advocacy, that is important, and that yields results. You cannot measure our productivity in terms of cases.

When you turn to cases, because it is there and you have to deal with it, I am interested, and what is interesting to know is whether or not there really was a drop off, and if so, why. I guess what I have found, Senator, is that it seems to me, from what I can tell, and I hesitate to play the numbers game or involve myself on why that happened, but one ready fact, because I looked at it strictly as a trial lawyer trying to understand what one could make of the numbers, it seems if you subtract from case filings of the past years the lawsuits which are simply civil counterparts to criminal cases, our filings have remained relatively constant. In other words, as you will recall, prior to 1978, roughly 1977–78, it was Division policy and practice to file a civil counterpart suit to virtually every price-fixing case when there was an indictment returned, and in most situations, a civil counterpart was filed.

In or about 1977 or 1978, I think that practice changed, and there has been a steady decline in the number of companion cases filed.

If you take those statistics and subtract out those companion cases, what you find is that, at least for the last 5 years, the numbers have been relatively constant. There has been no decline in the number of cases filed. They seem to be just about the same, so that is where we are.

Senator **Metzenbaum**. The staff has a few questions, and then I want to come back and talk to you about energy matters. I am going to ask them to ask those questions, and then I will be back. I do want to inquire rather extensively on energy issues.

Mr. **Chumbris**. Mr. Litvack, following up on your closing colloquy with Senator Metzenbaum, I would like to ask this question, and maybe part of the answer you have already given, but what are the statistics on cases that may have been settled prior to filing? In other words, that you may have consent decrees?

Mr. **Litvack**. You would not have it in consent decree context, but, for instance, what you might have is, the other day, as you may have read in the paper, we announced we were going to file a suit against a proposed merger acquisition, and we were prepared to do so, obviously, when we so announced it. The parties called off the acquisition. You do not get a case filing statistic if you want to play a numbers game.

If, on the other hand, you assume we were correct, and the acquisition should have been blocked, then you have effectively enforced the law without filing a lawsuit. We do not have both statistics, but it is something that works for us, and works for us without a number being chalked up in the column.

Mr. **Chumbris**. As part of this colloquy then, you could be even more effective in the last year or so by getting the person to come in and say, "I will desist from doing what I am doing," and you do not even file the suit——

Mr. **Litvack**. That is particularly true in the merger area, yes.

Mr. **Chumbris**. Especially with the FTC, because I think maybe you used the consent decrees, you have to file the suit for consent decrees, whereas the FTC can go ahead with their procedure without going into court, having a formal action taken?

Mr. **Litvack**. That is true. We can do only three things, really. One is file a lawsuit. No. 2, announce our intention to file an appropriate case, and the party may go ahead, in which event we would file, or they may back up, in which event you have nothing in terms of statistics.

Third is through our business review procedure, whereby under narrow circumstances people can come in and ask us our enforcement intention. We may so advise them. We do not have any procedure like FTC, so, yes, you are quite right, the law is being enforced in a variety of ways that are not going to show up in mere filings.

Mr. **Chumbris**. The information that you have just stated to me, is that part of the exhibit you have sent to the chairman?

Mr. **Litvack**. Certainly, the comment I made about a case which is not filed because parties call off the proposed merger, that would not be among the data which we supply. Whether or not the business review type is, I just cannot answer. I just do not know.

Mr. **Chumbris**. Would that information not be meaningful for you, as well as for our committee or for the Congress to have?

Mr. **Litvack**. Yes. We know how many business review letters we are requested to give, and how many we give, and how they break out. We clearly have that. The first statistic I am not sure we do have.

Mr. **Chumbris.** Thank you.

Mr. **Cohen.** Is there some difficulty within the Division or within the Department with respect to availability of travel funds?

Mr. **Litvack.** Travel funds are tight generally throughout Government, and throughout the Department. So when you say is there some difficulty, in the broad sense, yes.

Mr. **Cohen.** What is the nature of the difficulty?

Mr. **Litvack.** The nature of the difficulty is that the Department, like other branches, I am sure, of the Government, is under financial constraints, and we clearly are under financial constraints which impact on our travel budget as well.

Mr. **Cohen.** Is there any indication that there might not be funds available for travel after June 1, 1980?

Mr. **Litvack.** No, I have no indication.

Mr. **Cohen.** Recently the General Accounting Office issued a report on the Antitrust Division. They studied a number of antitrust investigations. They came up with four conclusions. These conclusions were that the Division needed to improve its operations by more closely monitoring enforcement, by evaluating the effectiveness of enforcement efforts, by providing closer management control of investigations, and by maximizing the use of available support services. What steps has the Division taken to act on these recommendations?

Mr. **Litvack.** I think there are three specific kinds of steps that can be identified.

No. 1: We have, through our antitrust case evaluation system, made that system more responsive and more informative to us, meeting many of the questions raised by GAO. We are now being supplied with more information than we have ever had before, which will enable us to have tighter control upon our cases and our investigations.

Second: Which is sort of outside the mainstream of the GAO question, I have, myself, by my own personal intervention, for lack of a better word, participated in the litigation system and in litigation problems that we have, and assured myself, on ongoing bases, that we do have a better control, so to speak, and better awareness.

Third: We have specifically, in the area of judgment enforcement, taken important steps which I identified earlier, to computerize our system, to get all various decrees in there, to enable us to be able to more effectively monitor, police, and indeed, even modify where that might be appropriate. Those are the kinds of things that we have done.

Senator **Metzenbaum.** We will put the GAO report into the record.

[The GAO report is on file with the committee.]

Senator **Metzenbaum.** Mr. Litvack, in October 1978 the Antitrust Division announced it would give serious consideration to lenient treatment of corporations or officers voluntarily reporting their wrongdoing prior to detection of it. How many corporations have come forward as a result of this policy?

Mr. **Litvack.** None.

Senator **Metzenbaum.** Is anything else being considered by the Division to encourage potential informats in antitrust cases to come forward?

Mr. **Litvack.** Various things have been considered. Nothing is being actively considered at this moment, not by me.

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Senator **Metzenbaum**. There was also a hotline established in a number of cities for consumers and others to report potential antitrust violations. What are the results of that program?

Mr. **Litvack**. We received a number of calls, declining over a period of time, with a number of bits of information. What we found is that a few of them led to investigations, most did not. Of the few that led to investigations, none has so far resulted in a case.

Senator **Metzenbaum**. Do you have any further plans with respect to this program?

Mr. **Litvack**. Not at this moment, no.

Senator **Metzenbaum**. Let me urge you not to be totally indifferent to the value of the possibility of consumer input. I think it would do two things.

First, it would indicate a governmental interest and concern for people-oriented problems, consumer problems. Second, you might strike some paydirt.

Mr. **Litvack**. I think, Senator, I inadvertently misled you when I said no. I did not mean we were abandoning these efforts. I meant I had no particular program, in addition. What we are doing, No. 1, the hotline is continuing. No. 2, we have, in some areas, as you may know, we have done two things. One: In some areas, such as New York, for instance, we have had our people go out, out of New York City and up to different cities in the State and throughout the State, hold seminars and forums for the people in those areas, to acquaint them with the laws, to make our presence known, to make them aware of the antitrust laws and its impact upon them, and to invite them to call to our attention problems as they arise.

In other areas, such as the Atlanta area we have actually taken out newspaper ads in some cases and had mailings to people, just making them aware of us, making them aware of the law, and telling them if they have such information to come forward.

Senator **Metzenbaum**. I would like to urge you to try to implement the program, talk show radio programs, TV programs, the kind of things to cause consumer awareness, and I believe it would make the people feel that Government had a concern.

Last but not least, Mr. Litvack, I would like to turn to energy matters. Last October your Deputy Assistant Attorney General, Donald Flexner, testified that although no cases had been filed, the energy section had a number of investigations pending, including the international oil investigation, the natural gas industry investigation, and the gasoline shortage investigation requested by the President.

At that time I responded that what we really had is a pending Antitrust Division.

Now, what is going on? Anything? So often Government reacts so slowly that people cannot even remember what the problem was all about. I remember when the President went on the tube and, in a most serious tone, said he is going to have Antitrust Division investigate this.

There are 215 or 220 million Americans. I doubt if 20 of them remember when he said that. The fact is that there is no sense of urgency. Oil company prices continue to rise at unbelievable rates. Oil company profits are certainly a major factor in causing the spiral of inflation. The natural gas investigation, here, too, nothing has happened. The fact is that natural gas prices are up tremendously, but natural gas production is down. This is the Antitrust Division. When do we get some action?

The international oil investigation—we were promised, as I remember, a report on that by spring. I admit it is still spring, but it is rapidly fleeting, and I have no indication that you are ready to come forward with a report. Nothing would please me more than to have you tell me you have a report in hand and will make it at this moment.

Where are we on all these pending investigations?

Mr. Litvack. Well, Senator, let me answer your question, and at the same time make a comment generally. Obviously, we, this Nation, all of us, have very serious energy problems. I do not think there is any question about that.

I think the question to which the Antitrust Division has directed itself, and is directing itself is, is there an antitrust problem, and not whether there is an energy problem, and not whether energy company profits are too high. We have not addressed those kinds of questions unless there is an antitrust problem involved.

What the energy section has been doing in a host of fields is looking at the question of what are the antitrust concerns here. Let me speak specifically to the areas you questioned about, because there is no doubt but that Mr. Flexner was right and is still right.

There have been no Federal court cases filed out of the energy section or in the energy area that I know about in the last 3 years since it existed. That is absolutely true.

Senator Metzenbaum. The investigations are not supposed to, as I understand it, determine whether or not there is a legal case. The Antitrust Division has an image of being a tough, good investigating force, that they could tell the American people what the facts are. Nobody said you have to have a case. You ought to investigate facts.

Mr. Litvack. That is exactly what they are doing. Let me tell you where they stand, as best I can. You referred specifically to two particular investigations, one of which I can, or reports——

Senator Metzenbaum. Three.

Mr. Litvack. Three; I will speak to all three.

First you mentioned, I believe, the gas shortage report which was a report requested from us by the President in or about July 1979, I believe. We rendered sometime during the summer of 1979 a preliminary report and indicated that we would thereafter submit a final report.

Senator Metzenbaum. That was the report that was so totally challenged. That was the reports everybody agreed was a lot of hot air. It was a report not backed up by facts. It was a report based upon the statistics of the oil companies. It was not an investigatory report by your Department. That was an absolute nothing report. That was based upon the oil companies telling you what the story was.

What have you done?

Mr. Litvack. I cannot agree with that characterization of the report. It was a temporary interim report. We have investigated since then at considerable length. We are at this moment finalizing in

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the Department, at my level and above, a review of that report for sending to the President.

Senator **Metzenbaum**. When will it be out?

Mr. **Litvack**. I cannot tell you. It is being finalized in the Department of Justice. I do not know how long it will take to get out of the Department, but it will not be long.

Senator **Metzenbaum**. A week? A month? Two months?

Mr. **Litvack**. I cannot tell you. We have to clear it through the Department. It will be a month probably.

Senator **Metzenbaum**. Do you know whether or not that report is based upon information given to you from the oil companies or factual data accumulated by your investigators?

Mr. **Litvack**. Both and all, from various sources from within the industry, from without, from the Government, from independent sources. It is based on every bit of data we can collect. It is not just limited to the oil companies any more than just independent sources. It is a totality of information.

Senator **Metzenbaum**. Does that report, since you have apparently perused it, indicate the inconsistency that our oil imports at that time were up, not down, and that the Iranian cutoff had no impact?

Does the report take into account the questions raised in the public media as well as by Members of Congress to why there was a shortage when there was, in fact, more oil coming in this country than there had been in the past?

Mr. **Litvack**. Without again getting into the details of the report or without agreeing with your characterization, yes, it takes into account various comments, criticisms, allegations, and suggestions.

Senator **Metzenbaum**. You do not know when that would be available?

Mr. **Litvack**. No. If I knew, I would tell you. No, I do not. Shortly.

Senator **Metzenbaum**. You are the head of the Division. Will it be a month? Three months? Six months? It will now be almost a year. You are head of the Division.

Mr. **Litvack**. I hope it will be shortly. I cannot tell you when it will be prepared and ready to go from the Department to the President. I just cannot tell you that.

Senator **Metzenbaum**. How about the international oil investigation? That was the one we were promised in the spring.

Mr. **Litvack**. On that one I have recused myself. There is nothing I can tell you. We are prepared to supply the information.

Senator **Metzenbaum**. Who is heading it up?

Mr. **Litvack**. Within the Division, Mr. Flexner is the deputy in the area in which that falls.

Senator **Metzenbaum**. Will you have Mr. Flexner advise me by letter or telephone call as to when he expects to make that report?

Mr. **Litvack**. Yes.

Senator **Metzenbaum**. What about the natural gas industry investigation?

Mr. **Litvack**. I am not familiar with that, Senator. That is why I think I said two out of three. I am not familiar with that.

Senator **Metzenbaum**. Flexner testified?

Mr. **Litvack**. I apologize for not knowing more about it. We have an investigation in the natural gas industry that I know about. I would hardly characterize that as an investigation of the natural gas industry. It is a particular company and its conduct that I am familiar with. Subject to correction, and I would be surprised if I had to correct myself, there is to this moment no industrywide natural gas investigation. If I am in error. I will, of course, correct it.

Senator **METZENBAUM**. My staff indicates it is correct. There was some investigation of a particular firm's conduct.

Mr. **LITVACK**. That is true. There is a particular aspect of a particular company and conduct.

Senator **METZENBAUM**. When will that be available?

Mr. **LITVACK**. I could not begin to be able to give you a date or time, That is looking toward a case. That is not going to be a report.

Senator **METZENBAUM**. I see.

We have some questions we will put to Mr. Flexner in a letter, one of which is that it was recently reported that various Justice Department personnel, including Mr. Shenefield, visited the Middle East in connection with the international oil investigation. We would like to know the purpose of the trip.

Do you know?

Mr. **LITVACK**. I only know what I read about in the papers, sir.

Senator **METZENBAUM**. We would like to know with whom they met and what the results were.

The energy section was formed more than 3 years ago. Has it ever filed a case?

Mr. **LITVACK**. Yes, I know what you mean by formed. If you mean filed a case in Federal court, the answer would be no.

Senator **METZENBAUM**. How many lawyers are assigned to that section?

Mr. **LITVACK**. Approximately 33.

Senator **METZENBAUM**. How many economists?

Mr. **LITVACK**. No economists are assigned to the section as such. A number work on the matters from time to time. We have an economic section itself. They make people available.

Senator **METZENBAUM**. Can you estimate how much money is spent by this section?

Mr. **LITVACK**. About $1.5 million a year.

Senator **METZENBAUM**. What are they doing for the country?

Mr. **LITVACK**. They are doing lots. Let me divide it into two or three categories.

They participate and have participated in a number of adjudicatory hearings before regulatory agencies. They were pivotal in TAPS, the trans-Alaska pipeline system hearings that were held before the FERC and resulted in an administrative law judge's decision favorable to the Division position. The TAPS case involved a question of what rates and what kind of rate of return the oil companies should be allowed in connection with the transportation of oil down from the Alaskan North Slope. We were successful with this. The Division, if not the leading participant, was one of the leading participants in the hearing which lasted a long time and is now on appeal to the full FERC. It will result in hundreds of millions of dollars being saved as a result of the application of the system that we articulated.

In addition, the Division participated in other pipeline hearings and is now to participate in a hearing before the NRC involving two nuclear powerplant licenses in Texas involving the question of competition in the electric power industry in that State.

We have also participated in another hearing involving wheeling power, the whole question of the generation of electrical power. All of these are tremendous eaters, for lack of a better word, of people, time, and energy. They involve a lot of people in the section. These administrative hearings take a lot of time. The administrative hearings end up being a prime factor in taking a large share of the burden. In fairness, they also produce large benefits when we are successful. TAPS is a good example. If you say, did you file a Federal count case, I would say, no, we do not have to. This involvement is so heavy, whether it is before the Department of Energy, FERC, or the States—a lot of our enforcement activities are going to be in the regulatory agency context. We were very active.

Senator Metzenbaum. Was the Antitrust Division's energy section involved in FERC's settlement with Texaco regarding diverted gas where FERC made a settlement that in no way provided any punitive damages or punitive aspects for Texaco?

Mr. Litvack. No.

Senator Metzenbaum. They should have been. We needed it.

Mr. Litvack. I do not believe they were. A large part of the time of this section is spent trying to explain what they do, a large part of their time is spent on things like the gas shortage report, reports on coal, consideration of Federal natural resources leasing, and a whole host of things which are mandated by various acts of Congress which we, the Division, look at.

A lot of time is spent on that.

The third area on which a lot of time is spent is international oil. Without getting into it for better or for worse, it takes a lot of people a lot of time to determine when something is going to happen. That is a major area of investigation.

Another thing that takes time is that there are a lot of things that they have ongoing, a few that might result in cases. They do them outside the context of the regulatory area and they may give rise to a case. They may require an investigation, I think.

[The prepared statement of Mr. Litvack follows:]

Prepared Statement of Sanford M. Litvack

Mr. Chairman and Members of the Committee: I welcome this opportunity to appear before the Judiciary Committee today to discuss the Antitrust Division's direction and operations for Fiscal Year 1981.

The Antitrust Division is requesting a 1981 funding level authorization of $47,255,000, 939 permanent positions and 963 work years. I believe that the proposed staffing level and the requested funding will enable the Division effectively to carry out its mission of preserving and promoting a free competitive economy.

During fiscal year 1980, the Antitrust Division has thus far filed 19 criminal cases and 8 civil cases. Fifteen of the criminal cases and four of the civil cases were filed since I joined the Division, approximately 3½ months ago.

Since joining the Division, I have met with the Division's entire staff, both in Washington and in each field office, in order to acquaint myself with the people and each current matter. My exposure to the people and the internal workings of the Division has solidified my own objectives and given me a good understanding of the Division's present direction.

Briefly stated, my goals during my tenure are to: (1) streamline and sharpen our litigation management efforts; (2) step up our criminal enforcement efforts; (3) emphasize the prevention of anticompetitive mergers; (4) continue our active program of competition advocacy and analysis in regulated industries; (5) focus new attention on the area of vertical restraints; (6) ensure that our outstanding decrees are effectively enforced; and (7) augment the professionalism and institutional pride among the Divisions' attorneys and economists, whose efforts are critical to the Division's success. I will expand briefly on each of these points.

I. LITIGATION MANAGEMENT

Much has been written about how effectively to manage litigation, and I do not suggest that I have any revolutionary ideas. Perhaps the most important step, however, is to develop a group of experienced and dedicated attorneys with a clear sense of priorities and direction. Toward that end, we are making several efforts to sharpen the skills of our attorneys and to given them a better understanding of the goals and polices of the Division.

First, I hold regular meetings with the chief of each Washington section before or after normal working hours, to discuss the status and strategy af all pending investigations and cases. These meetings are attended by section chiefs, assistant section chiefs, the relevant Deputy, the Director of Operations, myself and, where appropriate. staff attorneys. I hold similar meetings with each field office. At these meetings, which occur at least once every four weeks, we not only determine overall strategies for individual investigations and cases, but also agree upon tentative timetables for accomplishing particular objectives in those matters. I recognize that timetables must be amenable to modification if events so dictate, and our approach if flexible enough to permit such modification while at the same time structured to provide us meaningful "deadlines" which we can, and in most cases do, meet. Through my direct, early and continuing participation and supervision I believe we are developing an approach to litigation management that will improve the speed and efficiency with which we handle all of our investigations and cases.

In addition to monthly meetings, I meet with staff who are involved in major matters of the Division. This gives me an even more thorough understanding of the Division's major efforts, a greater awareness of the abilities of the staffs and the difficulties they face in handling those matters, and enables me to contribute more directly to those efforts. Most importantly, it also allows staff members to develop a greater appreciation of the goals and policies of the Division. I believe these meetings have been well received by the staff and have assisted us in focusing upon anticipated developments and planning the best course of action. Certainly, discussing and determining strategies in advance of implementation is much easier than trying to reverse decisions that have already been acted upon. Needless to say, it is also much better for morale.

Third, at the urging of many of the lawyers, I hold informal meetings with Division attorneys to discuss general litigation techniques. Topics cover the gamut of antitrust litigation techniques, from how to draft interrogatories to how the defense might prepare a particular type of witness. These meetings are held from 7–9 in the morning and are purely voluntary. The consistently large attendance at these meetings and the enthusiasm of the participants further evidence the dedication of Antitrust Division attorneys.

Fourth, we continue to offer formal training of various sorts to Division employees. Training in litigation is available through the Attorney General's Advocacy Institute, the National Institute of Trial Advocacy, and numerous other programs such as the antitrust program sponsored by Columbia University. The Division periodically sponsors lunch hour lectures and seminars on various legal, business or economic topics. The Division also maintains a videotape library including several videotaped lectures on antitrust economics and on trial techniques.

Finally, we are trying to improve our filing and reference systems and computer support capabilities. This will facilitate access to materials previously discovered or prepared by Division employees in handling antitrust matters. It will also allow greater and more efficient access to materials prepared by outside sources. For example, the Compustat Data Base, now available to Division employees, provides much information about numerous companies for the last ten years, including sales data, balance sheets, profit and loss statements, and various ratios of economic or statistical value.

Expediting the investigation and litigation of so-called "big cases" is one of my highest priorities. I do not subscribe to the theory that antitrust cases are too big or too complex to be expeditiously investigated and tried. In recent years, the Division has been attempting to improve its performance in these areas and, I assure you, will continue to do so under my tenure.

II. CRIMINAL ENFORCEMENT

I want to emphasize, as I have on several previous occasions, my determination to increase significantly our criminal enforcement efforts. Experience has taught me that a serious threat of criminal sanctions, including possible jail terms, is the most effective deterrent to antitrust violations. It is not uncommon for a businessman to weigh the projected profits resulting from anticompetitive behavior against the likelihood and cost of civil suits. In my experience, however, a corporate executive or employee is much less likely to make such cost/benefit analyses if he believes there exists a strong possibility of a jail sentence. I must quickly add that I do not believe all or even most businessmen fix prices. However, I do believe that when it occurs, such conduct should be dealt with in the most stringent manner available to us. Since price fixing and other per se offenses impact so heavily upon the consumer, it is my intention to seek criminal convictions and maximum penalties, including jail sentences, whenever appropriate.

III. ANTICOMPETITIVE MERGERS

The timely prevention of anticompetitive mergers is another important area which I intend to stress. Case law and the Department's Merger Guidelines set forth the factors we consider in determining whether a merger should be challenged. Of course, we will continue to challenge proposed horizontal or vertical mergers whenever they appear to have significant anticompetitive effects.

The Division will also, however, continue to keep a close watch on proposed conglomerate mergers. We will continue to challenge such mergers on grounds of untoward entrenchment, elimination of potential competition and substantial possibilities of reciprocal dealing, as we have in the past. I recognize that challenges on these grounds have not, overall, been very successful, and have presented substantial evidentiary problems in many cases. Nevertheless, I believe these theories have merit as effective tools that may ultimately prove successful in the courts.

IV. COMPETITION ADVOCACY AND ANALYSIS IN REGULATED INDUSTRIES

My highest priority is to streamline and improve the Division's handling of investigations and litigation and thereby to increase competition in the economy. Nevertheless, I am aware that in certain industries, or parts of certain industries, federal regulation is necessary and operates at least to a certain extent, in lieu of competition.

We advocate three principles regarding federal regulation of private industry. First regulation should be substituted for the operation of the market only where it is necessary because traditional competitive forces will not work effectively. The Division has been heavily involved in the Administration's attempts to deregulate substantially the trucking and railroad industries. We strongly believe that the result of deregulation would be lower prices and better service than currently exist under federal regulation.

Second, where regulation is necessary, agencies should choose the least anticompetitive method of achieving the regulatory goal. Important regulatory objectives can thus be achieved without unnecessary impact upon competition.

Third, a very heavy burden should be placed on proponents of continued or new regulation or antitrust immunities. Laws which permit such immunities should be construed as narrowly as possible. They should also be periodically reviewed to determine whether they are no longer necessary or appropriate because of changing market or economic forces.

One of the principal roles of the Antitrust Division regarding government regulation is to review administrative or legislative proposals for their potentially anticompetitive effects and to suggest less anticompetitive methods of achieving the desired results. The Division, of course, does not oppose all federal regulation of business. However, we believe that economic regulation should be resorted to only where, because of unusual circumstances in an industry, it is necessary.

In sum, I intend for the Division to continue as a leading advocate for competition in regulated, as well as unregulated, sectors of the economy.

V. VERTICAL RESTRAINTS

One important area that has received less than full-blown scrutiny from the Division in recent years is the area of vertical restraints. These common anticompetitive practices include hard core resale price fixing—conduct which in my view should be criminally prosecuted. I intend for the Division to pursue most vertical restraints of trade with the same vigorous efforts we focus on horizontal agreements.

VI. JUDGMENT ENFORCEMENT

Even when the Antitrust Division has been successful in achieving significant relief against anticompetitive practices, whether by litigated or consent decrees, there has previously been no systematic means of ascertaining whether defendants were in compliance with the decrees. By the same token, unless defendants or others brought specific problems to our attention, we had no way of knowing whether those decrees remained viable or were in need of modification or recision. We are now undergoing a massive effort to analyze and catalogue every decree in effect. Once computerized, systematic access to this information will enable us to do the vigorous and thorough job of enforcement and compliance monitoring that I believe is essential.

VII. PROFESSIONALISM AND INSTITUTIONAL PRIDE

Ultimately, the success of the Division and the effectiveness of its antitrust enforcement depend on the quality and results of work performed by Division personnel. As I have often stated, I believe that the lawyers, economists and other professionals in the Antitrust Division are as competent and dedicated a group of individuals as any with whom I have ever dealt. However, it is difficult to recruit and retain top quality professional staff because we cannot offer the monetary rewards that are available in the private sector. We must therefore offer these people all the support we can to help them perform their work effectively.

To a certain extent, we must rely on a professional pride and excitement in working in the Division, as well as a fundamental commitment to the public interest. From what I have seen, Mr. Chairman, these are still important motivating factors for our people, and I intend to do everything I can to maintain and promote these feelings of professionalism and pride.

Mr. Chairman, this concludes my prepared statement. I will be happy to answer any questions you or other members of the committee may have.

Senator METZENBAUM. That concludes our hearing for today. We may have additional questions.

[The questions of Senator Thurmond and responses of Assistant Attorney General Litvack appear immediately following the conclusion of the hearing.]

Senator METZENBAUM. Mr. Litvack, I would like to speak to you and to Mr. Ewing immediately after the hearing.

Thank you. The meeting is adjourned.

[Whereupon, at 11:05 a.m., the committee adjourned, subject to the call of the Chair.]

QUESTION AND ANSWER SECTION

QUESTIONS OF SENATOR THURMOND AND RESPONSES OF ASSISTANT ATTORNEY GENERAL LITVACK

[Questions are set italic; answers are set roman.]

1. (a) *How does the Antitrust Division's request for 1981 compare (in dollar and percentage terms) to the 1980 funding level?*

The Antitrust Division's 1981 request of $47,255,000 reflects a $1,995,000 or 4 percent reduction from the Division's 1980 anticipated appropriation of $49,248,000, which consists of an enacted appropriation of $43,544,000 as well as a $1,704,000 supplemental request for the 1980 pay raise and a $4 million supplemental request for the State antitrust grant program.

(b) *For the major direction and priority areas in 1980 and 1981, how do the funding levels compare?*

After adjustments for uncontrollable increases and nonrecurring decreases, such as $4 million for the State antitrust grant program, the Antitrust Division is requesting $1,458,000 for program increases. These program increases are confined to three areas: (1) a $658,000 increase in Administrative Services to relocate headquarters personnel into a single building; (2) a $350,000 increase in Reduction of Private Conspiratorial Conduct for automated data processing support for the continuation of document indexing, retrieval and organization in major investigations and cases; and (3) a $450,000 increase for Reduction of Oligopoly and Monopoly for continued automated data processing support for major investigations and cases.

2. (a) *With respect to the major directions and priorities that are set forth by the Antitrust Division, how are these priorities determined?*

To a large extent, the Division's activities and priorities are determined by the dictates of the antitrust laws themselves, as well as by administration and Department policies. Against this background, I determine our immediate specific goals and priorities based on my beliefs and experience concerning the best way to forster and preserve competition.

(b) *How does this determination of direction and priorities fit into the pattern of coordination and cooperation that the Antitrust Division obviously must have with the Federal Trade Commission?*

The Antitrust Division and the Federal Trade Commission have an informal but long-standing liaison arrangement whereby antitrust investigations and suits proposed by one agency are cleared with the other. In general, where a particular matter relates to investigations or litigation ongoing in one agency, or where particular expertise exists in one agency, the other will usually defer to it. The relationship has worked well, enabling both agencies to carry out, and even enhance, their individual efforts.

3. (a) *The fiscal year 1980 program request included an increase of $6.4 million for automatic data processing (ADP), which was about 15 percent of the Division's total funding request. Obviously such a large outlay of funds should have resulted in significant operational changes within the Division. Would you give us some brief comments about the specific results provided by this large expenditure for ADP support?*

The primary result of the $6.4 million funding increase in fiscal year 1980 has been litigation support for several major investigations and cases and approximately 25 other matters. This litigation support consists of systematically designed and controlled microfilming, indexing, and computer procedures enabling the Division to deal more effectively with the large volumes of information and documentary materials often encountered in antitrust investigations and cases.

In addition, the Division has used the funding increase to purchase certain economic data bases, provide systems and data processing support for a number of economic analyses, and improve access to automated legal research tools and the Division's internal work product.

(b) *Does this ADP system effectively tie-in or complement the Division's Information Systems Support Group (ISSG) that was established earlier?*

All the Division's ADP activities are consolidated and centrally controlled within our Information Systems Support Group.

(c) *Does the fiscal year 1981 request include additional funds for ADP, and if so, how much?*

The 1981 request includes an $800,000 increase for automated data processing support for the continuation of document indexing, retrieval, and organization in major investigations and cases.

(d) *What are the anticipated additional ADP funding needs for the next few years beyond 1981?*

Other than the additional costs associated with general price level increases, the Division does not expect to request significant additional ADP funding for the next few years beyond 1981.

4. All of us have been concerned in recent years about the many problems that the United States is experiencing in international cooperation and trade. Are there some Antitrust Division activities underway that may be helpful toward improving our foreign trade situation?

In accordance with directives of the President, and in keeping with our own long-standing policy, the Antitrust Division has been continuing the education and clarification effort in the area of the foreign commerce application of the antitrust laws. We have been attempting, with a good bit of success, to eliminate and minimize misperceptions existing in the minds of some members of the business community that the antitrust laws present an impediment to effective competition by American corporations in export trade or overseas joint ventures. We have recently continued this effort in meetings with American business people who live and work abroad, and with representatives of American Chambers of Commerce abroad, who expressed their belief that our clarification efforts have been effective in diminishing the fears of the U.S. overseas business community and in providing a more precise understanding in the minds of American business people of the jurisdictional and enforcement views of this Department. Also, the continued dissemination of our "Antitrust Guide for International Operations" has been well received by the business and legal communities. We intend to continue this effort in cooperation with business organizations. Additionally, we continue to make available our expedited business review procedure for export related transactions. For those transactions, we have committed to provide our advice within 30 business days of our receipt of all relevant information from the requesting parties.

5. You refer to the Division's "mission of preserving and promoting a free and competitive economy." This mission, of course, is most laudable. We need to be constantly alert to the proper enforcement of antitrust laws toward maintaining or enhancing "a free and competitive economy." Do you have, or foresee, problems that you feel would prevent the Antitrust Division from properly performing its duties and responsibilities in fulfilling this mission?

My experience in office thus far has only served to confirm my longstanding opinion that the Antitrust Division is blessed with perhaps the finest staff of any agency in the Government; the competence and dedication of our lawyers, economists and support personnel are unmatched. Nonetheless, we are at an increasing disadvantage vis-a-vis the private sector in attracting and keeping our ablest attorneys as a result of the widening gap between Government and private sector salaries. I am told that major private firms, for example, now pay new associates who have just finished law school as much as $37,000 a year. Hence, Government service poses a real and substantial financial sacrifice. While I hope the Antitrust Division will continue to set a standard of excellence, this is a problem that needs to be addressed as soon as possible. With attention to this problem, and with the continued support of Congress for our annual authorization and appropriation requests as well as for our specific efforts on litigation, competition policy and legislative issues, I expect the Division will continue to perform its duties and responsibilities with distinction.

6. (a) For several years prior to 1980, some funds were authorized to the Division for use by the States. I am interested in the general condition or status of antitrust activities in the States. What, in your view, is the current status of the antitrust enforcement programs in the States?

Most States have established or added to functional and active antitrust units under the grant program. The States have put their efforts into four major areas: litigation and investigation, regulatory reform, competitive procurement, and reform of State statutes.

The States have reported several hundred active investigations of violations under State and Federal law, and have filed over 200 cases. Over half the States are examining State regulatory schemes for compliance with the antitrust laws. In some States, comprehensive reviews of all State regulatory boards are being undertaken. In other States, a selective approach has been taken which advocates competition principles before regulatory agencies. Activities aimed at improving the process of competitive procurement have centered on establishing close liaison with purchasing officials to teach them to spot and then to report possible bidding irregularities to the antitrust unit for investigation. In addition, several States have undertaken computerized analysis of sealed bid markets to determine the presence of possible violations. With respect to State statutory reform, six States have sought and obtained passage of comprehensive new State antitrust laws as part of their antitrust programs. Six other States are continuing their statutory reform efforts.

(b) *How do the States' activities in antitrust enforcement affect the Antitrust Division's activities—in terms of workload, overall capacity to handle cases, and other complementary ways?*

The States can make an important contribution to the Nation's overall antitrust enforcement effort. State officials have a knowledge of, and an intense interest in, the business affairs of their own communities that cannot be matched at the Federal level. Federal priorities are established on the basis of national harm. This compels us to prosecute huge violations, even if they cost each American only a few cents or a few dollars; nonetheless, if we do not bring the case there may be no one else who can. However, State officials can set priorities according to State, rather than Federal, perspectives and priorities. This permits State officials to pursue matters that may be small by national standards, but that nonetheless severely affect the pockets of local residents. By supplementing Federal efforts in this way, States can make an enormous contribution to the welfare of our citizens.

(c) *How is coordination of effort handled between the Antitrust Division and the States?*

Coordination of effort between the Antitrust Division and the States is handled in a number of ways. Our Office of Operations has processed well over 100 requests from States for information under new section 4F of the Clayton Act. This provision permits States, upon proper request, to gain access to Department of Justice investigative files, thereby permitting more prompt attention to these matters at the State level. The Office of Operations also refers matters to State attorneys general for their consideration where appropriate. Twenty-two such referrals have been made over the past 12 months.

In addition, the Division's Office of Policy Planning maintains liaison with States receiving funds through the antitrust grant program. The Office of Policy Planning coordinates technical assistance from Division personnel to State attorneys general, arranges for the participation of State personnel in departmental training programs, and provides assistance to States in the operation of their grant programs.

7. *At page 27 of the transcript of the hearings before this committee on December 20, 1979, relating to your confirmation, you said: "I believe that an antitrust case can and should be tried in something less than a decade. I have done it, I think I should know what is takes." Mr. Litvack, if you succeed on such a project, you would be performing a great service to all concerned, including the taxpayers. Would you elaborate further, on how you would accomplish your objective of reducing the years of long antitrust trials?*

The Antitrust Division shares with the private antitrust bar—as well as the judiciary—the responsibility for effective and efficient management of large antitrust litigation; no one of us can do it alone. What I can do, and am doing, is to attempt to streamline litigation. By engaging in the close personal supervision of the Division's activities that I described in my testimony, I am insisting that our attorneys focus their investigative efforts more quickly, dropping extraneous issues and foregoing lines of inquiry tangential to central issues. I am also attempting to improve their litigation skills so that fewer and narrower, but more successful, discovery efforts lead to earlier and shorter trials, and so that trials themselves are expedited by use of effective but not excessive numbers of witnesses and documents. To be sure, our efforts cannot succeed unless trial judges demand that both sides adhere to tight schedules and well-defined issues. I believe the Federal judiciary is generally anxious to move antitrust cases as fast as the parties are able and willing to do so. I intend for the Division to be at the forefront in that effort.

8. *Have you had sufficient time to become fully acquainted with your Antitrust Division staff and the Division's budget to determine significant changes, if any, in the various areas of antitrust enforcement?*

At present, I am still in the process of evaluating the relative performance of the Division's various sections and field offices. By studying the monthly results of each unit—looking at what has been accomplished, both in terms of quantity and quality, in relation to the number of available staff—I am just beginning to see where we might want to make readjustments among sections and with respect to the kinds of work they are doing.

In general, I am satisfied that the current balance of litigation and competition advocacy activities is a proper one, and that no drastic alterations in our allocation of personnel or funds is either necessary or appropriate.

9. Both the FTC and the previous heads of the Antitrust Division have testified here that the tenure of top lawyers handling the Government's cases has been short, requiring two or three successive teams of lawyers on one particularly long trial. Does that practice still prevail now? If so, what do you suggest to avoid the above noted problem?

The problem does persist to some extent. Since the financial disparities between private practice and government service continue to grow (particularly in the antitrust area), I expect that we will always have such problems in prolonged litigation. As to a major change in the economics of Government versus private practice, I believe the best solution to this situation is to expedite future litigation so as to minimise or eliminate the type of problem described. In addition to my own involvement with our staff in this regard, another means of achieving this goal is the adoption of the recommendations made by the National Commission for the Review of Antitrust Laws and Procedures. Some of these recommendations are already bearing fruit in the form of legislation: i.e., S. 390, introduced in the Senate by Chairman Howard M. Metzenbaum and cosponsored by you and several other members of the committee; H.R. 4046–4050, introduced in the House by Chairman Peter W. Rodino; and H.R. 5949, introduced in the House by Congressman Harris. The Division has endorsed these legislative efforts and has worked with Congress in helping to enact them. Thus, our internal efforts to expedite litigation, supplemented by new legislation to further this objective, are two specific ways of dealing with the situation you described that are already underway.

APPENDIX

Additional Submissions of John H. Shenefield

United States Department of Justice

OFFICE OF THE ASSOCIATE ATTORNEY GENERAL

WASHINGTON, D.C. 20530

December 13, 1979

Honorable Howard M. Metzenbaum
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Metzenbaum:

During the course of the hearing on December 7, 1979, a number of your questions were directed to Division productivity and management. In accordance with your suggestion that I submit additional material for the record, I am pleased to enclose brief descriptions of some fourteen areas of management initiatives undertaken while I have been in charge of the Antitrust Division.

Also enclosed for the record is a description of the Antitrust Division's current workload, to which is attached a 10-page statistical review of the Division's workload by specific category of activity for the past decade. This workload analysis was the product of my intensive review with the Division's Section and Field Office Chiefs of their activities of all kinds. This review, of course, encompassed much broader considerations than merely production of one class of case, the subject of the memorandum from Joel Davidow to me dated August 1, 1979, from which you quoted during the course of the hearing. (A more readable copy of the Davidow memorandum is enclosed with this letter at the specific request of Mr. Herman Schwartz to replace the copy you obtained from other sources.) I believe you will agree that a fair reading of this workload data indicates a high level of productivity in the Division during the time I have been the Assistant Attorney General.

Finally, you may be interested in knowing that in fiscal year 1979 the approval rate on staff recommendations for cases was 91%, compared to 80% in fiscal 1978, and 72% in fiscal 1977. (In fiscal 1977, 79% of all disapprovals occurred prior to June 1977.) As a matter of sound law enforcement policy, however, approval rates should not be set at any target level; each staff recommendation must be evaluated on its merits, without regard to its impact on any statistical outcome.

Also being submitted to you under separate cover are volumes now being delivered to all attorneys and economists in the Division, namely, the new Antitrust Division Directives and the new Antitrust Division Manual -- the first new manual of operations in over a decade. I am sure you will appreciate both the effort that has gone into their preparation over the past year and a half, and also their importance in managing a Division with approximately 900 full-time employees.

I appreciate the opportunity you have afforded me to supply for the Committee's record a fuller treatment of the issues of productivity and management during my tenure as Assistant Attorney General in charge of the Antitrust Division.

Sincerely yours,

John H. Shenefield
Acting Associate Attorney General

Enclosures

cc: Honorable Edward M. Kennedy
Chairman, Senate Judiciary Committee

MANAGEMENT IMPROVEMENTS
IN THE ANTITRUST DIVISION

April 1977 - November 1979

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1. CREATION OF ENERGY AND TRANSPORTATION SECTIONS AND REALIGNMENT OF COMMODITY ASSIGNMENTS, NOVEMBER 1977

Upon my arrival in the Division, I found that the Division's important and complex responsibilities in the energy and transportation fields were fragmented across several sections. I consolidated these responsibilities into a single section each, thus creating the new Energy and Transportation Sections.

Additionally, I found that the existing allocation of certain other commodity responsibilities had been recognized for some time as arcane at best. While the idea of strict and immutable commodity responsibilities seemed to me to be out of step with our broadranging responsibilities, it was obvious that there had to be primary areas of responsibility for commodities and that these responsibilities could be streamlined and made clearer.

Thus, I made the following commodity reassignments:

(a) Drugs -- from Special Litigation to Patents (renamed "Intellectual Property Section").

(b) Basic chemicals -- from Special Litigation to Trial.

(c) All professional and state regulation matters -- consolidated in Special Litigation.

(d) All steel and iron ore matters -- from Trial and Foreign Commerce to Special Trial.

By transferring drug commodities into the Intellectual Property Section, and by asking for a new emphasis on trademarks and copyrights, we took the first step toward new litigating capability, while maintaining a strong emphasis in patent antitrust enforcement. There had been a feeling for some time that our growing activities in the area of professionals and in the area of trade regulation ought to be consolidated; that was done by moving responsibility for those matters into the Special Litigation Section. There was also a need to have a coordinated effort in the steel industry; this was accomplished by making the Special Trial Section responsible for International Trade Commission, interagency, and enforcement efforts in the steel industry.

2. MEETINGS WITH SECTION/FIELD OFFICE CHIEFS

I initiated semi-annual meetings with section/ field office chiefs to discuss their respective goals, problems and achievements. In preparation for these meetings, I asked each chief to prepare a memorandum briefly discussing, in a short paragraph or two, the status of each matter handled in the section. During these meetings, I focused on (a) when the matter began, (b) what had been accomplished (interviews, CID's, depositions, trial, etc.) and (c) the chief's schedule for bringing the matter to a conclusion. I found these meetings quite helpful to me and to the chiefs. The meetings provided us with a forum for a useful exchange of management ideas and information.

3. REORGANIZATION OF THE ADMINISTRATIVE SECTION

When I arrived in the Antitrust Division, I discovered that the Administrative Section was perceived, whether fairly or unfairly, as an unresponsive unit. The section consisted of little formal organization, and had few, if any, systematic procedures for assigning or reviewing work. Individual responsibilities were poorly defined and generally unclear. Thus, important details were frequently forgotten and not attended to until well past their deadlines.

I reorganized the section into a new Executive Office, with well-defined units, each of which had a supervisor in charge. Three talented mid-level managers were added to the staff to oversee the day-to-day operation of these units. This new staffing structure enabled the office to focus its activities in clearly-defined areas and substantially increase its effectiveness.

4. ESTABLISHMENT OF THE INFORMATION SYSTEMS SUPPORT GROUP (ISSG)

Upon joining the Division, I learned that we had an automated caseload management system -- given the acronym "ACES" for Antitrust Caseload Evaluation System -- and that we were using computer support for document-indexing and retrieval, and analysis of economic data in one case. There was also an automated statute and case law research system -- JURIS -- available in the Department. But it was perfectly obvious that computer-aided systems were not being used to their full potential.

Thus, during the summer of 1977, a task force of Division personnel, established at my direction, conducted a study and prepared a report on the status of automated systems support in the Division. The report documented existing systems usage, benefits and problems; discussed the Division's information systems support needs; considered the advantages and disadvantages of various alternatives for organizing and managing systems support activities within the Division; and concluded with a recommendation that a centralized organizational entity responsible for automated systems support be established.

After a thorough review of the report and its findings, and consideration of comments from interested parties, I decided to establish an Information Systems Support Group (ISSG) within the Division's Administrative Section. This decision coincided with the reorganization of the section described above. ISSG was assigned responsibility for providing systems support, primarily through the use of automatic data processing (ADP), for management information, litigation, economic analysis and legal research. As a result, the Division for the first time had one central organizational entity responsible for providing this type of support service to Division management, attorneys and economists.

In establishing ISSG, the Division now has a small cadre of talented professionals with considerable expertise not only in the use of computer systems but in a variety of litigation support areas, e.g., document organization and information retrieval, drafting of CID's targetted towards automated data bases, word processing, work product retrieval systems, and others.

For example, last year, the Division was able for the first time to develop a comprehensive budget plan and request to fund the identified needs for systems support. For fiscal year 1980, which began this past October 1, the Division received an increase of more than $6 million for this purpose. Yet, our approach to computer support in the FY 1980 budget is conservative. Our request used a cut-off point of 40,000 documents for computer support despite the fact that good private law firms regularly apply such support to cases involving 15,000 documents, and some have found it cost effective when applied to cases involving 10,000 documents.

Currently, ISSG is providing litigation support services to our IBM and AT&T cases, and to 15 other Division matters ranging in size from our International Oil investigation to small grand jury investigations.

5. EXPANDED USE OF MANAGEMENT INFORMATION SYSTEMS

After a comprehensive review of our existing methods of collecting, reporting and using information, and a discussion of various proposals with all of the section and field office chiefs, I announced certain changes in ACES this past August (1979). The major changes involved the following:

(a) Making greater use of unique file numbers for major projects and activities. Information is now reported for time spent and work accomplished on all major matters, as well as on traditional investigations and cases.

(b) Establishment of target dates and estimates of resource requirements for the completion of major events or phases in investigations, cases, regulatory proceedings, and other major projects. This includes time limits within which the Office of Operations, Deputy Assistant Attorneys General and the Assistant Attorney General are expected to complete their review and decisionmaking.

(c) Reporting by each matter on a weekly basis the number of hours, including overtime hours, worked by our professionals and paraprofessionals. The previous method of simply reporting percentage of time on a monthly basis was discontinued.

These changes in ACES, combined with our successful efforts to automate our financial management activities, have given the Division the capability to track total costs by individual matter, by section and by budget program. Thus, the Division now has a comprehensive system capable of associating costs and performance in terms we readily understand, i.e., the names of particular cases and investigations, and for budget purposes, a system capable of justifying appropriated dollars and positions within each of the Division's eight major budget programs.

6. RECRUITMENT OF MORE WOMEN AND MINORITY ATTORNEYS

The Division has made substantial progress in the past two years in the employment of more women and minority attorneys.

Without lowering our traditionally high professional standards, the Division has placed great emphasis on recruiting more women and minority attorneys. Within the last two years, the total number of women and minority attorneys has increased from 67 to 108. This represents a percentage increase from 15.4 to 25.1.

The number of women attorneys in grades GS-14 and above has more than doubled during this period; specifically, in November 1977 the Division had only 10 women attorneys at or above GS-14, whereas by October 1979, that number had increased to 23.

Further, we reorganized the process for screening attorney applicants for both the Attorney General's Honors Program -- a highly selective entry-level recruitment program -- and for experienced attorney positions.

I established an Application Screening Committee to review all Honors Program applications forwarded to us by the Associate Attorney General's staff. Division policy requires that this committee have at least six members, including at least one female attorney and one minority attorney. The committee recommends which applicant should be interviewed. Secondly, I established a four-member Applicant Recommendation Panel, again to consist of at least one female attorney and one minority attorney. This panel reviews applications and interviewer reports and selects applicants to be recommended for job offers.

As regards the hiring of attorneys outside the Honors Program, i.e., the hiring of experienced attorneys, I have established a thorough screening process. I have communicated to all sections and offices my affirmative action policy that, while lawyer skills and personal effectiveness should continue to be preeminently important, it is the policy of the Division to seek especially to interview and hire qualified minority and female lawyers.

Division policy and procedures in these two important areas are contained in directives ATR 1330.1, Hiring of Attorneys Outside the Department's Honors Program, and ATR 1335.6, Honors Program Process.

7. MODERN OFFICE EQUIPMENT

When I arrived in the Division, many of its professionals complained about the lack of modern office equipment. We have increased our purchases of dictating equipment, and have placed special emphasis on the expanded use of modern, word processing equipment.

Previously, the Division would buy, or rent, word processing equipment of various kinds absent any overall strategy or plan. As a result, the Division developed a hodgepodge of such equipment with limited capabilities for interfacing. We are now nearing the completion of an extensive word processing project which, when completed, will enhance the effective use of this equipment while either holding the line on costs, or reducing costs slightly.

I have ensured that this important topic will continue to receive the emphasis it deserves by adding an expert professional in this field to the staff of ISSG.

8. WORK PRODUCT RETRIEVAL

In conjunction with our word processing project, we have begun the development of a work product retrieval system. Significant Division work product, e.g., briefs, memoranda, ets., will be retained in a central repository. Using modern office equipment, an automated index will be developed so as to provide rapid, easy access to these extensive materials. This will make important Division work products available to all Division attorneys and enable them to use previous research products in developing their own written work.

For the past year, we have been reviewing Division work product and selecting the most significant documents for inclusion in an Exemplar File. This file, along with indices, was distributed in February 1979 to each section and field office to provide reference to selected documents. This file is continuously updated with new documents as they are identified.

9. ATTORNEY TRAINING

I attach great importance to training, continuing education and career development for Antitrust Division attorneys. Young attorneys coming out of school have a good foundation in the theory of the law; however, they have only limited knowledge of the actual practice of law. Older attorneys have gained practical experience, but need to keep abreast of new developments in the law. While there is no substitute for actual experience, off-the-job training provides the opportunity to share experience with a wider range of colleagues, to give more thought to legal theories and lititgation strategies than is possible under the pressure of daily work, and to make mistakes that will not jeopardize an actual case.

I directed our Office of Policy Planning to develop a program to meet the Division's particular needs. As a result, the Division sponsors or sends attorneys to a variety of training programs. These include:

(a) National Institute for Trial Advocacy, a three-week program in both civil and criminal trial advocacy given each year at the University of Colorado.

(b) Columbia University Law School Antitrust Trial Advocacy Course, a one-week program in trial advocacy geared specifically to the antitrust area.

(c) Attorney General's Advocacy Institute.

(d) Criminal Antitrust Litigation Program Jointly Sponsored by the Antitrust Division and the Attorney General's Trial Advocacy Institute, programs dealing with problems arising in criminal antitrust proceedings and mock price-fixing trial programs.

(e) Assignments as Special Assistants in United States Attorney offices, to improve litigation skills by assisting in the actual litigation of cases in those offices.

(f) Videotaped Demonstrations, including the Trial of an Antitrust Case produced by the American Bar Association, a series on evidence and another program on grand jury practice.

(g) Programs in Substantive Antitrust Law Sponsored by the Division, to which all Washington attorneys are invited to attend. These programs are videotaped for distribution to the field offices. Four such programs have been sponsored in FY 1979: Economics of Antitrust, Horizontal Restraints, Mergers from the Perspective of the Prosecution, and Mergers from the Perspective of Defense Counsel.

(h) Orientation for New Attorneys, a one-week program given each fall that includes training in witness interviewing and grand jury investigation techniques.

(i) Work-Related Course Sponsored by Universities, Bar Associations and Other Organizations, for which the Division pays half the tuition if funds are available.

(j) Visiting Scholars Program, to which all Washington attorneys are invited to hear and question distinguished antitrust practitioners and scholars.

(k) "Brown Bag" Colloquia Sponsored by Antitrust Division Professional Association, to which all attorneys are invited.

Notices of these and other training opportunities are periodically distributed to all Division attorneys. During FY 1979, the total attendance at Division training events of all kinds exceeded 1,600, for an average of almost four training events attended per Division attorney.

10. USE OF PARALEGALS

We increased our ratio of paralegals to attorneys from 1 to 8 to approximately 1 to 4 during my tenure in the Antitrust Division.

Upon my arrival in the Division, paralegals were assigned to specific sections and could not be reassigned to meet changing priorities without considerable resistance from their parent sections. We now assign a substantial portion of our paralegals to a central register in our Executive Office. This central assignment permits greater flexibility in reassigning personnel among the sections according to shifting priorities.

In spite of the increased emphasis on the hiring of paralegals, we have not sacrificed our standards. This is evidenced by the fact that 92% of our current full-time permanent paralegals have at least a four-year college degree.

Additionally, we have developed, in conjunction with the Department, a comprehensive paralegal training program to enhance the performance and career development of our paralegals over the long run. The program's core curriculum consists of orientation to the Department and the Division; stresses basic legal skills such as legal research and library use, and advanced legal

skills such as case and legislative analysis, with emphasis on legal drafting; an introduction to either criminal or civil litigation processes; an overview of the Freedom of Information and Privacy Act; training for attorney superiors of paralegals; and a four-week, structured on-the-job assignment.

11. SECRETARIAL TRAINING

I established a Division secretarial training program in January 1979. The program consists of a variety of training courses, and has both required and optional components. Specific topics covered in the program include orientation to the Division, correspondence styles, administrative procedures, general office administration, proofreading, legal citations, and basic typing and shorthand skills.

To date many courses have been successfully completed by our secretarial employees. As of this writing, the courses' total enrollments have already reached 168 -- just nine months since the program's inception. I am told that secretarial responses to the new program have been overwhelmingly positive.

12. ANTITRUST DIVISION MANUAL

During the past several months the Antitrust Division has prepared the Antitrust Division Manual. This Manual is the first comprehensive guide to the operating procedures and policies of the Antitrust Division since the mid-1960's. The Manual is an effort to provide all Division professionals with a single volume explaining what the Division does and how it goes about it.

The Manual describes the organization of the Department and the Antitrust Division and sets forth the statutes that the Antitrust Division enforces. A major portion of the Manual describes the Division's methods of conducting investigations, of meeting various problems that occur in criminal or civil litigation and of the Division's competition advocacy in industries.

The final sections of the Manual describe the Division's informational services, including the increased use of information retrieval services and sophisticated economic analysis. The Manual also includes a discussion of the Antitrust Division's relationships with other agencies and with the public.

The purpose of the Antitrust Division Manual project has been to create a fundamental tool for increasing the information available to Division personnel. It is also a useful management tool that will ease the communication barriers that may exist within an organization of the size and diversity of the Antitrust Division. It will set forth a consistent and comprehensive set of procedures and policies that will be uniformly and fairly applied in all of the Division's endeavors. It is also the first self-contained guide to the Division's newest management initiatives including the use of our ACES system and the methods of streamlining complex litigation through effective case management.

While the Division Manual is extremely beneficial to new attorneys coming to the Antitrust Division, it should also be a significant aide to experienced attorneys in determining what course to take in a particular enforcement effort.

By its format, the Manual may be updated periodically and may also be expanded to include new developments or procedures of the Antitrust Division. We intend to make the Manual publicly available through the Government Printing Office soon after it is released to Antitrust Division Attorneys.

13. ADMINISTRATIVE DIRECTIVES

Upon my arrival in April 1977, the Division's administrative policies and procedures were not communicated systematically to the various sections and field offices. As a result, there were very few written instructions or guidelines available to Division employees. We initiated a new directives system in November 1977, and now have over 30 such directives in force. During this past September, I personally reviewe each of these directives and initiated a broader distribution of them. Thus, these directives are now distributed in a loose-leaf volume to all section and field office chiefs and to all professionals; when appropriate, they are distributed to other personnel as well.

14. ANTITRUST DIVISION BULLETIN

We revitalized the Antitrust Division Bulletin to provide employees with more information on administrative, personnel, and other activities within the Division. The traditional information on cases filed and pending is still included, but the revision of the Bulletin to a new and expanded format has enhanced the flow of informal information throughout the Division.

ANTITRUST DIVISION WORKLOAD

During the past three fiscal years the Antitrust Division has made substantial gains in its enforcement activities in a variety of areas. While the number of civil antitrust cases filed has been on a decline, 31 in fiscal year 1979 compared to 45 in fiscal year 1976, the Division has increased its emphasis upon criminal violations, filing 27 criminal antitrust cases in fiscal year 1979 compared to 20 in fiscal year 1976.

The Division initiated 113 formal investigations of possible violations of the antitrust laws during fiscal year 1979, a 10 per cent increase over the number initiated in fiscal year 1976. During the last three years the Division devoted substantial investigatory resources to several entirely new areas. During 1978 and 1979 the Division conducted 303 screening investigations of some 127 industries under the shared monopoly program which have resulted in 30 formal investigations. Since implementation of the premerger notification program in 1978, the Division has initiated 129 investigations and, together with the FTC, filed 13 cases from information derived from the 1,095 notifications received. Since initiation of the Antitrust Hot Line Program in 1977 telephone hot lines have been established in Pittsburgh, New England, Denver and Phoenix; from the 514 calls received so far, 63 were considered significant enough to forward for action and 14 have resulted in the initiation of formal investigations.

In the so-called "non-traditional" antitrust programs, such as regulatory reform and legislative initiatives, the Division has achieved some of its most significant gains. In fiscal year 1979 the Division participated in 54 regulatory agency proceedings -- filing briefs, appearing at hearings, presenting oral arguments; in fiscal year 1976 the Division participated in only 32 such proceedings. Last year the Division responded to 345 requests by the Office of Management and Budget and the Congress for comments on proposed legislation, compared to 243 such requests three years earlier.

This past year, division personnel participated in 35 interagency and international committees dealing with a wide range of issues such as deregulation in the trucking and ocean shipping industries, government patent policy, energy, international transfer of technology, trade policy and industrial innovation. As required by various statutes, advice was given to other federal agencies on the competitive implications of over 600 proposed transactions, including mergers and acquisitions of financial institutions, disposition of surplus government property, federal coal leases, and outer continental shelf lease sales, nearly doubling the Division's activity in this area during fiscal year 1976.

In fiscal year 1979 the Division prepared 32 statutory reports to the President and to Congress on a variety of competition issues; only 17 statutory reports were prepared in fiscal year 1976. Examples include reports on the activities of the International Energy Agency, the state of competition in the coal and energy industries, identical bidding in public procurement, and Federal Government activities that may adversely affect small business.

Further, during 1979 the Division opened 238 contested proceedings involving the enforcement of consumer protection laws; 227 were opened in 1976. During this period the Division received 372 requests under the Freedom of Information and Privacy Acts, a responsibility that did not exist prior to 1976.

Finally, during the past year, the Assistant Attorney General, or his representative, made 28 appearances before congressional committees; 21 appearances were made in 1976. Over 2,900 letters were received from the general public in 1979, almost triple the volume received in 1976. Mail inquiries from Congress and referrals received from the White House have remained relatively steady the last several years, 604 of the former and 96 of the latter were received during fiscal year 1979.

Price Fixing and Other Restraints of Trade

The Division has continued to concentrate on criminal prosecutions of price fixing, bid rigging and other violations of Section 1 of the Sherman Act, winning an unprecedented number of convictions and obtaining significant sentences. In fiscal year 1979, fines and recoveries totalled more than $32 million, compared to $4.5 million in fiscal year 1976, while days to be spent in jail rose from 560 to 2,360 during this same period.

In the last two fiscal years more than 90 percent of the corporate and individual antitrust defendants prosecuted by the Division have either pled *nolo contendere* or guilty, or have been found guilty after a full trial. Thus, over the last two years nine out of every ten criminal antitrust defendants against whom a disposition was obtained have been convicted.

Several important appellate decisions involving criminal enforcement of the antiturst laws were handed down during the year. The Third Circuit and Seventh Circuit Courts of Appeals upheld the convictions of the defendants in *United States* v. *Gillen* 1/, *United States* v. *Brighton Building and Maintenance Co.* 2/, and *United States* v. *Continental Group, Inc.* 3/. A significant issue in all three cases was whether the Supreme

Court decision in *United States* v. *United States Gypsum Co.* 4/ changed the law on intent by requiring a more stringent burden of proof.

The *Gypsum* majority held that the Sherman Act is not a strict liability statute. A defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences fairly drawn from the evidence. The necessary intent can be demonstrated two ways. First, the requisite intent is established if the jury finds that a defendant's conduct was undertaken with the purpose of producing an anticompetitive effect -- such as fixing prices. Even absent a finding of such a purpose, the jury may nonetheless find that the conspiracy produced anticompetitive effects and that the defendant participated with the knowledge that such effects would most likely occur.

In *Gillen*, *Brighton Building*, and *Continental* the Courts of Appeals concluded that the holding on intent in Gypsum was born out of a concern for borderline violations and was not meant to modify past precedent on *per se* violations (conduct so pernicious that it is conclusively presumed to be unreasonable) such as conspiracies to fix prices and rig bids. Where the conduct is illegal *per se*, no inquiry has to be made on the issue of intent beyond proof that defendants joined or formed the conspiracy.

The decisions in these three cases establish as legal principle a policy that the Antitrust Division has followed since at least 1955. Since that time, the Division, in exercising its prosecutorial discretion, has sought indictments only when it believed it was confronted with willful violations. Thus, criminal prosecutions have been limited to those situations where the evidence demonstrated that the purpose of the conspiracy was to achieve a *per se* violation.

In another significant appellate decision, *United States v. John P. Foley, Jr. and Jack Foley Realty, Inc.* 5/, the Fourth Circuit Court of Appeals affirmed the felony convictions of defendants for conspiring to fix real estate commissions in Montgomery County, Maryland. A major issue on appeal was whether the district court lacked subject matter jurisdiction because of an insufficient nexus between the defendants' conduct and interstate commerce. The appeals court found that a substantial stream of interstate commerce existed and, therefore, defendants' conduct was a violation of the Sherman Act.

At the district court level, the Division has concluded successfully a number of significant cases. For example, two marine construction firms were indicted for allocating jobs and rigging bids for marine construction projects. Such projects include the installation of sub-sea pipelines and the fabrication and installation of offshore platforms, primarily for the oil and natural gas industries. Both firms pleaded *nolo contendere* and were fined $1 million each, the maximum corporate fine allowed under the Sherman Act. In another major case, 16 corporations and 10 individuals were charged in a 54 count indictment with bid rigging, mail fraud and submission of false statements in connection with river bank stabilization construction projects for the U.S. Corps of Engineers. A companion civil action was also filed to recover damages for the government.

Monopoly and Oligopoly

The premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act were implemented in the summer of 1978. The Act requires large enterprises merging or entering into acquisition transactions to notify both the Antitrust Division and the Federal Trade Commission. After notification, the parties must wait a specified time before the merger can be consummated. This allows the Government to petition the court for an injunction barring consummation of the merger pending a trial on the merits if the government believes the proposed transaction is anticompetitive.

The Division received 1,095 notifications since the implementation of this program. After an initial review of all notifications, 129 investigations were initiated and together with the Federal Trade Commission, 13 cases were filed challenging the proposed merger or acquisition.

The Division won a major decision affecting mergers in *United States* v. *Household Finance Corp.* 6/ when the Seventh Circuit Court of Appeals held that the business of making direct cash loans by finance companies is a line of commerce within the meaning of Section 7 of the Clayton Act. The district court had found that personal loans from finance companies did not constitute a separate line of commerce. In reversing the lower court, the Seventh Circuit stated that the Supreme Court repeatedly has held that a financial institution comprises a separate product market if it offers to a "significant" number of consumers a "cluster of products and services" that competing financial institutions do not. The court found that the record below supported the proposition that financial companies offer unique products and services to a class of higher risk customers than are serviced by other financial institutions.

The Division also won two significant decisions involving enforcement of divestiture decrees in *United States* v. *Work Wear Corp.* 7/ and *United States* v. *El Paso Natural Gas*. 8/ In a major precedent, the sixth Circuit Court of Appeals upheld the imposition of a civil contempt fine in excess of $1 million against Work Wear Corporation for failure to comply with a court order to divest itself of certain assets. Given Work Wear's lack of diligence in seeking divestiture prior to the imposition of the fine and its placemenmt of its own financial considerations ahead of complying with the law, the Sixth Circuit found that the district court had not abused its discretion in refusing to reduce the fine. This decision makes clear the supervening importance of effecting court-ordered divestiture in a timely fashion.

In El Paso, the trustee petitioned the district court for extension of the February 1979 deadline for selling all remaining stocks and completing the divestiture by El Paso of Northwest Pipeline Co. The trustee also requested a relaxation of the court-ordered requirement that no community of interest in stock ownership exist as a result of the sale. The Division opposed any time extension or relaxation of the absolute divestiture requirement in the original judgment. The court concurred in the Division's position and denied the trustee's request. The remaining stock was subsequently sold, finally bringing this long-open case to a successful conclusion.

In its suit against AT&T, the Division filed its first and second Statements of Contentions and Proof as required by the discovery schedule established by the district court in September 1978. In a further order the court set a September 1, 1980 trial date with a strict pre-trial schedule for concluding discovery, submitting pre-trial briefs and holding the pre-trial conference.

Substantial progress was made in the Division's systematic review of competitive conditions in concentrated industries under the shared monopoly program. The Division believes shared monopolies often may be the product of oligopolistic interdependence. Adoption of various mechanisms by members of an industry may facilitate non-competitive, interdependent behaviors. The Division has conducted 303 screening investigations of 127 industries for evidence of facilitating mechanisms. Through the end of the fiscal year, 30 formal investigations had been opened as a result of this screening. Several investigations were in their final stages, with decisions on whether cases should be filed expected during fiscal year 1980.

Other Antitrust Actions

Hart-Scott-Rodino's civil investigative demand (CID) amendments have made the CID a truly effective enforcement tool. We have taken full advantage of our ability to conduct depositions, to submit interrogatories, and to direct demands to third parties. During fiscal 1976, the last full year under the old law, the division issued only 66 CIDs. During fiscal year 1979 the Division issued 367 documentary CIDs, 301 interrogatory CIDs, and 32 deposition CIDs.

In an important decision supporting the Division's program of challenging restrictive practices by professions, the Court of Appeals for the Fifth Circuit affirmed the lower court's decision in *United States* v. *Texas State Board of Public Accountancy*. 9/ The district court had held that the Board's ethical rule prohibiting competitive bidding violated the Sherman Act and that the rule was not mandated or authorized by the state as sovereign.

The Second Circuit Court of Appeals handed down a significant decision that will help to expedite complex antitrust cases brought by the Federal Government. The Division had requested discovery materials obtained by one party in private litigation against another party, whom the Division was investigating, by issuing a CID for the materials. While recognizing that time and expense would be saved if the Division were given access to such materials, the district court ruled against the government. The Court of Appeals found that the Antitrust Civil Procedures Act authorized the use of that CID process to obtain such discovery materials, and reversed the lower court decision. 10/

This decision coincides with a recommendation made by the Antitrust Commission, discussed *supra*, that procedures authorizing government access to materials discovered in private antitrust actions should be liberalized. The Commission's recommendation was embodied in legislation introduced in the Congress during the fiscal year, and supported by the Division as desirable to confirm the appellate decision and fill gaps left by the Court's opinion by providing specific procedures for protecting the interests of all parties in the confidentiality of discovery materials and by preserving any rights and privileges with respect to such materials.

In an important decision for consumers, the Supreme Court, in *Reiter* v. *Sonotone Corporation* 11/, held that consumers who pay a higher price for goods purchased for personnel use as a result of antitrust violations sustain an injury in their "property" within the meaning of Section 4 of the Clayton Act. The Court's opinion closely paralleled the arguments the Division made in an *amicus* brief and during the oral argument given before the Court by the Assistant Attorney General.

Regulated Industries

The Antitrust Division has become increasingly active in the area of regulatory reform and antitrust prosecution of activities not falling within the scope of a regulatory scheme.

[illegible] the Division intervened in a variety of regulatory proceedings involving the transportation industry to act as a [illegible] advocating the elimination of unnecessary restraints on entry into markets and the removal of unnecessary restrictions on competitive ratemaking. The Division filed comments and participated in proceedings before the Interstate Commerce Commission (ICC), the Civil Aeronautics Board (CAB), and the Federal Maritime Commission (FMC).

Before the ICC, the Division urged the Commission to consider competition more and protection of existing firms less in motor carrier entry cases. The Division also argued that the ICC should, in appropriate circumstances, make prospective findings of public convenience and necessity which would reduce the regulatory burden on those trying to enter the trucking business. The Division supported a proposal to liberalize regulatory restrictions that sometimes require circuitous, wasteful routings of intercity buses. In another proceeding, the ICC adopted the position advocated by the Division and eliminated the "rule of eight," which restricted the number of shippers a contract carrier could serve. The Division also urged that rate-fixing meetings of motor carrier rate bureaus be open to the public. In a rail proceeding, the ICC adopted the position the Division supported and deregulated rail carriage of fresh fruits and vegetables. The Division also participated in several rail merger proceedings.

Before the FMC, the Division urged in several proceedings that conference rate-fixing authority not be extended to intermodal movements, arguing that since intermodal movements are a relatively new development in the shipping industry, a freer, more competitive environment is more likely to encourage these innovative services.

At the CAB, the Division participated in several airline merger proceedings. The Division also continued to participate in proceedings implementing the mandate of the Airline Deregulation Act, advocating in those proceedings that more reliance should be placed on competitive market forces.

In fiscal year 1979 the Antitrust Division successfully concluded cases brought in two regulated transportation industries. Firms in regulated industries frequently have antitrust immunity for activities undertaken pursuant to the regulatory scheme, but price-fixing activities that go beyond the scope of those permitted by regulation are subject to the antitrust laws. In *United States* v. *Atlantic Container Line, Ltd.* and *United States* v. *Bates*, grand jury indictments of seven North Atlantic shipping firms and 13 individuals were resolved when the court accepted the *nolo contendere* pleas of the defendants. The indictments alleged that the defendants conspired to fix rates beyond the authority granted by the Federal Maritime Commission for rate-fixing and conspired to refrain from informing the Commission about their conduct by not filing minutes of certain meetings and filing inaccurate minutes of other meetings. Pursuant to a plea bargain with the government, the defendants were fined $6.1 million, the largest total fines assessed in any criminal antitrust case to date.

In a civil case, United States v. Southern Motor Carriers Rate Conference, the Division charged several motor carrier rate bureaus with fixing intrastate rates, an activity that may not be immunized under the Interstate Commerce Act. The Division won this case on summary judgment and defendants were enjoined from fixing intrastate rates. Defendants have appealed and the injunction has been stayed pending the appeal.

The Division filed comments with the Economic Regulatory Administration of the Department of Energy urging that agency to reform its price and allocation regulation to eliminate the currently excessive protection from foreign competition which domestic refiners received under those controls. In other comments, the Division reaffirmed its opposition to the small refiner bias under the entitlements program and the so-called "open market credit," essentially an independent refiner bias, and urged DOE to refrain from controlling the price differential between leaded and lead-free gasoline, thereby aggravating rather than reducing the environmental harm stemming from fuel switching.

For a number of years, the Division has been concerned with the competitive implications of shipper ownership of crude oil and petroleum products pipelines. Consistent with these concerns, the Division is participating actively at the Federal Energy Regulatory Commission (FERC) in the Trans-Alaska System Proceedings (TAPS), FERC Doc. No. RM78-2. In June 1979, the Division filed an initial post-hearing brief and a supplemental intital post-hearing brief, together with proposed findings of fact and conclusions of law. The Division also intervened at FERC in the Williams Pipeline rate case, and has assisted FERC in developing the evidentiary record necessary to begin industry-wide rate reform for U.S. petroleum pipelines.

The Division intervened in a FERC proceeding to determine the legality of differential tariffs proposed by the Texas Deepwater Port Authority for financing purposes. FERC adopted the Department's position that such tariffs, if offered to shippers in exchange for financing guarantees of comparable value to the tariff differential, are legal under the Interstate Commerce Act. In July 1979 the Division, pursuant to its responsibilities under the Deepwater Port Act of 1974, submitted to the Secretary of Transportation its antitrust advice on the licensing of the Texas Deepwater Port.

The Division submitted formal comments to FERC regarding a proposed rule which would have permitted producer ownership of the natural gas processing plant to be built on the North Slope of Alaska. The Department argued that, in certain circumstances, permitting producers to own the processing plant could have anticompetitive effects and proposed conditions which would alleviate those effects if the Commission adopted the proposed rule.

Section 105 of the Atomic Energy Act of 1954, as amended in 1970, requires the Nuclear Regulatory Commission (NRC) to conduct prelicensing antitrust review of applications to construct and operate nuclear power plants if the Attorney General advises the NRC that "the activities under the license will create or maintain a situation inconsistent with the antitrust laws." On several occasions during 1978, the Department rendered antitrust advice to the NRC. In September 1979, an appeal board of the NRC issued an opinion affirming the favorable results that the Department had achieved at the antitrust hearing held in connection with the Davis-Besse and Perry nuclear facilities in Ohio which are operated by the Central Area Power Coordination Group (CAPCO) power pool.

The Division also intervened in a FERC proceeding which involved the question of whether the differential between Boston Edison's wholesale and retail rates constituted an unjustified price squeeze. In briefs filed in late 1978 and early 1979, the Department advised FERC as to the information needed and the appropriate standards for measuring whether differentials between wholesale and retail rates are justified.

Comments were filed with the Securities and Exchange Commission opposing a rule proposed by the National Association of Securities Dealers that would prohibit its members from indirectly charging less than the "fixed offering price" for new issues of securities. In recent years, certain underwriters have begun to indirectly charge the purchaser less than the fixed offering price by, for example providing other goods or services free or at a discount. This Division argued that this form of competition should not be hindered.

The Division submitted extensive comments to the U.S. Postal Service on proposed regulations to implement the private express laws. The comments focused on the data processing and electronic mail features of the proposed regulations and argued that the Postal Service should not impose its own monopoly constraints on the computer and telecommunications industries to block private sector competition.

In comments filed with the Commodity Futures Trading Commission, the Division argued that trading should not be limited to firms that are members of the exchange on which a commodity option is traded. There are less anticompetitive alternatives to assure adequate surveillance and enforcement to prevent abuses, e.g., through registration requirements and adherence to exchange rules.

Finally, as an example of Division activities in the regulated banking industry, comments were filed with the Federal Home Loan Bank Board supporting its proposal to permit federally-chartered savings and loan associations in the Washington, D.C. metropolitan area to branch across state borders as a prelude to interstate branching in other metropolitan areas. In supporting the proposal, the Division stated its preference for nationwide interstate branching because it would promote competition and benefit consumers.

Foreign Commerce

The Division has continued to monitor foreign cartel activity for any effect on United States trade and commerce, particularly those activities that may present a significant adverse impact on inflation and on prices of vital products for the American consumer. As a result of this monitoring, the Division began a number of investigations of such activity. In addition, the Division, in conjunction with the Department of Commerce, informed American businessmen on the relationship between export promotion and the antitrust laws.

The Division increased its regulatory involvement in the international trade area by participating in other agencies' proceedings on specific trade matters, by work on the Multilateral Trade Negotiation (MTN) agreements and the Trade Agreements Act of 1979, by participation in interagency groups at the Office of the Special Trade Representative that resolve particular trade cases and set policy on specific trade matters, and by participation in the Commodities Policy Task Force, an interagency group that advises on negotiating policy for 19 international commodity agreements. The Division also participated in the Export Policy Task Force, which has been seeking ways to promote U.S. export trade, and worked with the Departments of State and Treasury on issues of international competition policy.

The Division has continued its active participation in various activities of the Committee of Experts on Restrictive Business Practices of the Organization for Economic Cooperation and Development (OECD), including studies on antitrust policy as to buying power, concentration, and obstacles to antitrust investigation when conducted on an extraterritorial basis. The Division participated in an OECD group that recently published a report on competition policy in regulated sectors. At the United Nations Conference on Trade and Development (UNCTAD), the Division participated in negotiations leading toward a conference on a code of conduct for the international transfer of technology, and participated in negotiations on internationally agreed principles and rules for the control of restrictive business practices, particularly those adversely affecting developing countries. The Division also participated in bilateral negotiations on antitrust cooperation with Australian, British, Canadian, and Japanese antitrust officials. The Division regularly assists foreign antitrust officials who travel to this country to study antitrust law and enforcement methods, as well as to discuss restrictive business practice matters of mutual interest, and participates in exchange programs with other enforcement agencies.

Consumer Affairs

The Consumer Affairs Section is responsible for litigation arising under the Food, Drug and Cosmetic Act, the Consumer Product Safety Commission Act and civil penalty cases arising under the Federal Trade Commission Act. The Section also has responsibility for enforcing federal criminal provisions prohibiting the turning back of odometers and prohibiting certain kinds of violations of the Truth in Lending Act.

The Section successfully concluded a number of criminal cases involving the Food, Drug and Cosmetic Act. In one case, a felony prosecution involving the counterfeiting of drugs, the court sentenced the individual defendants to eight year terms each and assessed fines against the individuals and the corporate defendant totalling $188,000. The government also successfully concluded a felony criminal prosecution involving false clinical investigative research records maintained by a doctor, which subsequently were used by a drug firm to support an application to the Food and Drug Administration for approval of a new drug.

In *United States v. ARA*, a major Federal Trade Commission civil penalty action involving the illegal acquisition of certain assets in the magazine and periodical business, the Section obtained a judgment of $300,000 in civil penalties and a requirement that certain of the assets acquired be divested. The Section also concluded two major civil penalty cases involving credit discrimination in violation of the Equal Credit Opportunity Act with entry of consent judgments providing for injunctive relief and awarding substantial penalties. In *United States v. Reader's Digest*, a case involving advertisements the government alleged were deceptive in violation of a Federal Trade Commission cease and desist order, the government was awarded summary judgment on the issue of liability.

In fiscal year 1979, the United States Court of Appeals for the District of Columbia Circuit favorably decided a petition to review the Consumer Product Safety Commission safety standard for architectural glazing materials. The Court held that the products covered by the safety standard qualified as consumer products under the Act, but remanded the matter to the Commission for further consideration regarding certain aspects of the Commission's decision regarding wired glass.

The Section responded to over 1300 pieces of consumer mail during the year. Referrals of consumer complaints outside the jurisdiction of the Department of Justice were made to state and local consumer protection agencies.

Business Reviews

Although the Department is not authorized to give advisory opinions to private parties, in certain circumstances under regulations set forth in C.F.R., the Division reviews proposed business plans at the written request of interested parties and states its present enforcement intentions. The regulations provide that the request and response be announced at the time a business review letter is issued.

The Division initiated a policy to expedite business review requests concerning export-related activities. The new policy was adopted in conjunction with other efforts by the Administration to stimulate United States export trade. Export-related requests for business review letters will be answered within 30 business days from the date the Division receives all relevant data concerning the proposed transaction.

The Division received 16 business review requests during fiscal year 1979. Examples of proposals that received favorable review include the formation of a corporation to handle the export sales of four United States firms that process and sell poultry products; the establishment of prepaid legal services plans; a joint venture to build and operate a blood plasma fractionization plant; and a technical assistance agreement between Chrysler Corporation and General Motors whereby Chrysler would receive certain emission control and safety technology.

Objections were expressed to a proposed joint venture between General Electric and Hitachi to create a new company to manufacture and sell television sets. The Division declined to state its enforcement intentions on a proposal to adopt conditions of sale for trade between ship suppliers and shipowners, and a plan for self-regulation proposed by the Mortgage-Backed Securities Dealers Association that would obligate dealers to impose certain margin requirements on their customers.

Federal/State Relations

Since fiscal year 1977 there has been a growing partnership between the State Governments and the Federal Government on antitrust enforcement matters. One of the most significant areas of cooperation is the grant program to aid state antitrust enforcement, authorized by Congress in the Crime Control Act of 1976 as a three year "seed" program to help the states improve their antitrust enforcement capabiities. Congress appropriated $1 million for the program in fiscal year 1977 and $10 million for each of fiscal years 1978 and 1979.

Forty-five states, the District of Columbia and Puerto Rico are participating in the program and have been awarded grants. The allocation of funds is based primarily on population, under a formula developed with the assistance of the National Association of Attorneys General. The actual grants for fiscal year 1979 ranged in size from $125,000 for the least populous states to $383,000 for the most populous. Through the end of fiscal year 1979, $20,943,000 in grants had been awarded. Over 250 new personnel have been hired by the states - more than doubling the number employed prior to the program. The states have been active in enforcement under federal law and state law. States have filed antitrust suits alleging restraints of trade in industries including automobiles, retail gasoline, barber services, franchising, and cemetaries. Several grand jury investigations have also been initiated.

The states have developed expertise in advocating competitive principles before state regulatory agencies and licensing boards. Over half of the states have instituted programs to educate their professional and occupational licensing boards on competitive issues. In many other states, the State Attorney General has issued legal opinions to licensing boards pointing out the unenforceability of certain regulations due to conflict with Federal or state antitrust laws. Many states are deeply involved in promoting competitive bidding for state and local government procurement, and in several states this effort has led to convening of grand juries to investigate possible violations of state law.

Federal - State cooperation is growing under the parens patrie program as well as under the grant program. Title III of the Hart-Scott Rodino Antitrust Improvements Act of 1976 amended the Clayton Act to permit state attorneys general to bring private treble damage actions for violations of the Sherman Act, to secure redress for damages done to consumers in their states. The provisions of Title III call for the United States Attorney General to notify the states whenever a Federal action is brought where it appears a state may be entitled to bring an action based substantially on the same alledged violation. Upon the request of a State Attorney General the Division makes relevant investigative material available to the extent permitted by law. During fiscal year 1979 the division responded to 76 requests under Title III, nearly twice the number handled the previous year. The Division also made 26 referrals to state attorneys general of possible violations that appeared more appropriate for state, rather than Federal, action.

Antitrust Commission

The National Commission for the Review of Antitrust Laws and Procedures, chaired by the Assistant Attorney General, submitted its report to the President January 22, 1979. The Commission recommended approximately 50 specific changes and reforms that would streamline and expedite complex litigation and substantially deregulate important industries that have been denied the benefits of competition.

Many of the Commission's recommendations concerning expedition of complex litigation have been implemented by the district court in the Division's monopolization case against AT&T. In addition, several of the Commission's procedural recommendations were embodied in legislation introduced in the Congress during the year.

Citations

1/ 599 F. 2d 541 (1979).
2/ 598 F. 2d 1101 (1979).
3/ 603 F. 2d 444 (1979).
4/ 438 U.S. 422 (1978).
5/ 598 F. 2d 1323 (1979).
6/ 602 F. 2d 1255 (1979).
7/ 602 F. 2d 110 (1979).
8/ 465 F. Supp. 249 (1978).
9/ 592 F. 2d 919 (1979).
10/ United States v. GAF Corp., 596 F. 2d 10 (1979).
11/ 99 S. Ct. 2326 (1979).

ANTITRUST DIVISION
WORKLOAD STATISTICS
FY 1969 - 1979

Investigations	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979
Investigations by Type of Conduct*											
Sherman §1	208	232	391	285	307	202	274	263	330	162	225
Sherman §2	30	24	43	20	27	22	14	15	25	21	20
Clayton §7	212	173	133	147	174	107	77	84	110	96	152
Clayton §8	18	16	5	6	7	1	7	4	1	2	1
Clayton §3	2	2	4	4	9	-	3	-	-	-	2
Robinson-Patman	7	2	13	2	10	-	1	-	-	-	-
Others	-	24	4	1	4	6	5	8	18	9	7
(1) Hot Line Calls											
- received	-	-	-	-	-	-	-	-	148	226	140
- antitrust related	-	-	-	-	-	-	-	-	77	124	33
- forwarded for action	-	-	-	-	-	-	-	-	39	-	25
- investigations opened	-	-	-	-	-	-	-	-	11	[illegible]	-
(2) Business reviews											
- requested	14	16	14	18	22	18	20	30	30	24	16
- granted	13	9	10	9	15	14	17	24	20	18	14
- denied	1	2	0	5	4	1	3	6	5	3	1
- declined	0	0	0	0	0	0	0	0	3	3	1
- withdrawn	0	0	1	0	0	0	0	0	0	0	0
(3) Premerger Notification											
- received	-	-	-	-	-	-	-	-	-	147	859
- investigations initiated	-	-	-	-	-	-	-	-	-	20	101
- number of cases filed	-	-	-	-	-	-	-	-	-	0	9
(4) Assigned Screening Investigations											
- initiated	-	-	-	-	-	-	-	-	-	167	136
- no. of industries	-	-	-	-	-	-	-	-	-	38	89
- preliminary inquiries resulting from screenings	-	-	-	-	-	-	-	-	-	-	30

*Does not include premerger notification, screening investigations, business reviews or hot line calls.

	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979
(5) FBI Investigations											
- initiated	16	14	9	4	9	5	19	2	3	1	0
- terminated	31	18	15	8	13	6	8	5	13	4	3
- pending	36	34	27	26	19	18	28	25	6	3	0
(6) Preliminary Inquiries											
- initiated	482	375	462	462	361	385	265	311	277	243	329
- terminated	425	463	417	417	341	362	314	310	387	284	345
- pending	528	494	531	531	543	574	525	519	365	324	308
(7) CIDs											
- no. of CID investigations											
a. initiated	25	43	31	32	22	18	15	14	43	39	46
b. terminated	42	36	27	27	22	31	22	32	31	33	42
c. pending	78	87	89	88	93	80	71	53	60	66	73
- no. of CIDs issued	74	123	135	97	127	27	45	66	246	359	700
a. documentary	-	-	-	-	-	-	-	-	188	164	367
b. written	-	-	-	-	-	-	-	-	23	119	301
c. oral	-	-	-	-	-	-	-	-	32	76	32
(8) Grand Juries											
- initiated	22	23	43	32	34	37	37	50	48	27	38
- terminated	21	17	15	27	35	29	44	33	53	52	51
- indictments returned											
a. criminal	15	5	6	16	17	21	14	12	10	18	18
b. civil	2	3	3	12	8	8	11	6	7	14	9
- pending	34	46	69	67	73	81	75	92	86	61	49
Referrals to U.S. Attorneys	-	2	-	-	2	-	4	7	1	23	6
Referrals to State Agencies	-	-	-	2	8	5	7	2	2	36	26
District Court Antitrust Cases											
Total Civil Cases											
- Filed	39	54	52	72	42	33	37	45	34	27	31
- Terminated	31	49	44	44	50	48	24	40	36	48	33
Won	30	43	42	41	44	42	13	31	27	39	29
Lost	1	4	1	1	5	3	5	5	4	3	0
Dismissed	0	2	1	2	1	3	6	4	5	6	4
- Pending	83	88	96	124	116	101	114	119	108	87	85
(1) Restraint of Trade - Civil											
- Filed	10	15	14	31	19	10	29	18	19	20	14
- Terminated	10	17	16	16	21	26	9	14	13	22	26
Won	10	16	16	16	21	24	7	11	10	20	24
Lost	0	1	0	0	0	1	1	1	0	0	0
Dismissed	0	0	0	0	0	1	1	2	3	2	2

	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979
(2) Oligopoly and Monopoly - Civil											
- Filed	3	11	15	13	5	6	3	5	2	0	2
- Terminated	5	8	11	9	7	2	7	7	3	1	2
Won	5	8	11	9	7	2	2	4	2	1	2
Lost	0	0	0	0	0	0	2	1	1	0	0
Dismissed	0	0	0	0	0	0	3	2	0	0	0
(3) Merger Cases											
- Filed	26	15	24	19	16	13	3	7	4	7	11
- Terminated	16	22	11	20	18	18	7	15	13	14	1
Won	16	18	10	18	13	10	4	9	9	10	0
Lost	0	3	1	0	4	2	3	4	3	3	0
Dismissed	0	1	0	2	1	2	0	2	1	1	1
(4) Damage Actions - Civil											
- Filed	1	4	1	1	0	2	6	1	1	3	4
- Terminated	0	0	0	1	1	0	0	1	2	2	3
Won	0	0	0	1	1	0	0	1	1	1	2
Lost	0	0	0	0	0	0	0	0	0	0	0
Dismissed	0	0	0	0	0	0	0	0	1	1	1
- Pending											
(5) Other Civil											
- Filed	3	14	4	11	5	6	2	15	3	1	5
-Terminated	3	9	8	1	6	8	2	9	7	11	5
Won	2	8	7	1	5	8	0	9	6	8	4
Lost	1	0	0	0	1	0	0	0	0	0	0
Dismissed	0	1	1	0	0	0	2	0	1	3	1
Total Criminal Cases											
- Filed	18	5	12	15	20	34	35	20	37	31	27
- Terminated	16	11	10	12	21	18	19	35	29	34	33
Won	16	10	9	12	17	15	16	33	19	29	33
Lost	0	0	1	0	3	3	3	2	8	4	0
Dismissed	0	1	0	0	1	0	0	0	2	1	0
- Pending	20	14	16	19	18	34	50	35	38	35	29
(1) Restraint of Trade - Criminal											
- Filed	13	4	9	14	19	21	29	16	34	27	24
- Terminated	16	10	8	12	18	17	12	31	23	28	28
Won	16	9	7	12	16	14	12	30	16	26	28
Lost	0	0	1	0	2	13	0	1	6	2	0
Dismissed	0	1	0	0	0	0	0	0	1	0	0

	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979
(2) Oligopoly and Monopoly - Criminal											
- Filed	2	0	2	1	1	3	1	2	1	0	0
- Terminated	1	0	0	1	2	2	3	1	3	0	1
Won	1	0	0	1	1	0	3	1	1	0	1
Lost	0	0	0	0	1	2	0	0	1	0	0
Dismissed	0	0	0	0	0	0	0	0	1	0	0
(3) Criminal Cases Charging Other Federal Crimes (Perjury, Obstruction of Justice, Mail Fraud, False Statements, etc.)											
- Filed	3	17	5	11	5	15	10	19	5	7	4
- Terminated	0	1	2	0	1	1	6	4	4	6	7
Won	0	1	2	0	0	1	3	3	2	3	7
Lost	0	0	0	0	0	0	3	1	2	2	0
Dismissed	0	0	0	0	1	0	0	0	0	1	0
Appellate Cases											
Antitrust Division Cases											
Court of Appeals											
- Filed	-	5	2	4	4	10	14	10	11	21	4
- Terminated	-	3	3	4	1	12	5	7	14	14	7
Won	-	3	2	3	1	9	4	6	7	13	6
Lost	-	0	0	1	0	3	1	1	7	1	1
Dismissed	-	0	1	0	0	0	0	0	0	0	0
Supreme Court											
- Filed	-	4	8	6	9	6	7	6	8	11	4
- Terminated	-	2	3	4	4	5	4	1	2	3	2
Won	-	2	2	2	3	3	3	1	1	2	0
Lost	-	0	1	2	1	2	1	0	1	1	0
Dismissed	-	0	0	0	0	0	0	0	0	0	0

	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979
Amicus - Antitrust Division Cases											
Court of Appeals											
- Filed	1	2	2	0	2	4	2	1	1	6	1
- Terminated	1	0	1	2	4	2	2	3	0	4	1
Won	1	0	1	2	3	2	2	3	0	2	1
Lost	0	0	0	0	1	0	0	0	0	2	0
Dismissed	0	0	0	0	0	0	0	0	0	0	0
Supreme Court											
- Filed	2	0	1	5	1	2	1	1	1	6	3
- Terminated	1	1	1	0	4	2	1	2	2	6	2
Won	1	1	0	0	4	2	1	2	2	6	2
Lost	0	0	0	0	0	0	0	0	0	0	0
Dismissed	0	0	0	0	0	0	0	0	0	0	0
Other Agencies' Cases											
Court of Appeals											
- Filed	132	142	145	150	156	182	209	208	190	201	186
- Terminated	127	147	126	131	176	122	185	122	105	112	50
Won	57	75	72	60	96	56	107	54	42	62	34
Lost	16	24	14	17	22	20	59	23	18	21	4
Dismissed	54	48	40	54	58	46	49	45	45	29	12
Supreme Court											
- Filed	14	10	6	1	17	24	6	16	8	12	5
- Terminated	8	12	7	13	19	23	11	12	15	9	3
Won	6	10	6	12	17	23	10	10	15	8	3
Lost	2	2	1	0	0	0	0	0	0	1	0
Dismissed	0	0	0	1	2	0	1	2	0	0	0
Judgment Enforcement											
Divestitures	4	7	5	3	5	18	37	21	21	25	2
Compliance investigations	70	12	18	12	13	15	19	19	40	48	11
Compliance reports	60	62	65	100	112	115	140	140	311	313	360
Judgment interpretation or modification	8	5	8	6	6	8	27	27	31	23	9
Contempt cases	0	1	1	0	2	4	4	4	5	4	1
Other enforcement inquiries	29	37	50	46	54	35	50	50	65	73	65
Decrees requiring compliance program											
- No. of decrees	2	8	12	13	25	27	7	5	15	13	21
- No. of companies	12	42	30	38	61	77	14	14	48	43	96

	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979
Consumer Affairs Proceedings*											
Civil (excludes 22A's)											
- initiated	-	-	78	176	189	169	139	159	171	178	201
- terminated	-	-	16	57	102	263	158	104	207	234	239
Criminal (includes FDA, CPSC, Odometer/Auto Info. Stat.)											
- initiated	-	-	41	73	100	101	71	68	63	37	37
- terminiated	-	-	10	56	42	96	123	46	89	56	47
Uncontested Seizures (22A's)											
- initiated	-	-	777	850	1,192	400	507	314	493	390	435
- terminated	-	-	-	-	-	-	-	-	505	455	401
FDA											
- Injunction											
a. initiated	-	-	8	17	25	17	21	29	37	41	32
b. terminated	-	-	2	10	11	21	18	27	43	42	44
- Uncontested Seizures (22A's)											
a. initiated	-	-	777	850	1,192	400	507	314	493	390	435
b. terminated	-	-	-	-	-	-	-	-	505	455	401
- Contested Seizures (22B's)											
a. initiated	-	-	3	19	24	17	9	9	17	29	33
b. terminated	-	-	1	4	7	13	12	12	20	17	39
- Suits Against FDA											
a. initiated	-	-	11	12	17	9	7	15	39	21	25
b. terminated	-	-	6	7	10	15	7	10	16	40	22
- Appeals											
a. initiated	-	-	6	9	11	27	9	16	3	16	1
b. terminated	-	-	2	4	10	16	5	8	22	14	14
- Criminal Cases											
a. initiated	-	-	38	68	91	92	38	30	37	25	24
b. terminated	-	-	10	56	38	90	107	31	49	36	33
- Miscellaneous											
a. initiated	-	-	1	1	3	2	0	0	0	0	2
b. terminated	-	-	0	1	0	3	0	0	0	0	0
FTC											
- Civil Penalty											
a. initiated	-	-	7	20	12	10	11	4	17	33	18
b. terminated	-	-	1	5	8	11	3	7	10	30	20

*Consumer Affairs Section not in existence prior to January 1971

	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979
- Subpoena Enforcement											
a. initiated	-	-	4	6	9	16	10	2	0	0	0
b. terminated	-	-	0	6	5	11	11	5	13	0	0
- Suits Against FTC											
a. initiated	-	-	0	4	5	3	1	21	1	4	0
b. terminated	-	-	0	1	2	5	11	7	27	5	2
- §9 Forfeiture											
a. initiated	-	-	0	0	0	0	0	0	14	7	37
b. terminated	-	-	0	0	0	0	0	0	0	4	20
- Premerger Notification											
a. initiated	-	-	0	0	0	0	0	0	0	1	1
b. terminated	-	-	0	0	0	0	0	0	0	0	2
- Miscellaneous											
a. initiated	-	-	0	0	0	0	0	0	0	0	1
b. terminated	-	-	0	0	0	0	1	0	0	0	0
CPSC											
- Seizure											
a. initiated	-	-	37	77	58	51	35	13	6	4	26
b. terminated	-	-	3	16	41	154	40	18	26	13	17
- Suits Against CPSC											
a. initiated	-	-	0	1	2	1	9	8	9	1	8
b. terminated	-	-	0	1	2	0	2	5	17	9	2
- Order Enforcement											
a. initiated	-	-	0	0	0	0	0	2	6	0	0
b. terminated	-	-	0	0	0	0	0	0	1	4	2
- Civil Penalty											
a. initiated	-	-	0	0	0	0	0	2	1	3	2
b. terminated	-	-	0	0	0	0	0	0	1	2	4
- Injunction											
a. initiated	-	-	1	0	0	1	1	1	3	9	9
b. terminated	-	-	0	1	0	1	1	0	1	5	7
- Appeals											
a. initiated	-	-	0	1	1	0	16	4	7	4	1
b. terminated	-	-	1	0	1	0	3	1	2	5	10
- Criminal Cases											
a. initiated	-	-	3	3	8	8	22	33	19	0	2
b. terminated	-	-	0	0	4	6	15	15	32	13	4

	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979
- Miscellaneous											
a. initiated	-	-	0	0	0	0	0	0	0	0	1
b. terminated	-	-	0	0	0	0	0	0	0	0	0
Other Miscellaneous											
- Odometer/Auto Info. Stat.											
a. initiated	-	-	0	2	1	1	11	5	7	12	11
b. terminated	-	-	0	0	0	0	1	0	8	7	10
- Truth-in-Lending											
a. initiated	-	-	0	9	22	14	10	33	11	14	4
b. terminated	-	-	0	1	5	3	38	4	8	25	27
Attorney Days in Court	-	-	1,833	1,872	1,962	2,385	5,642	6,123	4,912	5,167	4,628
Case Results											
Individuals Indicted	28	14	34	24	42	84	82	101	88	103	62
Total Amount Individual Fines ($000)	253	243	40	203	221	175	645	578	743	1,231	2,098
- No. Individuals	55	37	18	24	46	32	44	72	87	72	76
No. Individuals Sentenced (Actual Jail)	5	3	7	1	8	5	8	6	26	29	19
No. Individuals Sentenced (Incl. Probation)	6	11	7	14	13	26	30	34	58	71	58
Total Number of Actual Jail Days (Sentenced-Served)	143	111	270	180	450	50	690	560	1,561	2,921	2,380
Corporations Indicted	80	16	56	51	69	121	127	110	147	147	182
Total Corporation Fines	894	1,512	268	977	1,208	1,263	2,200	3,135	2,597	11,214	23,338
- No. of Corporations	75	64	29	45	84	64	73	119	89	136	135
Total Corporation Damages	0	175	540	115	225	0	607	770	0	0	6,871
- No. of Corporations	0	5	11	1	4	0	5	8	0	0	35
Total Corporation Contempt Fines ($000)	0	38	0	0	5	600	75	0	0	0	0
- No. of Corporations	0	3	0	0	1	2	2	0	0	0	0
Cases Won Without Completing Litigation											
- Consent	17	36	39	31	35	34	10	28	22	34	27
- Conviction by Pleas	15	10	6	12	16	15	14	29	17	27	28
- Mergers Abandoned	8	4	2	7	6	1	2	1	3	3	0
- Other Conduct Abandoned	-	2	-	-	1	-	2	-	1	2	1
- Dismissed	-	-	-	-	-	-	-	2	1	2	-

	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979
Matters Won Without Filing Case											
- Mergers Abandoned	27	16	11	14	14	13	10	12	15	13	12
- Other Conduct Abandoned	9	4	4	7	7	7	7	5	12	16	8
Participation in Regulatory Agency Proceedings											
CAB	-	21	20	10	9	6	-	13	29	27	6
NRC	-	-	-	-	-	-	-	2	-	8	3
EPA	-	-	-	-	-	-	-	-	2	-	-
DOE/FEA	-	-	-	-	-	-	-	-	5	8	2
ERA	-	-	-	-	-	-	-	-	-	4	1
FERC	-	-	-	-	-	-	-	-	2	4	5
SEC	1	2	1	2	6	4	9	5	2	2	3
FDIC	-	-	-	-	-	-	-	-	-	-	1
FHB	-	-	4	5	2	3	-	2	-	2	1
FCC	8	4	16	4	5	13	5	4	5	9	1
FMC	-	-	-	-	-	-	-	2	16	14	7
ICC	-	-	-	-	-	-	-	2	25	47	19
FHLBB	-	-	-	-	-	1	1	-	1	1	3
Postal Rate Commission	-	-	-	-	-	-	-	-	-	1	3
Other	-	40	46	46	22	30	3	2	3	1	-
Participation in Bank Merger Proceedings											
Bank Merger Screenings	-	-	-	-	-	-	-	299	485	520	473
Bank Letters	237	224	170	224	248	305	335	113	217	209	196
Savings and Loan Letters	10	38	21	20	22	15	18	8	8	10	10
Bank Holding Letters	68	129	158	24	21	3	5	6	8	6	5
Merger Letters	256	201	143	197	233	195	150	132	201	193	181

	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979
Advice to States											
No. of Grants	-	-	-	-	-	-	-	-	6	43	56
Amount of Grants Awarded	-	-	-	-	-	-	-	-	1,000	9,944	10,000
Reports from States Reviewed	-	-	-	-	-	-	-	-	75	450	560
Assistance on State Antitrust Legislation	-	-	-	-	-	-	-	-	-	12	9
4-F (Hart-Scott-Rodino) Information	-	-	-	-	-	-	-	-	11	42	76
Training Provided (no. of individuals)											
a. DOJ	-	-	-	-	-	-	-	-	-	20	26
b. NAAG	-	-	-	-	-	-	-	-	-	-	280
Advice to States on Professional Activities	-	-	-	-	-	-	-	-	-	50	-
Advice to Foreign Governments											
Advice to and Negotiations with Foreign Governments	-	-	20	13	17	5	16	18	18	11	15
Advice to ITC	1	3	2	5	1	4	2	10	5	7	3
Advice to OECD	-	-	-	22	24	11	15	20	22	30	37
Other Antitrust Advice											
Advice to other Agencies (Statutory)	-	25	82	25	23	156	101	55	79	307	239
Advice on Surplus Property	45	46	45	47	47	76	55	53	48	11	7
Representation on Interagency Task Forces/Committees	-	-	-	-	-	-	-	1	3	28	35
Speeches											
a. Assistant Attorney General	9	11	4	5	5	6	8	8	17	15	14
b. Others	11	45	32	24	35	28	38	31	28	32	47
Special Projects	-	-	-	2	-	-	1	26	38	52	49
Congressional Appearances	7	17	8	16	8	19	26	21	17	25	28
Cong/OMB Requests for Comments	247	220	497	207	304	271	277	243	241	273	345
White House Referrals	14	5	20	47	23	23	37	101	335	117	96
Congressional Correspondence	570	118	757	465	382	322	542	855	690	593	604
Other Correspondence	258	989	1,230	1,855	1,122	924	1,387	1,027	3,408	3,560	2,905
Statutory Reports	1	1	7	9	5	7	2	17	38	56	32
Freedom of Information Act Requests	0	0	0	0	0	0	0	122	221	269	341
								[illegible]	[illegible]	[illegible]	31

ANTITRUST DIVISION
AUTHORIZATION REQUEST
FISCAL YEAR 1981

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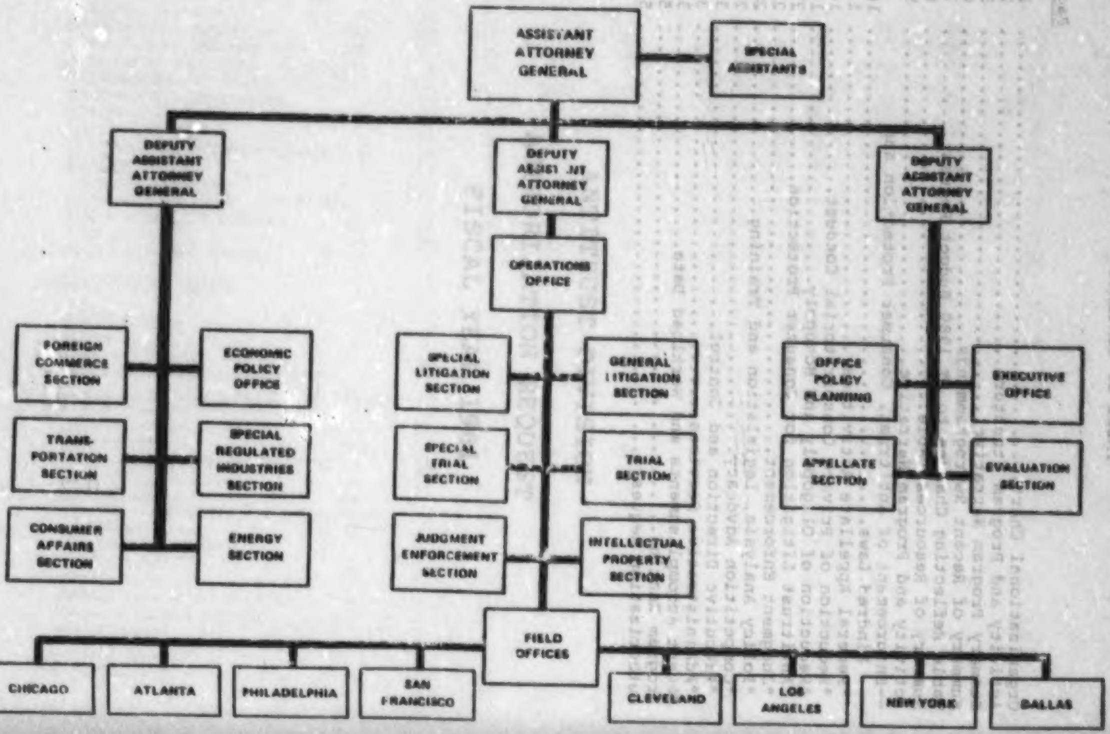
ANTITRUST DIVISION


ASSISTANT ATTORNEY GENERAL
SPECIAL ASSISTANTS
DEPUTY ASSISTANT ATTORNEY GENERAL
DEPUTY ASSISTANT ATTORNEY GENERAL
DEPUTY ASSISTANT ATTORNEY GENERAL
FOREIGN COMMERCE SECTION
ECONOMIC POLICY OFFICE
TRANS-PORTATION SECTION
SPECIAL REGULATED INDUSTRIES SECTION
CONSUMER AFFAIRS SECTION
ENERGY SECTION
OPERATIONS OFFICE
SPECIAL LITIGATION SECTION
GENERAL LITIGATION SECTION
SPECIAL TRIAL SECTION
TRIAL SECTION
JUDGMENT ENFORCEMENT SECTION
INTELLECTUAL PROPERTY SECTION
OFFICE POLICY PLANNING
EXECUTIVE OFFICE
APPELLATE SECTION
EVALUATION SECTION
FIELD OFFICES
CHICAGO
ATLANTA
PHILADELPHIA
SAN FRANCISCO
CLEVELAND
LOS ANGELES
NEW YORK
DALLAS

ANTITRUST DIVISION ACTIVITY AND PROGRAM STRUCTURE

Appropriation: Antitrust Division

ACTIVITY	PROGRAM	PROGRAM ELEMENT*
1. Enforcement of Antitrust, Consumer Protection and Kindred Laws	1. Federal Appellate Activities	1. Antitrust Appeals
	2. Reduction of Private Conspiratorial Conduct	2. Reduction of Private Conspiratorial Conduct
	3. Reduction of Oligopoly and Monopoly	3. Reduction of Oligopoly and Monopoly
	4. Antitrust Litigation for Consumer Protection	4. Antitrust Litigation for Consumer Protection
	5. Judgment Enforcement	5. Judgment Enforcement
	6. Policy Analysis, Legislation and Training	6. Legislative Support Activities
		7. Attorney Training
		8. Antitrust Economic Policy Activities
		9. Antitrust Policy Planning and Analysis
	7. Competition Advocacy	10. Competition Advocacy
	8. Executive Direction and Control	11. Policy Development and Implementation
		12. Management
		13. Freedom of Information and Privacy
	9. Administrative Services	14. General Services Support
		15. Systems Support

*Program elements are provided as a guide to illustrate some of the more typical functions conducted within the program.

ANTITRUST DIVISION
Authorization Request -- Fiscal Year 1981

SUMMARY PROGRAM NARRATIVE

Competition is a process that serves consumers by fostering innovation, an efficient allocation of resources, and a higher quality of goods and services at reasonable prices. The mission of the Antitrust Division is to promote competition, which is, as the Supreme Court has recognized, the "fundamental economic policy" of the United States.

The Division fulfills this mission by attacking unlawful or unnecessary restraints on competition, whether they are imposed by private or public action. Private restraints on competition are terminated or deterred through enforcement of the antitrust laws in criminal and civil proceedings. Competition advocacy, that is, participation in regulatory processes, competition analysis, and evaluation of the impact of new legislation on the marketplace, are the means by which the Division seeks to ensure that government action is pro-competitive or not unnecessarily anticompetitive.

The Division also supports Government programs regulating abuses of market power by participation with regulatory agencies in proceedings to enforce or review their orders, and initiates civil and criminal enforcement proceedings on behalf of Federal consumer protection agencies. In the Division's recent budget submissions, the major directions outlined for future years included formulation and implementation of a sensible energy policy; development of a theory and strategy to evaluate and challenge conduct that facilitates noncompetitive behavior in concentrated industries; increased emphasis on regulatory reform; continued investigation and prosecution of price-fixing cases; improvement of the handling of complex antitrust cases; and increased attention to merger enforcement. Progress has been made in each of these major areas, and plans for Fiscal Year 1981 include continuing emphasis on them.

Competition in the various energy industries is an increasingly important part of the Division's evolving antitrust policy. Major activities include the international oil investigation, development and implementation of an Outer Continental Shelf leasing policy, participation in the Energy Department regulatory process, development of structural standards to evaluate the competitive impact of Federal coal leases, proposing effective pipeline rate regulation reform, and evaluating options for fostering competition in the pipeline industry through structural remedies. The realization that the nation's energy resources are finite and the increased costs of all fuels have focused public attention on the energy industry. Energy is properly in the public spotlight; it will continue to have a high priority within the Antitrust Division.

The Division has taken a systematic approach to dealing with noncompetitive behavior in concentrated markets. On the investigatory front, the Division is continuing its preliminary survey of all concentrated manufacturing industries. This survey will provide the Division with a systematic body of knowledge on concentrated industries that could provide guidance for legislative initiatives. The Division has already opened 30 formal investigations as a result of this program. If the review provides a sound basis for suits, they will be brought. If cases are not warranted, a public report on the results of the effort will be valuable. The effort is a major one that will continue to be a priority in Fiscal Year 1981.

In a related area, the Division's merger enforcement program will continue to receive increased attention in Fiscal Year 1981 as a result of the accelerating merger movement in the economy and implementation of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. The Division is committed to using and developing existing merger law to prevent mergers that may produce specifically identifiable anticompetitive results. In addition, the Division has supported legislation that would control certain large conglomerate mergers, as well as legislation that would prohibit major oil companies from acquiring certain other large entities, unless such mergers are shown to be justified in terms of benefits to competition or enhancement of energy availability.

The Division supports appropriate measures to achieve reform in the surface transportation industries. The Division will continue its advocacy in proceedings before regulatory agencies for the elimination of unnecessary regulation and agency adoption of the least anticompetitive means of achieving overriding social purposes.

Division policy strongly supports criminal prosecution of hard-core violations of the antitrust laws. Public awareness that price-fixing, for example, is a serious crime with grave implications is an important objective in the battle to preserve and foster a competitive economy. Accordingly, the Division's commitment to criminal antitrust enforcement and appropriately severe sentences when convictions are obtained will continue to receive major emphasis, and will serve as a substantial deterrent to future price-fixing, bid-rigging and other conspiracies resulting in higher prices to consumers.

Efficient case management in antitrust must be given maximum priority. Progress in handling complex antitrust cases has occurred on two fronts: use of modern information processing technology to assist attorneys and economists in investigations and cases; and recommendations by the Antitrust Review Commission on procedural steps to control and expedite complex cases. With the formation of the Information Systems Support Group in Fiscal Year 1978, the Division improved substantially its ability to provide computer-aided systems for processing the massive volumes of documents and complex economic data associated with big antitrust cases. The Division will continue to use current technology to further its litigative activities where appropriate.

The recommendations made by the Antitrust Review Commission in its report, submitted to the President in January 1979, cover a range of procedural steps to reduce unnecessary delay in complex antitrust cases, e.g., improved judicial management and control, use of time limits, control of discovery, use of sanctions for dilatory behavior, and methods for early definition and resolution of issues. The Antitrust Division supports the Commission's recommendations and will continue to be involved in implementing them in Fiscal Year 1981.

The authorization submission addresses the Antitrust Division's major programs and initiatives to promote and maintain competition in the American economy in more detail. Each program and resource request is designed to further that mission. The Fiscal Year 1981 resource request, if approved, should maintain the Division's ability to fulfill its statutory mandates and carry out the President's policies.

SUMMARY OF RECENT REPROGRAMMING

No reprogramming is requested.

ANTITRUST DIVISION
TABLE TO REFLECT FY 1980 CHANGES
(In Thousands of Dollars)

ACTIVITY/PROGRAM	PRESIDENT'S BUDGET REQUEST FY 1980			CONGRESSIONAL APPROPRIATION ACTIONS ON FY 1980 REQUEST			REPROGRAMMING REQUESTED THRU DECEMBER 31, 1979			EFFECT OCTOBER 1979 PAY RAISE *			FY 1980 PROGRAM SUPPLEMENTAL **			FY 1980 AVAILABLE BUDGET AUTHORITY *		
	Pos.	WY	BA	Pos.	WY	BA	Pos.	WY	BA	Pos.	WY	BA	Pos.	WY	BA	Pos.	WY	BA
Enforcement of Antitrust, Consumer Protection and Kindred Laws:																		
Federal Appellate Activities..	31	25	$914	...	...	...	...	...	...	...	...	956	...	...	...	31	25	$970
Reduction of Private Conspiratorial Conduct......	253	226	12,760	...	...	...	...	...	...	...	...	479	...	...	...	253	226	13,240
Reduction of Oligopoly and Monopoly....................	276	262	18,136	...	...	...	...	...	...	...	...	544	...	...	...	276	262	18,680
Antitrust Litigation for Consumer Protection.........	25	23	831	...	...	...	...	...	...	...	...	49	...	...	...	25	23	880
Judgment Enforcement..........	38	37	1,242	...	...	...	...	...	...	...	...	64	...	...	...	38	37	1,306
Policy Analysis, Legislation, and Training................	121	117	4,115	...	...	...	...	...	...	...	...	231	...	...	...	121	117	4,346
Competition Advocacy..........	76	64	2,226	...	...	...	...	...	...	...	...	125	...	...	...	76	64	2;351
Executive Direction and Control......................	46	43	1,444	...	...	...	...	...	...	...	...	81	...	...	...	46	43	1,525
Administrative Services.......	73	63	1,837	...	...	-48	...	...	...	...	...	75	...	...	...	73	63	1,864
Antitrust State Enforcement...	...	...	70	...	...	...	...	...	...	...	...	...	...	...	$4,000	...	...	4,070
Other Than Permanent Workyears....................	...	91	...	...	...	...	...	...	...	...	...	...	...	...	...		91	
Workyears Associated With Sunday and Overtime.........	...	16	...	...	...	...	...	...	...	...	...	...	...	...	...		16	
TOTAL....................	939	967	43,592	...	...	-48	...	...	...	...	...	1,704	...	...	4,000	939	967	49,248

*Reflects the effect of all the additional funding to the pay raise; ($1,704,000) available budget authority includes transfer of funds from BOP.
**Antitrust State Grant Program

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
AUTHORIZATION REQUEST - FISCAL YEAR 1981
SUMMARY OF RESOURCES

Estimates By Budget Activity	FY 1979 AS ENACTED			FY 1979 ACTUAL			FY 1980 AS ENACTED			FY 1981 ESTIMATE			FY 1982 ESTIMATE		
	Perm. Pos.	WY	Amt.(000)	Perm. Pos.	WY	Amt.(000)	Perm. Pos.	WY	Amt.(000)	Perm. Pos.	WY	Amt.(000)	Perm. Pos.	WY	Amt.(000)
Enforcement of Antitrust, Consumer Protection and Kindred Laws	977	860	$37,277	977	860	$37,277	939	860	$43,544	939	856	$45,400	939	856	$45,921
Antitrust State Enforcement	...	...	10,231	...	...	10,231	...	...	...	...	...	...	...	...	...
TOTAL	977	860	47,508	977	860	47,508	939	860	43,544	939	856	45,400	939	856	45,921
Other Than Permanent Workyears		91			91			91			91			91	
Workyears Associated with Holiday and Overtime		16			16			16			16			16	
TOTAL Workyears		967			967			967			963			963	

Estimates By Program	FY 1979 AS ENACTED			FY 1979 ACTUAL			FY 1980 AS ENACTED			FY 1981 ESTIMATE			FY 1982 ESTIMATE		
	Perm. Pos.	WY	Amt.(000)	Perm. Pos.	WY	Amt.(000)	Perm. Pos.	WY	Amt.(000)	Perm. Pos.	WY	Amt.(000)	Perm. Pos.	WY	Amt.(000)
Enforcement of Antitrust, Consumer Protection and Kindred Laws															
Federal Appellate Activities	31	25	$881	31	25	$881	31	25	$914	31	25	$943	31	25	$962
Reduction of Private Conspiratorial Conduct	264	226	10,337	264	226	10,337	253	226	12,769	253	225	13,170	253	225	13,443
Reduction of Oligopoly and Monopoly	288	262	14,401	288	262	14,401	276	262	18,136	276	261	18,634	276	261	19,087
Antitrust Litigation for Consumer Protection	25	23	803	25	23	803	25	23	831	25	23	857	25	23	874
Judgment Enforcement	38	37	1,280	38	37	1,280	38	37	1,242	38	37	1,281	38	37	1,307
Policy Analysis, Legislation, and Training	127	117	4,141	127	117	4,141	121	117	4,115	121	116	4,280	121	116	4,366
Competition Advocacy	80	64	2,230	80	64	2,230	76	64	2,226	76	63	2,314	76	63	2,380
Executive Direction and Control	46	43	1,184	46	43	1,184	46	43	1,444	46	43	1,492	46	43	1,522
Administrative Services	78	63	1,900	78	63	1,900	73	63	1,709	73	63	2,520	73	63	2,081
Antitrust State Enforcement	...		10,231	...		10,231	...		78	...		...			...
TOTAL	977	860	47,508	977	860	47,508	939	860	43,544	939	856	45,400	939	856	45,921
Other Than Permanent Workyears		91			91			91			91			91	
Workyears Associated with Holiday and Overtime		16			16			16			16			16	
TOTAL Workyears		967			967			967			963			963	

ANTITRUST DIVISION

Authorization Request -- Fiscal Year 1981

Activity and Program Narrative

The activity and program structure of the Antitrust Division consists of one activity and nine programs. The following sections present a description of the programs of the Division, and a discussion of the program justification, long range goals, short term objectives, alternative approaches, and expected impact of the programs in FY 1981. In addition, principal statutory authority for conducting each program is cited.

ENFORCEMENT OF ANTITRUST, CONSUMER PROTECTION AND KINDRED LAWS

This activity consists of the following nine programs:

- **Federal Appellate Activities**
- **Reduction of Private Conspiratorial Conduct**
- **Reduction of Oligopoly and Monopoly**
- **Antitrust Litigation for Consumer Protection**
- **Judgment Enforcement**
- **Policy Analysis, Legislation and Training**
- **Competition Advocacy**
- **Executive Direction and Control**
- **Administrative Services**

FEDERAL APPELLATE ACTIVITIES

The purposes of this program are to act on antitrust cases before the Supreme Court as authorized by the Solicitor General; represent the interests of the United States in the courts of appeals in all civil and criminal cases brought by the United States under the Federal antitrust laws; represent the United States in proceedings to review orders of certain regulatory agencies; and, when warranted, participate as *amicus curiae* in private antitrust cases.

Program justification.

The Division's responsibility for appeals from decisions by district courts in antitrust cases and for participation as *amicus curiae* is defined by 28 C.F.R. §0.20 and 28 C.F.R §0.40(a). Authority to represent the Interstate Commerce Commission, Federal Maritime Commission and the Nuclear Regulatory Commission in proceedings to review orders is contained in 28 U.S.C. §2341-2350. The Civil Aeronautics Board is represented pursuant to the Attorney General's responsibility for the conduct of Government litigation as authorized in 28 U.S.C. §§515 and 519 and 28 C.F.R. §0.41(e). Responsibility for appeals resulting from the Food, Drug and Cosmetic Act, statutes administered by the Consumer Product Safety Commission, certain proceedings under the Federal Alcohol Administration Act, and the enforcement of Federal Trade Commission orders in suits for statutory penalties is outlined in 28 C.F.R. §0.41(b) and (f)-(h).

The appellate program is an essential continuation of the Division's antitrust enforcement efforts at the district court level. The Division is responsible for defending favorable antitrust judgments on appeal. When a district court issues a decision adverse to the Government in an antitrust case, Divison staff analyze the decision and record and recommend for or against appeals. If the Solicitor General authorizes appeal to the court of appeals, the Division is responsible for preparing appeal documents. Similarly, the Division must recommend to the Solicitor General whether or not to appeal adverse decisions in the courts of appeals. If appeal to the Supreme Court is authorized, the Division prepares the petition for writ, the brief on the merits and the record appendix. In all cases in which the United States or a client agency is respondent in the Supreme Court, the Division prepares the brief in opposition to *certiorari* and the brief on the merits if the petition is granted. All briefs in appeals to the Supreme Court are reviewed by the Solicitor General's office before filing.

When amicus participation in private cases is considered, the Division follows the same process outlined above. Private antitrust litigation has increased substantially in recent years. Increased amicus participation is desirable, and frequently required, to protect the Government's interest in the development and enforcement of antitrust law.

In the case of regulatory proceedings, Division attorneys review the decision and record and recommend either support of the agency or a separate position by the United States. As a necessary corollary to the Division's increasing participation in regulatory proceedings to advocate competition policy, it is increasingly concerned with further advocacy of competition issues in appeals taken from those proceedings.

The appellate program will be funded in FY 1981 at the same level as in FY 1980, with approved adjustments for uncontrollable increases. This level of funding is essential for the Division to provide timely and high quality representation of the Government in the appellate process. The need to defend felony convictions, the need to foster sound and consistent development of the law, and the continuing emphasis on the advocacy of competition issues in appeals taken from regulatory proceedings require continuation of funding at the current level.

Long-range goals.

1. To continue to support the sound and consistent development and enforcement of antitrust law through the expert prosecution and defense of appeals in antitrust matters and participation as amicus curiae.

2. To continue to provide effective representation before courts of appeals and the Supreme Court in proceedings to review orders of certain regulatory agencies.

Short-term objectives.

- To defend successfully appeals by defendants convicted in antitrust felony prosecutions and those subject to civil penalties or injunctive relief.

- To meet the needs created by the Division's increasing participation in regulatory proceedings to advocate competition policy.

-- To increase *amicus* participation in private antitrust litigation to protect the interests of the United States in the development and enforcement of antitrust law.

Alternatives.*

There are no practical alternatives to achieve the objectives and fulfill the purposes of this program effectively.

Impact of short-term ojectives.

-- The interests of the United States will continue to be represented effectively in cases brought by the United States under antitrust laws, in the review of certain regulatory agencies, and in matters warranting *amicus curiae* participation.

-- The affimation of criminal convictions and sentences on appeal will help to deter future violations of the antitrust laws.

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* Alternatives discussed here and elsewhere in this request do not necessarily reflect the opinions of the President, the Attorney General, nor the Antitrust Division.

REDUCTION OF PRIVATE CONSPIRATORIAL CONDUCT

The purpose of this program is to deter private conspiratorial conduct by investigating and litigating violations of Section 1 of the Sherman Act (15 U.S.C. § 1). Criminal prosecutions are employed to punish violators; civil actions seek to recover damages to the Government and secure injunctions against the continuation or renewal of illegal conduct.

Program justification.

The Division's responsibility for this program is set forth in 28 C.F.R. §0.40(a).

The investigation and prosecution of price-fixing, bid-rigging, customer allocation, and other agreements among private parties intended to reduce competition and maintain or raise the price of goods and services, is justified by the consumer impact of such conspiratorial conduct. Price-fixing, for example, is a willful violation of the criminal law -- a major white collar crime that takes money directly and dramatically from the pocketbooks of consumers and should not go undetected and unpunished. Through its enforcement program, the Division also seeks to deliver the message to would-be offenders that detection, prosecution, conviction and punishment are significant risks for those who engage in price-fixing and other conspiratorial conduct.

In addition to emphasizing the investigation and prosecution of violations, continued emphasis has been placed on persuading judges, with some success, to levy appropriately severe sentences when convictions are obtained. Prosecution results for fiscal year 1979 indicate a continuing upward trend in severity of sentences. In fiscal year 1979, fines and recoveries totalled more than $32 million, compared to $12.4 million in 1978, and individuals sentenced to incarceration received an average sentence of four months, compared to an average of three months the previous year. The courts have clearly responded to the policy message sent by Congress in changing criminal antitrust violations from a misdemeanor to a felony for all violations occurring after December 1974. The increased severity of sentences, along with the Division's continued vigilance in investigating possible violations of the law, serve as a substantial deterrent to future price-fixing, bid-rigging and other conspiracies.

A wide range of investigatory techniques is used in this program, including staff and FBI investigations, Civil Investigative Demands, and grand jury investigations. In addition, the Division monitors private activity and market performance through its litigating sections and field offices and employs professional economists, frequently with computer assistance, to collect and analyze regional and national market data, with special emphasis on highly concentrated industries.

The Division also seeks to educate the public, the business community and the legal profession with respect to the principles of the antitrust laws and enforcement policies, and seeks to maximize competition among those bidding under the Government procurement program by coordinating with and advising other executive agencies on their property acquisition policies.

Resource increases for this program in FY 1981 will provide data processing support. These funds will be used primarily in major investigations and cases for the continuation of document indexing, retrieval, and organization. In part because of automated data processing, business enterprises and the economy as a whole are increasingly able to assimilate large amounts of information. This increasing sophistication, and its impact upon the antitrust laws, have added depth to the investigative expertise required of effective antitrust lawyers. Specifically, these factors have prompted the use of computer assisted methods of organizing and managing case materials. The weight of current evidence is that, with proper training and planning, these methods can be used to make very large and complex cases manageable, and to provide litigators with cost effective alternatives to traditional manual methods.

Long-range goal.

To promote and maintain competition in the American economy by reducing private conspiratorial conduct to restrain trade or commerce.

Short-term objectives.

-- To continue Division emphasis on the investigation and prosecution of price-fixing cases and other restraints of trade and seek stiff penalties, including jail terms, for individual violators.

-- To limit rate-setting in regulated industries strictly to the sphere in which Congress has expressly authorized it to exist.

- -- To maximize competition among those bidding under the government procurement program by coordination with and advice to other executive agencies on their property acquisition policies.
- -- To educate the public, business, and legal profession with respect to the principles of antitrust laws and enforcement policies.
- -- To continue to provide automated data processing support to major investigations and cases in order to organize and process large amounts of information efficiently.

Alternatives.

There are no known suitable alternative methods that would achieve the stated objectives and fulfill the purpose of this program.

Impact of short-term objectives.

- -- Convictions and stiff sentences for price-fixing will deter future violations. The rewards will flow to the economy and to consumers in the form of lower prices and fair competition.
- -- The systematic application of computer technology to support major investigations and cases will maintain the productivity of personnel, the quality of investigations and preparation for trial, and the Division's success rate in promoting competition.

REDUCTION OF OLIGOPOLY AND MONOPOLY

The primary purpose of this program is to prevent and eliminate illegal concentration of economic power in order to keep prices at competitive levels, and to prevent or dissipate concentrations of economic power that may threaten the economic, social and political way of life in the United States. Resource commitment to this program is supported by general agreement of economists that the potential economic benefits of eliminating patterns of monopoly and undue concentration in industry are very substantial.

Program justification.

The principal statutes enforced under this program are Section 2 of the Sherman Act (15 U.S.C. § 2) and Section 7 of the Clayton Act (15 U.S.C. § 18). The Division's responsibility for this enforcement program is found in 28 C.F.R. §0.40(a).

Existing monopolies and oligopolies are attacked primarily under Section 2 of the Sherman Act. Major cases attacking undue concentration of economic power are prolonged, require large amounts of professional resources, are bitterly contested, and rarely can be terminated through negotiated settlement. Major current activities expected to be active in FY 1981 include the AT&T case, which is scheduled to go to trial in September 1980, and possibly the IBM case.

Fortunately, single-firm monopolies are relatively rare in the modern American economy. Competitive problems are found more frequently in oligopoly markets -- those dominated by a few large sellers. A few dominant firms in an oligopolistic market, recognizing their interdependence, may be able to coordinate their decision-making so as to achieve a monopoly-like level of performance without an overt agreement. In FY 1981, the Division will complete its systematic survey of all concentrated manufacturing industries to identify such "shared monopolies." So far in this effort, the Division has conducted 343 screening investigations of 127 industries and has opened 30 formal investigations as a result of this screening.

Two conditions generally must exist for firms to reach the position where their price and output decisions can be interdependently made. First, firms must be able to reach some consensus as to the right noncompetitive price structure. Second, firms must be able to detect rivals who might otherwise succeed in gaining increased profits by undercutting the consensus price.

Concentration plays a very definite role in the creation of these two shared monopoly prerequisites. As a market becomes more concentrated, firms will have relatively less difficulty both in reaching a consensus and in detecting undercutting rivals. With fewer major firms, there are usually fewer combinations of complicating factors. Also, with fewer firms the incentive to cut prices is lower, not only because the risk of getting caught is higher, but because the potential benefits, even if undetected, are lower: a firm with a greater percentage of the market has less remaining market to gain.

Because oligopoly lies on a continuum between the theoretical extremes of pure competition and monopoly, economists have some difficulty predicting whether, under given circumstances, a group of firms is likely to act more like joint monopolists or competitors in maximizing profits. The "circular dependence" of oligopolists, who take into account one another's actual or presumed responses in making business decisions, creates severe analytical difficulties. Yet any legal approach to the problem must rest in large part upon reasonably defensible economic conclusions regarding the behavior of firms in highly concentrated industries. It is an important and valuable public service to investigate major concentrated industries even if the only result is the conclusion that they are functioning reasonably competitively and within the law. Where the Division finds conduct or structures harmful to competition, it is prepared to employ all aspects of the Sherman Act's Sections 1 and 2 in challenging them.

Mergers and acquisitions that may tend to substantially eliminate competition by creating a monopoly or oligopolistic market structure are attacked primarily under Section 7 of the Clayton Act. The Division's merger enforcement program has taken on added importance because the economy is in the midst of an accelerating merger movement. The Division monitors proposed mergers and acquisitions of corporations engaged in interstate or foreign commerce, responds to Business Review requests from interested corporations proposing merger or acquisition, and investigates a large number of transactions. It is essential, for this program to be effective, that all mergers and acquisitions of any substantial size be investigated. An effort must be made to enjoin all such transactions when a violation of the law is indicated. The Division coordinates its investigations with the Federal Trade Commission (FTC) through an informal liaison agreement that avoids duplicative efforts.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a) provides for premerger notification to the Division and the FTC of all substantial transactions, and for a waiting period during which either of the agencies can determine whether to seek a preliminary injunction against consummations. The regulations implementing the Act became effective in September 1978 (Federal Register, July 31, 1978, Part II). During the first full year of implementation of the premerger notification, the Division received 859 notifications. After an initial review of all notifications, 101 investigations were initiated and nine cases were filed challenging the proposed merger or acquisition. The Division expects a significant level of merger activity to continue in FY 1981.

Resource increases for this program in FY 1981 will provide data processing support. These funds will be used primarily in major investigations and cases for the continuation of document indexing, retrieval, and organization. In part because of automated data processing, business enterprises and the economy as a whole are increasingly able to assimilate large amounts of information. This increasing sophistication, and its impact upon the antitrust laws, have added depth to the investigative and litigative expertise required of effective antitrust lawyers. Specifically, these factors have prompted the use of computer assisted methods of organizing and managing case materials. The weight of current evidence is that, with proper training and planning, these methods can be used to make very large and complex cases manageable, and to provide litigators with cost effective alternatives to traditional manual methods.

Long-range goal.

To promote and maintain competition in the American economy through the investigation and litigation of noncompetitive conduct in concentrated industries, development of cost-effective legal initiatives designed to make oligopolies more competitive, and attacking mergers and acquisitions which may tend to eliminate competition by creating a monopoly or oligopolistic market structure under Section 7 of the Clayton Act.

Short-term objectives.

-- To enforce effectively the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

-- To promote independent, competitive behavior in concentrated industries through the initiation of investigations and litigation in major concentrated industries.

-- To develop and implement managerial and procedural reforms that will allow big cases to be brought to conclusion more expeditiously.

- To continue to provide automated data processing support to major investigations and cases in order to more efficiently organize and process large amounts of information.

- To litigate to a successful conclusion the major monopolization case against AT&T.

Alternatives.

There are no known suitable alternative methods that would achieve the stated objectives and purpose of this program.

Impact of short-term objectives.

- Competition will be fostered and the Division will demonstrate that noncompetitive conduct and structure resulting from artificial monopoly and oligopoly are not immune from antitrust enforcement.

- The systematic application of computer technology to support major investigations and cases will maintain the productivity of personnel, the quality of investigations and preparation for trial, and the Division's success rate in promoting competition.

ANTITRUST LITIGATION FOR CONSUMER PROTECTION

The purpose of the Division's consumer protection program is to assist various Federal agencies in the effective implementation of responsibilities to the consumer through the control, direction and conduct of litigation to enforce consumer protection statutes.

Program justification.

Statutory authority for the program derives from the Attorney General's responsibility for the conduct of Government litigation under 28 U.S.C. 516, 519, and is delegated to this Division by 28 C.F.R. §.41(h). Principal client agencies served are the Food and Drug Administration (FDA), Consumer Product Safety Commission (CPSC) and Federal Trade Commission (FTC).

The statutes enforced include the Food, Drug and Cosmetic Act, the Federal Trade Commission Act, the Consumer Product Safety Act, the Hazardous Substances Act, and the Truth-in-Lending Act. The Division is responsible for coordinating and supervising the prosecution and defense of cases involving client agencies and, in cooperation with U.S. Attorneys, for the preparation and trial of such cases. Examples of the types of cases are proceedings to prevent or punish the introduction into commerce of adulterated food, drugs and cosmetics, the sale and distribution of potentially harmful consumer and household use products, and civil penalty actions for violations of FTC cease and desist orders prohibiting consumer fraud.

The consumer protection program also involves several non-litigation functions including preparation of comments on virtually all consumer-oriented legislation other than amendments to the antitrust statutes; and handling several hundred pieces of consumer mail every month. This latter activity often encompasses an informal "ombudsman" role. Liaison is maintained with state and local enforcement agencies and other Federal agencies for referral of consumer complaints outside the jurisdiction of the Department of Justice.

Although no resource increases have been requested for consumer protection in FY 1981, continuing heavy demands will be placed on this program. Both the CPSC caseload and FTC civil penalty case referrals are increasing. In addition, while relatively stable in number, the size, complexity, and impact of cases referred by FDA has increased. In the FDA criminal area, there are more felony cases and more complex cases involving false reporting of data.

Long-range goal.

To protect consumers from defective or harmful products and from unfair and misleading business practices.

Short-term objectives.

-- To continue to be responsive to client agencies by supervising and conducting litigation.

-- To provide support and assistance to U.S. Attorneys litigating consumer cases in the form of briefs and pleadings.

-- To process expeditiously the several hundred pieces of consumer mail received every month.

Alternatives.

The Attorney General could authorize agencies to represent themselves in litigation. However, maintaining control of litigation within the Department of Justice has significant benefits which would not exist if litigation authority was decentralized. These benefits include the development of consistent policy and legal doctrine for the Federal Government; control over the volume and quality of litigation by keeping weak cases out of court; and application of the expertise of Department attorneys in trial practice and knowledge of the customs and practices of the various Federal courts.

Impact of short-term objectives.

-- Violations of consumer protection statutes will be prosecuted through civil and criminal litigation.

-- Consumers will be assisted in the resolution of their complaints.

JUDGMENT ENFORCEMENT

The Division's judgment enforcement program ensures that antitrust litigation results favorable to the Government are given full effect through the achievement of proper and effective relief, and that firms subject to antitrust judgments comply fully with their provisions.

Program justification.

This program is authorized by 28 C.F.R. §0.40(a).

Antitrust civil cases typically conclude with court orders forbidding certain conduct and requiring remedial conduct. These judgments are prepared for the court by Division litigating staffs, and in the case of consent decrees, after negotiation with defendants. Approximately 80% of civil antitrust cases are terminated by consent decrees. Under the provisions of the Antitrust Procedure and Penalties Act of 1974 (15 U.S.C. § 16(b)-(h)), the Division publishes proposed consent decrees in periodicals of legal or general circulation as required by the court, along with a competitive impact statement permitting interested parties to make an informed evaluation of the proposed decree.

To make its antitrust enforcement program effective, the Division investigates and brings civil and criminal contempt proceedings when it determines that judgments it has obtained are being disobeyed. Compliance reports are reviewed and investigation initiated where indicated to assure that firms subject to antitrust judgments comply with their provisions. In addition, the Division identifies decrees or decree provisions that have become unnecessary or even anticompetitive over time and seeks modification or termination by court action.

Finally, the Division monitors the many judgments that require further action by defendants, such as divestitures within a certain period of time. These cases present difficulties in obtaining full compliance. Defendants frequently seek relief from compliance by pleading impossibility of performance, and further litigation often is necessary to resist such claims.

The judgment enforcement program will be funded in FY 1981 at the same level as FY 1980, with approved adjustments for uncontrollable increases. This level of funding is necessary to ensure complete enforcement of the antitrust laws. There would be little or no incentive for individuals and organizations to comply with judgments if they knew no follow-up action would be taken to enforce them.

Long-range goal.

To achieve a visible and effective judgment enforcement program through systematic compliance investigation and litigation to impose sanctions on decree violators and, where necessary, obtain further injunctive relief.

Short-term objectives.

-- To monitor consent judgments and institute contempt or other enforcement proceedings where violations occur.

-- To modify or terminate obsolete judgment provisions.

-- To augment traditional reliance on complaints of possible violations by developing methods to identify judgments of sufficient importance to justify independent investigations.

-- To improve the organization and management of older decrees.

Alternatives.

There are no known suitable alternative methods that would achieve the stated objectives and fulfill the purpose of this program.

Impact of short-term objectives.

-- Enforcement of the antitrtust laws will be supported and judgment compliance fostered by instituting proceedings where violations occur.

-- Competition will be promoted through the modification or termination of judgment provisions that have become anti-competitive over time due to changing economic and market conditions.

POLICY ANALYSIS, LEGISLATION AND TRAINING

This program combines several functions within the Division: legislative activities; research and evaluation of major legal, program and economic issues; analysis of economic data for specific investigations and cases; and attorney training.

Program justification.

The activities encompassed in this program are authorized by 28 C.F.R. §§0.40 and 0.153.

The Antitrust Division becomes involved in the legislative process in three basic ways. It proposes and supports legislation submitted through the Department's legislative program, it participates in the development of legislative proposals by other Executive branch agencies, and it comments upon and testifies with respect to proposals for legislation having a bearing on competition policy. The long-range competitive effects of proposed Governmental programs designed to meet immediate policy objectives are often complex and obscure. For this reason other Executive branch agencies frequently request and obtain Antitrust Division counsel on the competitive issues raised by proposed new legislative programs. New legislative proposals are put forward regularly in Congress which would affect the operation of the American free market system. In those and other instances, the Division is called upon to respond through oral testimony or written comment to Congress. In addition, the Division regularly proposes and/or supports legislation presented by the Department.

In recent years, the Division has received over 300 formal requests annually from Congress and the Office of Management and Budget for analysis and policy positions concerning proposed legislation. Formal testimony is given some 25 to 35 times a year. In addition, increased public interest in antitrust enforcement has meant a substantial increase in Congressional and White House letters; the Division responds to some 700 to 800 such requests annually.

An increasingly important part of this program is defensive; i.e., effective opposition to anticompetitive legislative proposals, often special interest legislation seeking to create or extend exemptions from the antitrust laws.

Economic studies of major industries and of economic conditions crossing industry lines provide information and guidance in case selection and suggest fruitful avenues for the commitment of investigative resources. Research into the ramifications of exceptions to the antitrust laws, such as the labor exemption and state regulatory exemptions, is done by non-litigating attorneys and used in case management decisions.

Professional economists provide the Division's litigating sections and field offices with economic assistance in two major respects. First, economic analysis is applied to litigation proposals. Within the limits of available resources economists follow enforcement matters from preliminary inquiry through final decree and judgment enforcement. Economists provide substantial early evaluation of the economic significance of business activities proposed for investigation. This analysis is especialy important in the preliminary evaluation of proposed mergers and acquisitions, enabling an informed judgment as to the use of limited resources to conduct merger investigations. Economists also assist the legal staff by defining the relevant markets for analyzing the economic effect of structure, conduct and performance of industries and firms subject to antitrust enforcement action. In this connection, Division economists frequently serve as expert witnesses to educate courts and juries on the economic basis of our litigation contentions. The economic staff plays a major role in estimating and establishing the foundation for proof of damages sustained by the Government in its procurement of goods and services because of illegal activity, usually price-fixing.

Second, the expertise of economists is used to initiate investigative activity looking toward litigation. One example is our concentrated industry review. Another major undertaking involves analysis of pricing behavior in major regional markets with respect to basic consumer commodities. Price data in each market are collected and analyzed, corrected for regional differences in such factors as local wage levels, population density, and transportation costs. Unexplained differences are viewed as possible evidence of potential anticompetitive behavior in markets exhibiting higher or more rigid price patterns. This information is furnished to legal staffs for investigation and has produced a number of local and regional price-fixing cases.

Policy planning and analysis has a major role in developing antitrust policy in new areas. As part of this task, legal analyses of questionable anticompetitive practices are conducted and integrated with theoretical and factual studies and economic analyses. The results of these studies may lead to recommendations for new Division initiatives or the restructuring of on-going enforcement efforts. The basic assumption underlying this activity is that systematic investigation and analysis by highly qualified professionals will identify specific problem areas in the economy and guide the Division's activities along lines that assure the greatest return for the enforcement dollar. The Division also seeks to establish a continuing institutional planning capability to develop ideas and program options which will survive periodic changes in top Division management.

The primary emphasis in the Division's training program for attorneys is on basic advocacy training for young attorneys, advocacy training in antitrust litigation for more advanced attorneys, and training in substantive antitrust law. The Division is now planning, and will institute early in Fiscal Year 1981, a training program in investigatory techniques. The Division conducts an orientation program for all incoming attorneys which provides an introduction to the policies and procedures of the Division and basic instruction by senior attorneys on the preparation and presentation of various types of antitrust cases. Promising young attorneys are sent to the Attorney General's Advocacy Institute. Since 1972, the Division has paid tuition for participation of selected mid-level attorneys to attend the National Institute for Trial Advocacy in Colorado and a week-long program on preparation and presentation of antitrust cases presented by Columbia University School of Law. Finally, as resources permit, the Division provides tuition assistance to employees enrolling in education programs relevant to their job responsibilities and legal or business programs devoted to topics relevant to current enforcement programs.

Resources requested for this program for FY 1981 are the same as for FY 1980.

Long-range goals.

To ensure that the objective of increased competition in the marketplace is promoted vigorously in new legislation, to enhance the quality of investigative, litigative, and competition advocacy activities through economic and statistical analysis, to research and analyze major policy and legal issues; and to improve training for Division attorneys.

Short-term objectives.

-- To encourage the submission and passage of legislation promoting a competitive economy and discourage legislation to limit antitrust laws or provide new exemptions.

-- To develop sound legal and economic bases for investigations and cases and ensure that the Division's enforcement program is beneficial to the economy.

-- To have at least 50 percent of the Division's attorneys and economists participate in some form of training or continuing legal, economic and managerial education each year.

Alternatives.

There are no practical alternatives to achieve the objectives and fulfill the purposes of this program effectively.

Impact of short-term objectives.

-- The Division's legislative program will be consistent with the principles of a free market economy to the extent feasible.

-- The success of Division enforcement and competition advocacy activities will be enhanced through sound legal and economic analysis.

-- The litigation skills of Division attorneys will be improved.

COMPETITION ADVOCACY

This program seeks the elimination of unnecessary regulation and the adoption of the least anticompetitive means of achieving overriding social purposes through participation in proceedings before regulatory agencies and in executive branch deliberations relating to competition policy.

Program justification.

Authority for these various activities is found in 28 C.F.R. §0.40, the Federal Coal Leasing Amendments Act of 1975, the Deepwater Ports Act, the 1970 Amendments to the Atomic Energy Act, 42 U.S.C. §2135, Section 408(b) of the Federal Aviation Act of 1958, 49 U.S.C. §1378(b), the 1966 Bank Merger Act, 12 U.S.C. §1828, and the Outer Continental Shelf Act Amendments of 1978.

The Antitrust Division promotes competition policy in regulatory decision-making in three basic ways. First, it participates in adjudicatory hearings and rule making proceedings of Federal regulatory agencies, i.e., the CAB, ICC, FMC, NRC, FCC, SEC, FPC, FRB, FDIC, Comptroller of the Currency, and the International Trade Commission. These agencies frequently face the task of reconciling statutory purposes to foster particular lines of commerce with the competitive principles basic to industry in general. The Division's goal is to seek elimination of regulation that lacks both economic and legal support, or reform of regulation that goes beyond the minimum necessary to achieve the legitimate ends of the regulatory scheme to the detriment of competition.

Second, the Division evaluates Federal regulatory schemes in order to advise other departments and agencies on the competitive issues involved, and to develop legislative proposals for restructuring legislative mandates or procedures to eliminate unnecessary or counterproductive Governmental interference with free market forces. This activity, which was undertaken piecemeal within the Division for many years, has been accelerated in response to general economic problems and growing public awareness of inadequacies in a system of direct economic regulation. The Division also participates in numerous interagency and international committees on a wide range of issues such as deregulation of certain industries, energy, trade policy, and industrial innovation.

Third, the Division undertakes enforcement activity (investigations and prosecutions) where appropriate to ensure that the special benefits of government regulation, including frequently antitrust immunity, are obtained only by following the procedures of the specific regulatory scheme.

The Division is also trying to stimulate competition in the delivery of professional services. While some anticompetitive restrictions on such critical functions as pricing and advertising are self-imposed by professional groups, and thus amenable to challenge through litigation, others are sanctioned or required by State and Federal regulatory bodies. Thus the role of competition in the delivery of these services can be furthered only if litigation is supplemented by effective participation in the regulatory decision-making processes.

The resources requested for this program in FY 1981 are the same as for FY 1980.

Long-range goal.

To eliminate unnecessary or counter-productive governmental interference with free market forces.

Short-term objectives.

-- To achieve more competition in Federally regulated industries.

-- To minimize the prohibitions against and restrictions of competition under the guise of state regulation.

-- To stimulate competition in the delivery of professional services.

-- To reduce the antitrust immunities enjoyed by particular industries.

Alternatives.

There are no practical alternatives to achieve the objectives and fulfill the purposes of this program effectively.

Impact of short-term objectives.

-- Unnecessary anticompetitive regulation will continue to be challenged before Federal regulatory agencies.

-- Action will be taken to address the myriad of prohibitions against and restrictions of competition under the guise of state regulation.

-- Emphasis will be placed on achieving more competition in the transportation and energy industries.

EXECUTIVE DIRECTION AND CONTROL

This program encompasses several activities within the Division including overall management and direction of Division activities by the Assistant Attorney General and Deputy Assistant Attorneys General and administration of the Freedom of Information and Privacy Acts.

Program justification.

General authority for these activities is contained in 28 C.F.R. §0.40, §0.130, and §16, subparts A and D.

Since time restrictions make it impossible for the Assistant Attorney General personally to supervise each aspect of each program area, the quality and adequate staffing of this program are critical for the Division to be managed in a manner consistent with current trends and practices in the Federal Government. This program is designed to provide direction and review of the full range of Antitrust Division activities. The Deputy Assistant Attorneys General make significant contributions to this program. The program also includes activities by section and field office chiefs to assist overall management as opposed to specific case direction, as well as some resources from the Executive Office.

The Freedom of Information Unit locates and reviews files that may be responsive to requests, makes preliminary judgments as to discoverable and exempt material, consults with trial staffs and Division management for final disclosure determinations, coordinates release of information and assesses appropriate charges. The Unit consults with the Associate Attorney General's staff on Departmental appeals for denial of disclosure, and with Civil Division attorneys on court litigation under the Act. It is also responsible for preparation of quarterly reports on compliance to the Associate Attorney General and for consultation with other Department FOI units on amendments to Department regulations.

Privacy Act responsibilities include identification and designation of systems of records subject to the Act and exemptions applicable thereto; processing of individuals' requests for information about themselves in Division files; and annual reporting of Act compliance to the Department.

Requested resources for the activities in this program are the same as for FY 1980.

Long-range goal.

To provide effective and efficient management and direction of all Antitrust Division activities.

Short-term objectives.

- -- To provide effective policy direction and leadership for Antitrust Division personnel.
- -- To maintain a working climate for Division personnel that fosters interest in and dedication to the Division's programs.
- -- To speak for competition before the courts, within the Administration, before regulatory agencies and the Congress, and before the general public.
- -- To allocate resources and control the current and future workload and output of the Division to produce results that benefit the American people.

Alternatives.

The objectives of this program could not be met by alternative means. The Division requires central leadership and policy direction to fulfill its mandate.

Impact of short-term objectives.

- -- The direction and management of the Division will be maintained and the Division will continue to be effective in promoting competition throughout the economy.

ADMINISTRATIVE SERVICES

This program provides management, administrative, and information systems support to the Division.

Program justification.

General authority for these activities is found in 28 C.F.R. §0.40.

Management, administrative and budget support is provided for each of the 16 sections, eight field offices and numerous trial staffs. Analysis and continuing review of personnel and budget resources, both for long-range planning and for developments that require immediate realignment of manpower and funds, is necessary to support the Division in its enforcement of the antitrust laws. Because of the nature of antitrust work, the necessity for realigning resources is not unusual and can have a tremendous impact on the programs as a whole and established fiscal policies. Management responsibilities include appraisal of current operational activities and development and implementation of new methods, procedures and policies to meet the changing needs of the Division resulting from, for instance, any one of a combination of the following -- increased staff, workload, legislation and reorganization. Guidance and direction are provided to the management officials in Washington and the field in such areas as personnel and related administrative matters.

In addition to responsibility for budget development and implementation, control is maintained over expenditures for employment, litigation, travel, training and all other items requiring allocation of Division funds. This program also encompasses all matters pertaining to personnel which may be encountered from the date of application and entrance on duty to separation, including assignment of secretarial and paralegal support services; affirmative action in accordance with equal employment opportunity goals; security - personnel, document and physical; records managment; space; citizens' inquiries; collection of Antitrust Division fines and penalties; workload statistics; and other administrative support services.

The Information Systems Support Group, established in FY 1978, provides Division attorneys, economists, and management personnel with expertise in meeting their diverse information management and retrieval needs, primarily through the use of automatic data processing. This Group assists attorneys with the control and retrieval of investigation and case-related materials, e.g., documents, depositions and transcripts; performs computer-assisted analysis of economic data; provides computer-based management information services to supervisory personnel; collects and provides timely and convenient access to Division attorney work products and other research materials; and coordinates the development of Division word processing systems and procedures to make possible efficient, timely data base construction as an adjunct to document preparation.

The increase requested for this program is to enable the Division to consolidate its headquarters personnel in one building. This will benefit nearly all Division activities by allowing better communication among suborganizations and make the provision of administrative support more efficient.

Long-range goal.

To provide effective and efficient support to all Antitrust Division activities.

Short-term objectives.

- To consolidate the Division's headquarters offices to one location.

-- To support the Division's professional staff with high quality administration and modern tools for information processing.

Alternatives.

The objectives of this program could not be met by alternative means; decentralization within the Division would result in duplication of effort. Greater centralization at a Departmental level would result in loss of vital decision-making and control essential for responsible management.

Impact of short-term objectives.

Division activities will receive effective and efficient administrative and information systems support.

pages tightly bound

Antitrust Division

Report on Recent Accomplishments

During 1979 the Department of Justice filed 58 antitrust cases. Of these, 31 were civil and 27 were criminal cases. The civil cases included 14 price-fixing cases, 2 monopoly cases, one contempt case, three other restraints of trade cases and 11 merger cases. The criminal cases included 24 cases alleging price-fixing and other restraints of trade and three cases alleging false material declaration. In addition, the Department issued 16 business review letters advising persons whether a prospective activity was likely to be challenged as an antitrust violation. Criminal prosecutions resulted in the imposition of substantial fines and sentences. Corporations were fined a total of $23,338,000; individuals a total of $2,098,000. 58 individuals were sentenced to a total of 29,035 days in jail. In the last two years more than 90 percent of the corporate and individual antitrust defendants prosecuted by the Division have either pled _nolo contendere_ or guilty, or have been found guilty after a full trial. Thus, over the last two years nine out of every ten criminal antitrust defendants against whom a disposition was obtained have been convicted.

I. Reduction of Private Conspiratorial Conduct

United States v. Atlantic Container Line, Ltd., et al.

On June 1, 1979, a Federal grand jury indicted five corporations, two groups of shipping firms and 13 individuals on charges of conspiring to fix prices of the ocean transportation of freight between the United States and Europe. One indictment charged the shipping firms with a felony violation of Section 1 of the Sherman Act and a second indictment charged the individuals with a misdemeanor violation of the same section. The indictment alleged that the defendants agreed to fix prices outside the scope of agreements approved by the Federal Maritime Commission (FMC). Although it is not illegal for ocean shipping companies to fix rates for ocean transportation of freight, this activity must be within the framework of agreements approved by the Commission. The indictment alleged that the defendants failed to inform the FMC of their conduct.

During the period covered by the indictment (from at least as early as 1971 and continuing into 1975), the defendant companies were the seven major container lines in the United States - Europe trade and are believed to have accounted for almost 60 percent of that trade. In 1974 the total revenue in this trade was approximately one billion dollars. At arraignment on June 8, 1979, all the defendants pled _nolo contendere_ and were fined a total of $5,450,000, the largest set of fines by far in the history of the Sherman Act.

United States v. the Cleveland Builders Supply Company, et al.

On January 3, 1979, a Federal grand jury returned two indictments charging seven corporations that supply ready-mix concrete in Cuyahoga County, Ohio with conspiring to fix prices in violation of Section 1 of the Sherman Act. One indictment, charging felony price-fixing, named six corporations as defendants and the other, charging misdemeanor price-fixing, named one corporation with having participated in the conspiracy prior to December 21, 1974. On that date, a violation of the Sherman Act was changed from a misdemeanor to a felony. A companion civil complaint filed, naming all seven defendants, seeks to enjoin the defendants from continuing to engage in or reinstituting the price-fixing combination and alleged conspiracy. The seven defendants had total gross sales of ready-mix concrete from plants in Cuyahoga County of approximately $83.5 million during the four years from January 1972 through December 1975, according to the indictments and complaint. Fines of $3,500,000 were imposed.

United States v. J. Ray McDermott and Company, Inc., et al.

On December 14, 1978, a Federal grand jury in New Orleans, Louisiana indicted two marine construction firms and six of their executives on charges of conspiring to allocate contracts and to rig bids for marine construction projects. The 11 count indictment charged the two corporations and their six officers with a felony violation of Section 1 of the Sherman Act. In addition, the six executives were charged with mail and wire fraud. Marine construction services include the installation of sub-sea pipelines and fabrication and installation of offshore platforms, primarily for the oil and natural gas industries. The indictment charged the defendants exchanged bid price information and submitted collusive bids to various customers requiring their services in the Gulf of Mexico and elsewhere, depriving them of the benefits of open competition in contracting for the performance of marine construction services. Both of the defendant corporations pled *nolo contendere* and were fined $1 million each. The six executives were fined a total of $409,000.

United States v. Rheem Manufacturing Company, et al.

On January 17, 1979, a Federal grand jury indicted six corporations and eight individuals with conspiring to fix the prices of water heaters. The indictment and a companion civil suit, both charging a violation of Section 1 of the Sherman Act, were filed in U.S. District Court in Philadelphia. The indictment charged that, beginning as early as 1963 and continuing until at least into 1977, the defendants and various co-conspirators agreed to fix the list prices of water heaters and the discounts allowed from such prices. The corporate defendants are the leading manufacturers of mass-produced automatic water heaters in the United States; during the period of time covered by the indictment total sales of such water heaters totaled $2 billion. The civil suit also names the six indicted corporations and seeks injunctive relief based on the same allegations as those in the indictment. Four of the corporations and five individuals pled nolo contendere and were fined a total of $1,076,000. Jail sentences totaling six months were imposed on the individuals. The other two corporations and three individuals were acquitted by a jury on October 16, 1979 after a 6 week trial.

United States v. Rockwell International Corporation, et al.

On November 1, 1978, a Federal grand jury in Philadelphia, Pennsylvania returned a felony indictment charging two corporations with conspiring to fix prices of gas meters in violation of Section 1 of the Sherman Act. The indictment and companion civil suit charged the defendants with conspiring to fix the prices of gas meters throughout the United States from May 1973 until November 1977. The meters are used by public utility companies and commercial and industrial concerns to measure the flow of natural gas. This matter was brought to the Division's attention by the American Meter Division of Singer Company in a voluntary disclosure. Pursuant to a new policy to encourage disclosure, Singer was not indicted but was only named as a defendant in the companion civil case. The defendant corporations and the Singer Company accounted for approximately $231 million during the alleged conspiracy. One defendant pled guilty and the second defendant was tried and found guilty. Fines of $725,000 were imposed.

United States v. Halifax Hospital Medical Center, et al.

On November 27, 1978, the Department of Justice filed a civil antitrust suit charging the Halifax Hospital Medical Center in Daytona, Florida, and the Volusia County Medical Society for violation of Section 1 of the Sherman Act. The complaint alleged that the Medical Center and the Society conspired to impair the ability of a health maintenance organization, Florida Health Care Plan, Inc., to commence and maintain operations and to compete in the delivery of health care services in the Volusia County Area. Health maintenance organizations (HMO) provide a procompetitive alternative to fee-for-service medical practice. By combining an emphasis on preventive medical care with incentives for doctors/owners to keep expenses down, the HMO may also serve to lower overall health expenditures and stem the inflationary rise in costs for health care. For these reasons, the growth of HMOs has been encouraged by HEW. The suit asks that the defendants be enjoined from continuing or renewing the alleged conspiracy and asks that the medical center be enjoined from adopting standards or procedures with the purpose or effect of discouraging physicians affiliated or contemplating affiliation with the HMO from locating in Volusia County. It also seeks an order directing the medical society to rescind its rescission against the organization.

II. Reduction of Oligopoly and Monopoly

United States v. First National State Bancorporation, et al.

On June 6, 1979, the Department of Justice filed a civil antitrust suit to block the proposed merger of two commercial banks in New Jersey. The banks are First National State Bank of Central Jersey, a subsidiary of First National State Bancorporation, and the First National Bank of South Jersey. The Comptroller of the Currency approved the merger on May 8, 1979; however under the Bank Merger Act of 1966, the Justice Department has 30 days to file suit to enjoin the merger. Such a suit automatically prevents the merger pending final court action. The complaint alleged that the merger would violate Section 7 of the Clayton Act by eliminating direct and potential competition between the two banks in Atlantic County, Atlantic City, and Hammonton. Bancorporation is the largest commercial banking organization in New Jersey and its subsidiary, First National State Bank-West Jersey, operates three offices in Atlantic County, and controls three percent of the total commercial bank deposits in the county. First National Bank of South Jersey is the largest commercial bank in Atlantic County, as measured by deposits, and controls 46 percent of the total commercial bank deposits in the county. The major effects of the merger would be felt in Atlantic County, New Jersey's most concentrated commercial banking market. As of June 30, 1978, the ten commercial banks in the county had total combined deposits of $708 million; the three largest banks holding 81.3 percent of such deposits. The suit said the proposed merger would eliminate existing and potential competition between the merging banks; eliminate Bancorporation as a potential competitive factor in Atlantic County and in the Atlantic City and Hammonton markets; increase concentration in commercial banking in these markets; and might foster further mergers in these markets. Finally, the complaint alleged that competition generally in commercial banking in the affected markets might be substantially lessened. The suit asked that the proposed merger be declared illegal and that the defendant be enjoined from carrying out any merger or consolidation.

United States v. Household Finance Corporation, et al.

On January 9, 1979, the Department of Justice filed a civil antitrust suit challenging the acquisition of American Investment Company by HFC American, Inc., a wholly owned subsidiary of Household Finance Corporation, the largest independent finance company in the United States. The complaint alleged that the acquisition may substantially lessen competition in the direct cash loan market. These are loans made to individuals by finance companies under the regulations of various states, repayable generally on an equal periodic basis. According to the complaint, Household Finance Corporation operates more than 2,000 branch offices in 47 states and, as of December 31, 1977, had total direct cash loans outstanding of approximately $2,450,854,000. American Investment Company is among the 20 largest independent finance companies in the United States operating 477 offices in 30 states and having approximately $348,499,000 in outstanding direct cash loans as of December 31, 1977. The District Court found that personal loans from finance companies did not constitute a separate line of commerce and ruled in favor of the defendant; however, the acquisition was stayed pending an appeal.

On August 10, 1979, the Seventh Circuit Court of Appeals held that the business of making direct cash loans by finance companies is a line of commerce within the meaning of Section 7 of the Clayton Act. The court stated that the Supreme Court repeatedly has held that a financial institution comprises a separate product market if it offers to a "significant" number of consumers a "cluster of products and services" that competing financial institutions do not. The court found that the record below supported the proposition that finance companies offer unique products and services to a class of higher risk customers than are serviced by other financial institutions and reversed the District Court's decision.

United States v. Emerson Electric Co., et al.

On March 22, 1979, the Department of Justice filed a civil antitrust suit seeking to block an agreement under which Emerson Electric Co. would acquire more than 50 percent of the capital stock of Skil Corporation. The suit, together with an application for a temporary restraining order and preliminary injunction barring consummation of the proposed transaction, was filed in U.S. District Court in Chicago. The complaint, in five counts, alleged that the transaction may substantially lessen competition in electric tool and chain saw markets, where Emerson and Skil Corporation are major or potential competitors. In 1977, Emerson was the 166th largest industrial corporation in the United States with more than $1.1 billion in assets. In 1978, Emerson's net sales exceeded $2.17 billion while Skil's net sales exceeded $163.7 million in 1977.

The complaint said the acquisition would eliminate Emerson as a potential additional competitor in the concentrated portable electric tool markets where Skil has 13 percent of industry sales. In addition, the complaint charged that the proposed acquisition eliminated competition between the firms in the gasoline chain saw market. The complaint asked that the court declare the acquisition unlawful and issue a preliminary injunction against the defendants, preventing the consummation of the acquisition.

III. Federal Appellate Activities

McLain v. Real Estate Board of New Orleans

On January 8, 1980, the Supreme Court reversed a court of appeals opinion which had held that the activities of real estate brokers are not in or affecting commerce. The plaintiffs in this private antitrust case alleged that the defendant real estate brokers had conspired to fix the rate of their brokerage commission. To establish the interstate commerce element of the offense, they observed that much of the financing and title insurance in real estate transactions comes from out-of-state sources. The defendants argued and the district court and the court of appeals agreed, that plaintiffs had failed to demonstrate that real estate brokers are necessary participants in the interstate aspects of residential real estate and title insurance. The Division participated in the Supreme Court argument in support of plaintiff.

In concluding that plaintiff's evidence of out-of-state financing and title insurance satisfied the jurisdictional requirements of the Sherman Act, the Supreme Court held that the effect on commerce test is not limited to challenged activities that have an integral relationship to an activity in interstate commerce. Thus, plaintiffs were not required to show an effect on commerce caused by the alleged conspiracy but, rather, only that the brokerage activities had a substantial effect on interstate commerce.

United States v. Society of Independent Gasoline Marketers of America

The United States Court of Appeals for the Fourth Circuit sustained the conviction of five independent gasoline companies and a trade association for violating Section 1 of the Sherman Act. The indictment charged that the defendants had engaged in a conspiracy in the Middle Atlantic States to fix prices for the retail sale of gasoline in unreasonable restraint of commerce. The court concluded that the government's evidence was sufficient to establish the single conspiracy charged in the indictment and that the defendants had acted with the requisite criminal intent.

United States v. Thomas J. Gillen

The United States Court of Appeals for the Third Circuit affirmed the conviction of an individual charged with conspiring to fix the price of anthracite coal. The issue on appeal was whether the defendant had acted with the requisite criminal intent. The court held that a finding that the defendant knowingly participated in a conspiracy to fix prices was sufficient to prove the intent element of a Sherman Act violation.

United States v. Continental Group, Inc., et al.

The Court of Appeals for the Third Circuit affirmed the convictions of two corporations and two individuals for conspiring to fix prices for the sale of consumer bags. After conviction by the jury, the district court fined the two corporations and two individuals a total of $1,420,000 and sentenced both individuals to four months imprisonment followed by 32 months probation. The Court of Appeals found that there was sufficient evidence to support the convictions; that the district court had not erred in permitting the jury to consider hearsay declarations and actions of alleged co-conspirators against all the defendants without first making a finding that the government had established the existence of the alleged conspiracy and the participation therein of each defendant and alleged co-conspirator by a preponderance of independent evidence; and that the district court had not erred in its instructions to the jury on the issue of intent.

Reiter v. Sonotone Corporation

On April 25, 1979, the Division participated in arguments before the Supreme Court as amicus curiae in the case of Reiter v. Sonotone Corporation. The question presented for the Court was whether customers who pay higher prices for goods or services as a result of antitrust violations are injured in their "property" within the meaning of Section 4 of the Clayton Act.

The district court had held that the term "property" included "money of the plaintiff" and that Congress intended to give a treble damages remedy to retail customers. The court of appeals reversed, stating that consumers who allege "no injury of a commercial or competitive nature are not injured in their property under Section 4." In an important decision for consumers, the Supreme Court held that the district court decision was correct.

United States v. John Foley Realty, Inc., et al.

The Fourth Circuit Court of Appeals affirmed the felony convictions of defendants for conspiring to fix real estate commissions in Montgomery, Maryland. A major issue on appeal was whether the district court lacked subject matter jurisdiction because of an insufficient nexus between defendants' conduct and interstate commerce. The appeals court found that a substantial stream of interstate commerce existed. The brokers' activities were not only an integral part but in practical effect were the dominant factor in first creating a substantial interstate market by utilizing interstate advertising and referral services, and then drawing in interstate funding and loan guarantees for mortgages.

United States v. Brighton Building and Maintenance Co., et al.

The Court of Appeals for the Seventh Circuit affirmed the conviction of the defendants for rigging bids on highway construction projects in Illinois. A significant issue on appeal concerned the sufficiency of the instructions with respect to the element of intent. Relying on the Supreme Court decision in *Gypsum*, the defendants argued that the jury must be instructed that in order to convict, it must find that the defendants acted with intent to restrain trade or commerce. The Court of Appeals distinguished the *Gypsum* case, stating that *Gypsum* involved the practices of price verification, conduct that is not per se unlawful, whereas this case involved a per se violation of the Sherman Act. The Court went on to say that it did not read *Gypsum* as indicating that once defendants are proved to have intentionally made an agreement that is unlawful per se, there must be an instruction that the defendants cannot be convicted unless they are found to have intended to restrain trade or commerce. The Supreme Court has denied *certiorari*.

IV. Antitrust Litigation for Consumer Protection

Several major FTC civil penalty cases were prosecuted, the principal ones involving anticompetitive pricing practices by five manufacturers of impregnated paper insulation used in heavy electrical cable and discriminatory credit practices with respect to divorced women seeking credit at a national retail department store chain; $175,000 in civil penalties were imposed. This latter case was the first of its kind, as was another civil penalty case against a major car rental company for violation of the FTC's holder-in-due-course rule. With respect to the Consumer Product Safety Commission, the Division defended the Commission's product safety standard for architectural glass, the regulation of TRIS-treated children's sleeping garments and various civil enforcement and defensive cases in Georgia involving flammable carpets.

V. Judgment Enforcement

United States v. El Paso Natural Gas

The trustee petitioned the district court for extension of the February 1979 deadline for selling all remaining stocks and completing the divestiture of El Paso of Northwest Pipeline Co. The trustee also requested a relaxation of the court ordered requirement that no community of interest in stock ownership exist as a result of the sale. The Division opposed any time extension or relaxation of the absolute divestiture requirement in the original judgment. The court concurred in the Division's position and denied the trustee's request. The remaining stock was subsequently sold, finally bringing this long-open case to a successful conclusion.

United States v. Work Wear Corporation

Under the terms of a 1971 consent decree, the Work Wear Corporation was required to divest certain assets within three years. Work Wear was given one extension to comply with the consent judgment. When Work Wear failed to comply within the extended time period, the Division filed a civil contempt action and the court ultimately imposed a fine amounting to over $1 million. Work Wear appealed to the Sixth Circuit Court of Appeals after the district court denied a motion to reduce the fine by one-half. Given Work Wear's lack of diligence in seeking divestiture prior to the imposition of the fine and its placement of its own financial considerations ahead of complying with the law, the Sixth Circuit Court found the district court had not abused its discretion in refusing to reduce the fine and affirmed the lower court decision. This decision makes clear the supervening importance of effecting court-ordered divestiture in a timely fashion.

VI. Policy Analysis, Legislation and Training

The Division prepared testimony on draft legislation and background analysis dealing with large conglomerate acquisitions with emphasis on those involving acquisition by major petroleum producers. The Division provided staff support to the National Commission for the Review of Antitrust Laws and Procedures. The Commission completed its work within the authorized six months. The Commission recommended approximately 50 specific changes and reforms that would streamline and expedite complex litigation and substantially deregulate important industries that have been denied the benefits of competition. Many of the recommendations of the Commission, requiring legislative changes to expedite complex litigation, have been incorporated into S. 390, the Antitrust Procedural Improvements Act of 1979. Testimony has been given in support of this legislation. At the state level, support for stronger antitrust laws has led to several efforts at passing new or revised state statutes. The Antitrust Division has provided assistance in drafting legislation to several states.

The Division provided several new in-house training programs to antitrust attorneys in 1979. Two programs were developed on mergers, one covering the problems arising in the context of merger takeovers and another on mergers from the perspective of defense council with non-governmental attorneys participating. The Division also provided four weekly programs on horizontal restraints.

VII. Competition Advocacy

Department of Energy

The Division filed comments in several Department of Energy (DOE) rulemaking proceedings. The Division urged DOE to eliminate special benefits to small refiners under the Emergency Petroleum Allocation Act regulations, valued at more than 1 billion dollars a year. The Department argued that the Act, the basis of DOE's regulatory authority in the petroleum industry, was enacted to protect consumers from high prices for petroleum products resulting from the 1973 Arab Oil Embargo and to preserve the competitive structure of the petroleum industry. The subsidies were not only inconsistent with the statute's pro-consumer mandate, but actually encouraged the construction of many inefficient refineries incapable of processing available crude oil supplies into the most needed petroleum products. DOE decided to substantially reduce the subsidies granted to small refiners.

The Division urged DOE not to adopt a mandatory retail price differential between leaded and unleaded gasoline. The Division argued that while the purpose of the rule would be to deter improper use of leaded fuel in cars with emission control systems requiring unleaded fuel, the actual effect of the rule could be to create shortages of unleaded fuel thereby creating an even greater threat to the environment than an excessively large price differential. DOE decided not to impose such a maximum price differential.

Federal Energy Regulatory Commission

In the Federal Energy Regulatory Commission's proceeding on the Texas Deepwater Port Authority's plan to provide rate incentives to shippers to commit themselves to extensive use of the facility, FERC agreed with the Division's argument that such a tariff would be lawful if it reflected the value of the commitment being offered. It also adopted the Division's recommended method by which the reasonableness of the incentive should be measured. A favorable ruling on that application was important to the creation of an independent crude oil and petroleum product pipeline system in the United States, an important Division goal.

The Division also urged the Federal Energy Regulatory Commission to adopt measures to prevent possible anticompetitive effects if producers of Alaska natural gas build a gas conditioning plant at Prudhoe Bay.

The Department also intervened in the Williams Pipeline rate proceeding at the Federal Energy Regulatory Commission. Williams is the case in which FERC will determine generic issues of oil pipeline rate of return regulation. While the decision is still pending, the evidence filed by the pipeline companies indicates that even they recognize that significant reform is required. Pipeline rate reform is a necessary step in achieving structural relief in the pipeline industry.

Nuclear Regulatory Commission

A Nuclear Regulatory Commision (NRC) Appeals Board affirmed a major victory achieved by the Division at the NRC against Cleveland Electric Illuminating Company and four other major utilities in the Ohio - Western Pennsylvania area in which the Department had sought to attach conditions to a nuclear power plant license. The conditions sought are designed to ameliorate anticompetitive practices by the respondent utilities. The Appeals Board adopted the Department's interpretation that the governing statute permits consideration of competition policy beyond the specific letter of the antitrust laws, agreed with our definition of the relevant markets and our analysis of anticompetitive activity. The effect of the decision is to substantially enhance competition in the wholesale sale of electric power in that area of the country.

After several years of litigation, and a major victory before an NRC Appeal Board, the Division entered into settlement agreement with Consumers Power Company ending litigation before the NRC as to whether competitive license conditions would be attached to Consumers' nuclear power plant licenses. The settlement achieves virtually all of the relief we have sought and leaves intact an Appeal Board decision of extremely significant precedential value.

Securities and Exchange Commission

The Securities and Exchange Commission agreed with the Division's position in determining what accounting procedures should be applied in reporting the cost of oil and gas exploration on financial statements. Although the Commission initially was deciding between whether such expenses should be capitalized or taken as current expenses, it ultimately decided that a new system should be developed which accurately reflected the value of crude oil reserves.

Deepwater Port Report

The Division reviewed the application by the Texas Deepwater Port Authority to construct a deepwater port off the coast of Texas. In our report to the Secretary of Transportation, we recommended that any license issued be conditioned with a number of competitive safeguards. Most of our recommendations were adopted by the Secretary of Transportation.

Annual Report to Congress on Competition in the Coal Industry

The Division completed its second annual report to Congress on competition in the coal industry. This year's report updated the previous year's evaluation of substitutability between coal and other fuels, such as oil, and separately analyzed the state of competition in the metallurgical coal industry.

Interstate Commerce Commission

In 1979, the Division participated in numerous proceedings before the Interstate Commerce Commission (ICC) involving motor and rail transportation. The Division supported a proposal by the ICC to eliminate the "rule of eight", the effect of which has been to restrict contract (trucking) carriers from serving more than eight private shippers and frequently less than eight should any of their proposed customers be conglomerates in several lines of business. Contract carriers provide middle ground between common carriers -- truckers that provide for hire transportation available to the public generally -- and private carriers, where a shipper provides its own transportation. Liberalizing the Commission's interpretation of the rule permitting contract carriers to serve "one or a limited number of persons", would permit such carriers to offer services to a wider scope of customers. The Division urged the ICC to grant nationwide operating authority to Allstates Transworld Van Lines, Inc., a minority-owned firm with headquarters in St. Louis, Missouri. Besides serving the general public, Allstates proposed to put agents in urban areas to provide better service to inner city residents. In its brief, the Division argued that approval of Allstates application would promote competition and could be the impetus for existing carriers to become more competitive and provide the public with better service at lower rates.

Comments were filed by the Division supporting the ICC's petition for a rule-making to permit intercity bus lines to engage in more flexible downward pricing of both charter and regular route services. The petition, filed by Trailways, Inc., proposed complete flexibility (both upward and downward) in establishing charter rates, and "nonpredatory" regular service fare reductions effective immediately on posting. Under this proposal, the Commission would still retain jurisdiction to suspend or investigate predatory price reductions. The Division supported both proposals, because they would increase competition in interstate carriage and make bus travel more competitive with other modes of transportation. The Division also argued that if the ICC adopted this proposal, the bus industry rate bureau should be prevented from establishing collective rates for charter services.

The Division was also an active participant in several rail merger proceedings during 1979. For example, in the Detroit, Toledo & Ironton proceeding, the Division argued that the acquisition of the Detroit, Toledo & Ironton by the Baltimore and Ohio Railroad and the Norfolk and Western Railroad presented substantial anticompetitive problems. The ICC agreed with the Division's position and the Detroit, Toledo & Ironton was acquired instead by the Grand Trunk Western Railway.

Civil Aeronautics Board

During 1979, the Division filed briefs with the Civil Aeronautics Board (CAB) to promote competition in the airline industry and participated in several airline merger proceedings. The Division also continued to participate in proceedings implementing the mandate of the Airline Deregulation Act, advocating in those proceedings that more reliance should be placed on competitive market forces. Consistent with the Division's position, the Continental-Western merger and the Eastern-National merger were not approved by the Board. Moreover, although Pan American was permitted by the Board to acquire National Airlines, the Board refused to permit Pan American to acquire National's Miami-London Route and has instituted a new proceeding to obtain new competition in this most significant transatlantic market.

The International Air Transport Association (IATA), an organization of international carriers, filed a proposal to amend its approved agreement to fix international rates for air carriers, which the Division urged the CAB to deny. The Board announced its tentative decision to withdraw IATA immunity for collective ratemaking in international aviation, based on changes that have occurred in international aviation since the IATA was first approved in 1946 and on the Board's increased reliance on competitive market forces. In view of the increased competition in international markets and the emerging pattern of bilateral agreements, the Division urged the Board to reaffirm its tentative decision. In a recent press release the Board indicated its tentative decision to permit IATA to continue for another two years. However, in the North Atlantic, the most significant market for U.S. foreign travel, U.S. carriers would be prohibited from adhering to IATA's rate fixing structure.

Federal Maritime Commission

The Division filed a petition asking the Federal Maritime Commission (FMC) to reconsider a decision which would allow various ocean liner operators to engage in a group boycott of container leasing companies. The Division argued that the FMC erred in not recognizing that elimination of certain types of container operations would not only curtail competition between conference members but would also eliminate competition between the conference and the container leasing companies. The Division also argued that the Commission lacks jurisdiction to approve any agreement that would allow carriers to engage in practices that are not within the regulatory scope of the Shipping Act.

The Division filed comments with the FMC opposing approval of proposed amendments to the United Kingdom/USA Gulf Westbound Rate Agreement. The amendments would allow carriers providing joint ocean-rail services (minibridge) in the Europe/U.S. Gulf trade via Atlantic coast ports to become members of rate agreements. Given the anticompetitive effect of the proposed amendments the proponents are required to justify them by demonstrating serious transportation needs and important public benefits. The Division argued that the proponents have not adequately met this burden and that the Commission should either summarily disapprove the amendments or, in the alternative, hold a full evidentiary hearing to evaluate the justifications submitted before granting approval.

Banking

The Division supported the Federal Home Loan Bank Board's (FHLBB) proposal to permit federally chartered savings and loan associations to branch throughout the state in which their home offices are located, promoting competition and benefiting consumers. The Division also filed comments with the FHLBB supporting a proposal to allow federally chartered savings and loan institutions to offer customers checking account-like services because it expands the services these institutions may offer their customers.

Antitrust Division

Salaries and expenses, General Legal Activities

Workload Data

Item	Actual			Estimated	
	1977	1978	1979	1980	1981
Antitrust Cases					
Pending beginning of year	140	146	122	114	110
Filed	71	58	58	56	56
Terminated	65	82	66	60	60
Pending end of year	146	122	114	110	106
Administrative Law Cases					
Appellate					
Pending beginning of year	536	627	479	484	489
Filed	646	364	452	475	475
Terminated	555	512	447	470	470
Pending end of year	627	479	484	489	494
Consumer					
Pending beginning of year	831	638	512	488	418
Filed	776	624	586	550	550
Terminated	969	750	610	620	620
Pending end of year	638	512	488	418	348
Investigations					
Pending beginning of year	616	541	479	455	419
Filed	330	310	364	360	360
Terminated	405	372	388	396	396
Pending end of year	541	479	455	419	383
Miscellaneous Proceedings 1/	1,429	1,629	2,052	2,050	2,050
Days in Court	4,912	5,167	4,628	5,200	5,200

1/ Miscellaneous Proceedings include surplus property clearance, business review letters, and appearances in regulatory proceedings, competitive impact reports to other departments and agencies on proposed administrative actions, legislative comments and reports, and responses to Congressional and White House mail.

Antitrust Division

Authorization Request - Fiscal Year 1981

PROGRAM RANKING

RANKING	PROGRAM
1	Reduction of Private Conspiratorial Conduct
2	Reduction of Oligopoly and Monopoly
3	Competition Advocacy
4	Judgment Enforcement
5	Policy Analysis, Legislation and Training
6	Executive Direction and Control
7	Administrative Services
8	Federal Appellate Activities
9	Antitrust Litigation for Consumer Protection

Antitrust Division
Authorization Request -- Fiscal Year 1981/82

The Antitrust Division is requesting a funding level authorization in FY 1981 of $45,499,000, 939 positions, 91 full-time equivalent of other positions, and 963 workyears.

	Appropriated (Totals)		President's Budget (Estimated)		Authorization Request (Estimated)	
	FY 1979	FY 1980	FY 1981	FY 1982	FY 1981	FY 1982
Permanent Positions	977	939	939	939	939	939
Full-time Equivalent of Other Positions	91	91	91	91	91	91
Workyears	967	967	963	963	963	963
Amount ($000)	$47,508	$43,544	$45,499	$45,921	$45,499	$45,921

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DEPARTMENT OF JUSTICE AUTHORIZATION
LITIGATION AUTHORITY

WEDNESDAY, APRIL 30, 1980

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to notice, at 10:05 a.m., in room 2228, Dirksen Senate Office Building, Senator Max Baucus presiding.

Present: Senator Baucus.

OPENING STATEMENT OF SENATOR BAUCUS

Senator Baucus. The hearing will come to order.

This morning we continue hearings on the Department of Justice authorization bill for fiscal year 1981. Today's hearings focus on the delegation of litigation authority by the Department of Justice to the Department of Energy.

On April 3 Barbara Babcock, former Assistant Attorney General for the Civil Division, and Alice Daniel, current Assistant Attorney General for the Civil Division, testified of serious problems the Civil Division has encountered in dealing with the Department of Energy and major energy cases. Ms. Babcock told this committee that the memorandum of understanding giving DOE substantial litigation authority was entered into by the Department of Justice under duress. A year after that memorandum was negotiated, she recommended that it be rescinded. Alice Daniel stated that many of the problems encountered by Ms. Babcock still exist today.

Since the delegation of litigation authority is an area of increasing concern to this committee, we have invited the General Counsel and the Special Counsel of the Department of Energy here today to provide them an opportunity to share with us their views on the memorandum of understanding and the general area of delegation of litigation authority. At this morning's hearings, we intend to address the following questions:

Have the Department of Energy and the Department of Justice had trouble coordinating their litigation policies?

To what extent do those problems affect the energy litigation to which the Federal Government is a party?

What can be done to improve the Government's position in litigation?

How will future litigation in which the Department of Energy has an interest be handled by the Department of Justice and the Department of Energy?

We are holding these hearings in the spirit of cooperation. Our foremost concern is the successful resolution of any problems that may exist between these two departments.

Mr. Coleman, we are very happy to have you here today. As I have already said in my opening statement, I am holding this hearing primarily to get to the bottom of the apparent problem, perhaps real problem, between the two departments in resolving the proper allocation of litigation authority.

During the earlier hearing, as I indicated, Alice Daniel and Barbara Babcock and others in the Justice Department outlined what they regard as very serious problems between the Civil Division and the Department of Energy. Obviously they probably have some vested interest in their views, and obviously you have some vested interest in your views, but the point I want to make at the outset is that I in no way intend this hearing to be one to grill you or Mr. Bloom, or try to give somebody a hard time.

Rather, it is intended to directly and as efficiently as possible try to resolve this problem, or at least begin to resolve it in the way that makes the most sense for the public and the country.

Do you have a statement?

STATEMENT OF LYNN COLEMAN, GENERAL COUNSEL, ACCOMPANIED BY PAUL BLOOM, SPECIAL COUNSEL FOR COMPLIANCE; AND JOHN P. McKENNA, ASSISTANT GENERAL COUNSEL FOR REGULATORY LITIGATION, DEPARTMENT OF ENERGY

Mr. COLEMAN. I have no prepared statement, Mr. Chairman. I am here to discuss the issue informally, but thoroughly, as well.

Senator BAUCUS. Excuse me?

Mr. COLEMAN. I have no prepared statement. I will discuss with you informally, if that is permissible, my perspective and views on this question. It is a very important issue. It is not an issue particularly with the Energy Department. It is one that has received the attention of the Congress and particular committees on several occasions in the past.

For many years the Department of Labor had a memorandum of understanding with the Department of Justice, and still works under one, and in more recent years the Environmental Protection Agency has entered a memorandum of understanding with the Department of Justice.

In the act creating the Department of Energy itself, the Department of Energy Organization Act, section 502(c), the Congress said that the Attorney General could authorize any attorney of the Department of Energy to appear for and represent the Department of Energy in court proceedings.

More importantly, in the conference report statement accompanying that section, the Congress expressed its expectation that there would be a memorandum of understanding entered into between the Department of Energy and the Department of Justice to provide for division of responsibility and management of those cases. That same subject has been revisited by our authorizing committees from time to time when they hold hearings on our authorization bills.

It is clear to me that it was certainly their expectations that there would be a memorandum of understanding. To that end, on October 5, 1977, the effective date on which the Department of Energy became a Cabinet department, Secretary Schlesinger wrote a letter to Attorney General Bell, calling for discussions to commence pursuant to the expression of intent by Congress that there be a memorandum of understanding between the two agencies. Although this was prior to my confirmation as General Counsel, it is my understanding that Associate Attorney General Egan responded warmly on behalf of the Department of Justice that they would be pleased to enter into such discussions. Those discussions occurred over the course of the next several months. During the pendency of those discussions, I know that the chairman of the House Energy and Power Subcommittee was interested in their progress and whether, in fact, a memorandum of understanding was going to be reached which would be acceptable to both parties.

In April 1978 a memorandum was signed by the Secretary of Energy and the Attorney General, and both departments commenced to live under it. As one who is familiar with those negotiations, and the drafting and the execution of that agreement, it was certainly our understanding at the time, and I believe it was of the Justice Department, that the ordinary regulatory case arising under the Emergency Petroleum Allocation Act, which is the act pursuant to which all price and allocation regulations are promulgated for the oil companies, would be handled by lawyers of the Department of Energy.

The memorandum of understanding uses the terms "primary litigation responsibility" and "secondary litigation responsibility." The modus operandi was that when a case was filed, either one in which the Department would be seeking relief in an enforcement context, or where some oil company had filed a suit against the Department of Energy, if it were a case in which the Department wished to claim primary responsibility and have the primary duty in the handling of that case, a memorandum would be sent to the Civil Division. In due course, the Civil Division would respond and say, either you can have primary responsibility, or we want to take primary responsibility.

If it were a case that the Civil Division claimed it felt strongly about, there was a procedure for taking the matter up between the General Counsel and Associate Attorney General so that it could be worked out.

At the time the memorandum was entered, we must have had a hundred or more cases pending. The previous experience had been that Federal Energy Administration lawyers would take an active role in a number of those cases pursuant to an informal understanding with the lawyers in the Civil Division. They almost always had to prepare at least first drafts of all briefs and pleadings, and sometimes would work extensively on a case that was being handled by the Justice Department. The lawyers in the FEA Litigation Division, which was a fairly good-sized Division at the point, headed by Mr. Bloom prior to his becoming Special Counsel, would work on those cases.

Primary responsibility for the cases pending in April 1978 was assigned; about half of them went to the Energy Department and about half of them went to the Justice Department Civil Division.

Over the next year, as cases were filed, or as cases came in, I am told that the Department of Energy was assigned primary responsibility for something like 60 percent of the cases.

Now, I know that Ms. Babcock, and from reading the transcript I assume Alice Daniel as well, have problems with the concept of the memorandum of understanding. They said there ought not be one. In my own view, Congress said there should be one, and the Justice Department was acting pursuant to Congress stated wishes in that matter.

In recent times, I think there is an attitude in the Civil Division that there should not be a memorandum of understanding, and there is reference in the prior record to Ms. Babcock's recommending that it be rescinded. Our lawyers working on those cases have come to the view that there has been something approaching a de facto attempt to rescind the memorandum in the last several months.

The fact is that in the last 2 or 3 months, the Civil Division, or the Justice Department has been claiming primary responsibility in almost all of the cases that have been filed, and agreeing to the Department of Energy having primary responsibility in almost none of those cases. That is a matter of concern to us, a matter about which I have had conversations with the Associate Attorney General, Mr. Shenefield, and which we are hoping to try to straighten out.

As you know, the Office of Management and Budget undertook a study of litigation, really a study of providing legal services by the Department of Justice for the U.S. Government, a part of which concerned litigation. They found a general attitude among the departments, with which the OMB staff agreed, that separate litigating authority, statutorily decreed for Cabinet departments, was not desirable. They thought the general concept of the Attorney General being the chief lawyer for the Government, and having overall final responsibility in legal matters was a sound one. It made sense in the area of regulatory litigation, however, that there be substantial delegation of litigation authority by the Department of Justice pursuant to memoranda of understanding with those departments which had the capability to handle litigation, where the regulatory programs that they were carrying out would lead to a duplication of effort if the Justice Department handled all of that litigation, and where concern for efficient use of legal resources would tell you that you ought to let the lawyers in the departments involved play a much more active role.

The memorandum of understanding the Department of Energy has is very much in line, I would say, with the conclusions that were reached in that staff analysis.

Senator BAUCUS. Let me ask you a few questions. I appreciate what you have said thus far.

How would you characterize the present relationship between Justice and DOE right now; that is, at this time? Have you worked out these problems? Are there still disagreements?

Mr. COLEMAN. I would have to say there are disagreements. I think it reflects an attitude on the part of some in the Civil Division that there should not be a memorandum of understanding.

Senator BAUCUS. Would you characterize the disagreement just as you already have; that is, you believe that Civil Division staff feels they should have exclusive primary litigating authority?

Mr. **Coleman.** I think that is the attitude of many of the lawyers there. At the senior levels, there has been a consistent effort, I think, to try to resolve differences that do arise.

I might say I believe that differences of opinion may be endemic to the legal profession, and that does not particularly concern me. If you have two lawyers working on one case, they are often going to have a different attitude as to how the case ought to be tried.

Senator **Baucus.** To what degree, though, is some of the misunderstanding attributable to Energy? You seem to say the entire fault is with Justice. Where should the Department of Energy give in here?

Mr. **Coleman.** I did not mean to leave that impression at all. What I would say is that the Department of Energy lawyers who worked on these cases think they ought to have a much larger role in them. The Department of Justice lawyers——

Senator **Baucus.** They want a larger role, too.

Mr. **Coleman.** Yes, institutionally.

Senator **Baucus.** What can Energy do constructively to help resolve this difference?

Mr. **Coleman.** Well, I have gone in complete good faith to Mr. Shenefield, and we are going to have a series of discussions, I trust, over the next several weeks, which are aimed at improving some of these. But there has to be, in my opinion, an attitudinal change, at least to some degree, by some of the people in the Civil Division, to accept the fact that a memorandum of understanding is the policy of the Department of Justice, and that they should attempt to get along under it.

In my own view we got along reasonably well in the first year, I would even say surprisingly well, in handling those cases. I do not think that these differences have affected the handling of particular cases adversely. I think these differences have been a delaying factor in a number of instances.

Senator **Baucus.** One thing I find intriguing is that Civil Division told this committee that its relationship with Energy is the worst among all its client relationships in the Government. You mentioned there is a memorandum of understanding with the Department of Labor and Justice, EPA has an agreement of some kind with Department of Justice, and I am sure that the Department of Justice has formal or informal agreements with many other client agencies. I am curious as to why the Justice Department would say—that is, members of the Civil Division, Alice Daniel I think is one, and Ms. Babcock may have been one too, but I will have to go back and double check—that in their experience their relations with the Department of Energy is the worst. Why would that be?

Mr. **Coleman.** I read the transcript. As I read what they are saying, the primary reason they thought it was bad was because we had a memorandum of understanding, and they did not think we ought to have one. This flows from an institutional view that, for Energy Department lawyers to be handling cases that the Civil Division lawyers wish they were handling is bad and that that is a problem. However, the memorandum of understanding expresses the policy of the Department of Justice executed by the Attorney General. Many times, in testimony before congressional committees, the Department of Justice has said they support the concept of a memorandum of understanding.

Senator BAUCUS. What about backup litigation support? Apart from who has primary jurisdiction, once that question is resolved—you have read the transcript; you know one of their complaints is that often the Civil Division, where it has primary jurisdiction, goes to Energy for litigation support and does not get it.

Mr. COLEMAN. I have no doubt that you will find instances where a lawyer at the Justice Department will feel that he has not had the support on a particular case that he would like to have had. You will find as a general condition that lawyers in the General Counsel's Office and lawyers in the Civil Division, will both say that they are understaffed and would like——

Senator BAUCUS. What about litigation reports? The Civil Division gets litigation reports from all agencies.

Mr. COLEMAN. It has not been our custom——

Senator BAUCUS. Why can you not supply them?

Mr. COLEMAN. Because in my opinion they are unnecessary.

Senator BAUCUS. Why is that?

Mr. COLEMAN. In a case that you are both working on, and you both know what the other lawyer has in mind with respect to the case, it is not something that we have customarily provided the Department of Justice.

Senator BAUCUS. Is that not an area where maybe you can help resolve some differences? You have admitted yourself that Energy is not immune from criticism?

Mr. COLEMAN. If they want to do it that way, I will more than likely agree to do it. I am not sure that that is really a meaningful criticism. The attitude of the Department of Justice is that we are going to handle these cases, and you are going to always be in a secondary role, do the yeoman work, discovery, and all of that sort of activity and we will argue the cases, then there might be——

Senator BAUCUS. Excuse me, Mr. Coleman, we are right now discussing the class of cases where both agencies agree that Justice has primary litigation authority. We are not discussing whether or not Justice or whether Energy should have it. We are discussing that group of cases where everyone agrees Justice should have primary litigating authority.

The question then is, in those cases why is not Energy a little more cooperative?

Mr. COLEMAN. All right. First of all, the issue of whether there are litigation reports, no one at the Justice Department has asked that we customarily provide litigation reports. They have not been done. Work on those cases proceeds more informally. If they want to formalize that into reports, they can address that request to me and I will take it up.

If I could go to the second part, as to whether in those cases where Justice has primary responsibility, we attempt to be cooperative, there have been, on several occasions, instructions given in the highest offices in the Litigation Branch at the Department of Energy that those cases are just as important as the cases in which we have primary responsibility, and that from a management point of view, we expect cooperation to be given. That is our policy; we insist on it.

Undoubtedly, you are going to find the case where the Department of Justice lawyer will take the view he has not gotten cooperation that he says he ought to.

On our side, we could dredge up cases of enormous importance to use where they are writing the briefs, and they delivered it to us on the afternoon before it was to be filed and said, "Here, review it."

You can find, you know, as many examples as you want to take the time to look for where somebody is dissatisfied, in some particular, with the performance of his colleagues in the other Department.

Senator Baucus. These are important cases, are they not?

Mr. Coleman. Extremely important cases.

Senator Baucus. How much is involved in these cases?

Mr. Coleman. Anything from a few hundred thousand dollars, or no money involved, if it was an injunction case, to over $1 billion in some instances.

Senator Baucus. If that is the case, do you not think that both the Department of Energy and Justice have some responsibility to quit quibbling and bickering over who and what gets the glory, to get his name on the brief, and on the petition filed in court, and so forth? I have a hunch a lot of people in the country—I am one—are getting a little upset at the bickering between agencies. They are just a waste of time, and it is counterproductive.

Mr. Coleman. If I might say, the programs are Department of Energy programs. Mr. Bloom and I are very serious about seeing that our statutes and regulations are enforced. We have an able corps of lawyers in my office and his office who are dedicated to that enforcement effort. We often get sued by oil companies over questions of interpretations of our regulations. All of these cases are extremely important, not just to see whether you win or lose, but with respect to where they fit in the overall regulatory scheme, and what implications they may have for other cases. We live with that every day. We have lawyers who write those regulations, interpret them, bring the actions, and are perfectly capable of handling them in court.

The issue then becomes whether, because of institutional concerns, the Justice Department ought then to take over the case, learn everything about it, if they can, that the Energy Department already knows, and take it to court. My own view is that we are quibbling far less than they are.

If I might just continue, we have not contested in recent months a single decision of the Civil Division to assert primary jurisdiction. I do not believe that the Civil Division in recent months has been living up to the spirit of the memorandum of understanding in terms of the allocation of cases. They have been taking them all.

I brought up that question as a general matter with the Associate Attorney General, and expect to proceed at that level to try to resolve the matter.

Senator Baucus. How many attorneys are there in the Department of Energy?

Mr. Coleman. In the Department of Energy?

Senator Baucus. Yes.

Mr. Coleman. Attorneys assigned to the General Counsel's Office, something over 400, I think, counting regional and field counsel. There is another large contingent of attorneys in the Special Counsel's Office.

Senator Baucus. How many in the Special Counsel's Office?

Mr. Bloom. I have about 40 in my headquarters office, and about 65 in the field, which includes 33 who are detailed from Mr. Coleman's roster.

Senator **Baucus.** Thirty-three?

Mr. **Bloom.** Thirty-three of the sixty-five in the field, who work on my payroll, are actually occupying slots, personnel positions, in the General Counsel's Office. That is, they are detailed from the General Counsel's Office to my office. Independent of that, I have about 32 or 33 of my own attorneys in the field, and 45 in the headquarters.

Senator **Baucus.** Among the 400 that you have, Mr. Coleman, how many are litigators?

Mr. **Coleman.** In the Litigation section?

Senator **Baucus.** Yes.

Mr. **Coleman.** Mr. Chairman, there are six Assistant General Counsels in the Enforcement and Litigation section and, let us see, five of those deal in some respect to petroleum enforcement cases. There are two Assistant General Counsel groups that we call regulatory litigation, that are the ones that handle litigation for us in court, or work with the Justice Department on litigation that is in court. The number of lawyers is on the order of 30 lawyers. There have been some recent vacancies, and some recent hiring decisions——

Senator **Baucus.** You have 30 slots?

Mr. **Coleman.** I do not recall the number offhand.

Senator **Baucus.** Approximately?

Mr. **Coleman.** I think the slot number is higher than that. There are some vacancies, and with the hiring freeze——

Senator **Baucus.** Can you give me a rough estimate as to how many slots you have?

Mr. **Coleman.** I think the slot number is around 35 or so lawyers. We have allocated, of the total allotment, about that many lawyers. There are some vacancies.

Senator **Baucus.** How many vacancies are there now?

Mr. **Coleman.** Half a dozen or so.

Senator **Baucus.** Half a dozen out of 35? So you have about 29?

Mr. **Coleman.** Something on that order. I will be happy to provide the exact number for you, if you wish.

Senator **Baucus.** If you would, please.

Now, I take it that the balance, the 350 roughly, are not in the litigating section; is that a fair assumption?

Mr. **Coleman.** No; we have a section that is called Enforcement, that handles administrative litigation. These are the same kind of cases heard before the Office of Hearings and Appeals, which is within the Department. There is also an Administrative Litigation section that works on those same kinds of cases and some that are in court as well.

Senator **Baucus.** All I want to know is how many lawyers there are who spend most of their time litigating, and how many lawyers do not. That is all I am asking.

Mr. **Coleman.** It is the largest section in the office, upward of a hundred, I think.

Senator **Baucus.** One hundred?

Mr. **Coleman.** That is in Washington, and regional offices; they are heavily involved in enforcement work, either preenforcement——

Senator **Baucus.** Among those people who litigate, how many are in court? Is it fair to say some are exclusively, have exclusive courtroom litigating experience, and others in regulatory agencies, or is it both?

Mr. **Coleman.** The two regulatory litigation groups are involved almost exclusively in court litigation. The Office of General Counsel, as of April 30, 1980, has on board 30 attorneys in its Offices of Regulatory Litigation. The specific divisional strengths are as follows: Regulatory Litigation I has 16 full-time permanent attorneys and 1 full-time temporary law clerk—counted as an attorney for administrative purpose. Regulatory Litigation II has 13 full-time permanent attorneys.

The others I mentioned are primarily in administrative litigation, although they do get to court occasionally. The general litigation group, which handles nonregulatory cases, is almost exclusively involved in court litigation, although they usually are in a supportive role with the Justice Department. However, they will often argue the case themselves, pursuant to agreement.

Senator **Baucus.** It is my understanding the Civil Division lawyers, when they have primary litigating authority in a case, are not allowed to talk directly with the personnel in the Department of Energy who draw up regulations, who really have the most substantive knowledge of the substance of the case, but rather they have to go through litigators at Energy who are not any more experienced than those at the Civil Division. That is, they cannot go straight to the horse's mouth. They have to go through another layer of bureaucracy.

Mr. **Coleman.** My understanding is the wish of the Civil Division is to have one contact point within the Department which they can contact to get whatever it is they want. If they wish to talk to a particular person, orderly procedure would be to contact their counterpart in the General Counsel's Office, who will then arrange the appropriate meeting with whoever it is they need to see. I am aware of no ban on talking to——

Senator **Baucus.** It is your position that if somebody at the Civil Division of Justice who has primary litigating authority wants to talk to anybody directly in Energy, he may do so?

Mr. **Coleman.** I think the orderly procedure would be to contact the person in the General Counsel's Office who is assisting them on the case in the Department.

Senator **Baucus.** But in addition to going through that one contact, must everything go through the contact?

Mr. **Coleman.** It depends on whether it is a case in which, let us say, there is going to be a witness from the Department of Energy, and there is a great deal of work going on with that witness, I would be surprised to find that all contacts go through a lawyer. I think they might call up the witness in a particular instance. That, however, strikes me as not a problem in orderly procedure.

Senator **Baucus.** Let me read a letter from Associate Attorney General Egan dated March 14, last year. This is a letter to you:

> It is my understanding that several requests which the Civil Division attorneys assigned to these cases for the opportunity to meet with the auditors for the purpose of clarifying some of the allegations made in draft complaint have been denied. Indeed I understand that attorneys from your Department abruptly canceled an audit briefing for Civil Division attorneys and refused to reschedule the session.

I do not know exactly what that means, but in some sense it means that the Civil Division attorneys have been denied access to certain personnel in the Department of Energy.

Mr. COLEMAN. Mr. Chairman, my recollection of that particular occurrence is that it was related to some cases that were being prepared at that time by the Office of Special Counsel, and my assumption is that they were not at that point sufficiently far along that they thought it would be useful for conversations to occur between——

Senator BAUCUS. I am sorry; what is your recollection? I did not hear that.

Mr. COLEMAN. I am saying my recollection is those were cases that were handled and prepared by the Special Counsel's office, and they regarded it as premature to be involved in discussions with Justice Department lawyers.

Senator BAUCUS. It is my understanding those cases had already been referred to Justice.

Mr. COLEMAN. Mr. Bloom can answer that a lot better than I can, I expect.

Senator BAUCUS. Mr. Bloom?

Mr. BLOOM. Senator, you are alluding to one episode in a series of events relating to referrals which were made originally from my office through Mr. Coleman to the Civil Division, asking that Division to bring certain crude oil production cases. In fact, they were never brought by the Justice Department. They were brought as civil enforcement actions, direct administrative enforcement actions, what are called proposed remedial orders—PRO—by my office subsequent to that letter.

The letter that you allude to refers to cases that are colloquially known as crude oil PRO cases. The reason for the letter is that we had requested the Justice Department, at the end of November 1978, to permit the bringing of those cases. We had prepared draft complaints, and we had provided in December 1979 very extensive briefings with all our crude oil people. We look forward with eager anticipation to prompt and favorable action by Justice Department on our recommendation.

Under the memorandum of understanding, which was then in effect, it provided clearly that the Assistant Attorney General would advise if the Justice Department disagreed with our request for primary jurisdiction, which we had made in that case.

Prior to the letter from which you read, Mr. Egan, who was the associate, rather than Assistant Attorney General, as provided in the memorandum, sent a letter to Mr. Coleman announcing that under certain stated conditions Justice did intend to bring those cases. Those conditions were not the ones under which we had asked them to bring them, nor did they accede to our request for primary litigation authority.

Mr. Coleman then sent another letter pointing out to Mr. Egan that the manner of disposing of the question of primary litigation did not comport with the memorandum. The memorandum provided for an appeal, that the original decision would be reported by the Assistant Attorney General, and Mr. Egan would act as impartial arbiter in the event of a dispute to review that decision. Instead, we received a final conclusionary letter from Associate Attorney General Egan saying that they would do it only on their conditions and on their terms, which were primary responsibility for them. At that time the Department of Energy was faced with the situation: Did we wish to proceed with the request to the Justice Department to handle the cases on their terms, under the different conditions, and under different intervening litigation matters, which I will be glad to describe to you, including Judge Gesell's decision in the NGL cases which had intervened.

During that period, the Department of Energy reassessing whether we seriously wished the Department of Justice to continue to bring them under the conditions they had imposed, under the conditions stated in Mr. Egan's letter, which Mr. Coleman had questioned and asked him to reconsider. During that period, it is true, the Justice Department asked for direct contact to certain of my auditors. My auditors at that time were otherwise occupied in helping my office and Mr. Coleman's office in directly preparing materials that would help us make a decision as a program office, whether we wished to ask the Justice Department to continue on the course it had advised; that is, to proceed with primary litigation authority under the conditions that it had imposed on our request, or whether we would withdraw that request.

So the letter you are talking about does not purport to represent a characteristic or continuing or programmatic situation. It was an isolated episode that resulted from a very unusual situation.

The Justice Department had inconsistently with the memorandum, in our view, announced a decision. Mr. Coleman had asked them to reconsider it. While that reconsideration was going on, they asked for access to certain auditors, and those auditors' time was unfortunately preempted at that time by other very important assignments I had given them.

As it eventuated, the request became absolutely academic because there was no need for Justice Department to have access to those people, because we withdrew the request of the Justice Department to file those cases and, in fact, we filed them ourselves as administrative actions.

Senator **Baucus**. Did not Justice legitimately need access to the auditors, so that Justice itself could decide on how to handle the cases?

Mr. **Bloom**. Justice had already announced its decision.

Senator **Baucus**. What was that decision?

Mr. **Bloom**. That decision was, under certain stated conditions, somewhat different from the ones we had proposed in the original memorandum of referral, that they would take the cases under their primary authorities.

Mr. Coleman pointed out in his response, which I think was in February, prior to this letter, that that did not appear to comport with language of the memorandum which said that the Assistant Attorney General would make the preliminary decision subject to Mr. Egan's review.

So all that Justice had at that time, from our point of view, was a request from Mr. Coleman that they reconsider that decision——

Senator **Baucus**. I am sorry. You have talked a while. Let me talk a while now.

As I understand it, Justice did have primary litigating authority at one point; is that correct?

Mr. **Bloom**. Justice announced it intended to take it——

Senator **Baucus**. Before Justice made that announcement, the Department of Energy did refer the case to Justice?

Mr. **Bloom**. With a request for our primary management of the case. We included in our referral a statement—I read it last night—that they would supply up to 12 full-time attorneys to staff the very demanding cases. They were of unprecedented complexity and significance to our program.

We offered to put an unprecedented number of full-time lawyers on them, and we asked Justice for a favorable response to our request for primary management of those cases. Justice's response, at the Egan level, rather than Assistant Attorney General level, as provided in the memorandum, said "no" and attached other conditions that were inconsistent.

Senator **Baucus**. What were those conditions that were so abhorrent to the Department of Energy?

Mr. **Bloom**. Well, two basic legal changes. Justice imposed the condition that related to certain injunctions in what we were calling injection well cases. I do not want to bore the subcommittee with abstruse legal details.

Senator **Baucus**. Tell me in layman's terms.

Mr. **Bloom**. Multihundred-million-dollar case pending in Wichita over whether injection wells can be counted as producing wells.

Senator **Baucus**. What were the conditions that Justice attached that you found objectionable?

Mr. **Bloom**. One was that they refused to take action on any company that was involved in those cases. We said that was erroneous. Justice took the view that certain injunctions that were pending in that district court action prohibited, or had the spirit of prohibiting, any additional enforcement action against companies involved. We took the view that that was absolutely wrong.

Senator **Baucus**. Logically, I would think you would take your auditors and would march them over to Justice so you could show Justice what information you had to convince them to bring cases.

Mr. **Bloom**. That was the legal issue, Senator.

Senator **Baucus**. Why did you deny Justice access to your auditors? I do not understand.

Mr. **Bloom**. We did not deny access.

Senator **Baucus**. You said you did.

Mr. **Bloom**. We told them at that time it was not possible to provide the auditors, the particular audit people they wanted. They wanted Mr. Mayberry and others.

Senator **Baucus**. It was not possible at that time to——

Mr. **Bloom**. To provide the individuals they wanted.

Senator **Baucus**. That is denying access, is it not?

Mr. **Bloom**. Temporarily.

Senator **Baucus**. How long? How long is temporarily?

Mr. **Bloom**. In that case, if I may finish my answer, Senator, in that case it was just as long as it was necessary for us to have Mr. Mayberry finish his work, and——

Senator **Baucus**. To have whom finish his work?

Mr. **Bloom**. Mr. Mayberry was the gentleman they wanted to talk to. They wanted to talk to him and some of his people. They wanted to talk to him to further their preparation of the case. At that time the Department of Energy was reevaluating whether we wished Justice Department to proceed at all. From our point of view it would have been futile, pointless, and a waste of resources to send over to Justice for further briefing auditors who could only help them to bring cases, and these were the very cases we were considering withdrawing from the Justice Department at that time.

I might point out, Senator, that it would in fact have been utterly useless, because we did withdraw those requests.

Senator BAUCUS. Let me read further: "Department of Energy cooperation in other aspects has been less than satisfying and in many instances inexplicable."

What is he referring to there?

Mr. BLOOM. I wish you would ask Mr. Egan. I am sorry he did not appear at your last hearing.

Senator BAUCUS. I do not know if you are too sorry about that.

Mr. BLOOM. I am indeed, since Mr. Egan is the one who actually negotiated the memorandum that Ms. Babcock was talking about.

Senator BAUCUS. Mr. Coleman, are you familiar with the February 25, 1980, report "Regulatory Litigation, Brief Management Review"?

Mr. COLEMAN. I probably have seen it, but I do not recall it by that date or time. If I might see a copy of it.

Senator BAUCUS. Staff will give you a copy.

Before we get to that, let me follow up a question to Mr. Bloom.

Can you tell me, for my information, how long did you deny access, or at least how long were your auditors tied up so they could not talk to Justice?

Mr. BLOOM. It could have been as long as several weeks, Senator. The period they were denied access was that in which I was reevaluating whether I wanted Justice Department to bring those cases for the Department of Energy, before I decided that I did not. They were told at the time that our auditors were involved in crucial, internal programmatic work.

Justice Department at that time thought it was going to go forward with the cases, and therefore was resentful that it could not have access to these auditors. It turned out that the matter was absolutely meaningless, because in fact they did not need the auditors, since they did not bring the cases.

Senator, if I was not clear on it, when we asked the Justic Department to bring those cases, we provided day-long full briefings between all my auditors, including the chief auditor, Mr. Mayberry, and all the senior staff, which I brought in from the field, from Dallas and Houston, for days and days, during the period of November and February. It is not a situation in which they were deprived. We gave them audit reports, and very extensive—tens of hours of extensive preparation and direct access to those auditors.

It was only during that very brief period which we responded with surprise and some dismay to Mr. Egan's letter, and the conditions he was imposing, that those auditors were unavailable.

Senator BAUCUS. Have you ever denied access at any other time to any of the Justice Department personnel?

Mr. BLOOM. To my knowledge, I have had no such requests, nor have I denied it. In all cases in court we routinely provide access, and as far as I know, both sides, Justice and DOE, have always preferred those requests be communicated through our General Counsel's Office.

Senator BAUCUS. On page 5 of that report which you now have, Mr. Coleman, are you familiar with it?

Mr. COLEMAN. Yes, I have seen it.

Senator BAUCUS. I would like to hear your comments on some of the statements. On page 5, under "Symptoms of Distress," the report states that "inordinate staff attorney effort required to get a brief completed, perform discovery work and other litigation paperwork."

It says, "missed deadlines and frequent need to file for extensions. Office appears in general state of disorganization. Staff leaving. Organization stress exhibited at all levels. Unhappy frustrated people."

Those are just some of the statements there which you can see. What does all that mean?

Mr. COLEMAN. Let me put it in context. This is a staff report, or a brief statement by some people in the Office of Administration at the Department of Energy. I asked them to look at the Litigation section to determine whether there was adequate secretarial support, whether we needed to make some changes by way of attempting word processing, to look at the question of organization, to see whether we had ourselves organized in the most effective manner possible. This was their candid response.

These statements here, I think, probably reflect something an individual staff lawyer said in a particular interview. I do not believe they represent a conclusion that that is what the person making this analysis, at our request, found. He was saying, here are some of the symptoms of the problems that we have. Apparently somebody said that.

Senator BAUCUS. Yes; and I am sure anybody doing the report would include statements that are representative.

Mr. COLEMAN. I do not know. I have not talked personally to the person that recorded these observations.

Senator BAUCUS. I am curious; is there any reason why you have not? This is pretty tough stuff here. It is very critical of the Department's Litigation——

Mr. COLEMAN. If it were a conclusion expressed, rather than a statement that they heard somebody say this, that would be——

Senator BAUCUS. The statements are all negative. They are not positive. That is the conclusion to me.

Mr. COLEMAN. I sent him over there to see what improvements were needed to be made. We had a number of meetings on things we think we can do.

Senator BAUCUS. You have not talked to the person who compiled this report?

Mr. COLEMAN. I have not personally. My staff, my assistants, and the management in the litigation group have talked——

Senator BAUCUS. Has anybody directly working with you talked to this person and referred back to you as to what can be done to correct these problems?

Mr. COLEMAN. Those people work for me, too. They are the people I look to in the management of the litigation area as well as my special assistant.

Senator **Baucus**. How often does your litigation staff miss deadlines? That is one of the statements in the report here.

Mr. **Coleman**. I cannot respond to that. My impression is, not often. I will be happy to have either of the Assistant General Counsels for Regulatory Litigation answer that question more particularly, if that is one that——

Senator **Baucus**. Well, based on your experience, is it average, above average number of times that your office misses deadlines?

Mr. **Coleman**. I think a missed deadline would be an extreme rarity.

Senator **Baucus**. Why does the report state that is one of the big problems?

Mr. **Coleman**. I do not recall this being a report.

The statement says missed deadlines, and frequent need to file for extensions.

I assume what that means is that because of the amount of work to be done, the time to do it in, it was not possible to get a brief prepared for filing for the time it was supposed to be filed. It was necessary to request an extension of time to file a brief. That is done routinely all over the United States, in every private law firm, every government agency that I know anything about.

A missed deadline is when you miss one that is not——

Senator **Baucus**. I do not mean to quibble with you, but it says frequent need to file extension. It does not say occasional. It says frequent.

Mr. **Coleman**. I would think, if you asked the Justice Department if they frequently file for extensions, they would say they do.

Senator **Baucus**. That may be. I do not know.

Mr. **Coleman**. Ask any law firm in town if they frequently file for extensions, and they would say they do.

Senator **Baucus**. All I know is that in this report it happens to be the Department of Energy report, and we come across that statement. We do have a statement that says Energy frequently misses deadlines.

Mr. **Coleman**. I do not see this as saying we frequently miss deadlines.

Senator **Baucus**. Frequently file for extensions. I do not want to quibble. I am wondering what is the problem here?

Mr. **Bloom**. I might be able to shed a little light on this. I am a client of Mr. Coleman's, independent of his office, and I bring cases ranging up to hundreds of millions of dollars that are litigated in part by his office, and by support of his office in the Justice Department. I would be, I think, as aware as anybody if there was any misfeasance or nonfeasance or failure to follow professional standards.

I can tell you, and I stress that my office is independent of Mr. Coleman's, that we have absolutely no such experience. The Litigation personnel who handle my cases, to the best of my knowledge, the other cases, do them with dispatch and efficiency and professionalism, and simply do not miss deadlines or otherwise contribute to causing any prejudice to these cases.

I am as sensitive to the security and forward motion of my cases as any program manager or client or regulatory office in government. I can tell you from 3 years of experience, that the phenomena that you think you perceived described in these outlines simply do not occur. I am not aware of a single case where the Department of Energy lawyer has missed a deadline and caused any prejudice to any one of my cases. And I stress that I have filed a great number of the cases, and am involved in a great proportion of the cases that are handled by Mr. Coleman's office.

Senator BAUCUS. I am just curious as to what these mean, or may mean. Here is another statement. "Inordinate staff attorney effort required to get a brief completed, perform discovery work and other litigation paperwork."

What does that mean?

Mr. COLEMAN. I can only speculate. I assume somebody said something like that. This staff person is not a lawyer you understand, but is somebody from the Office of Administration, who went over and talked to some of the lawyers.

Senator BAUCUS. I am sure they interviewed lawyers.

Mr. COLEMAN. I understand. That is what I said. They interviewed lawyers. Those lawyers are undoubtedly overworked. They undoubtedly have frustrations from time to time. You find in our office the same thing you find at Civil Division on that score. But I do not know what a particular person had in mind when he made this statement, other than we have a lot of discovery work, because in litigation with the oil companies, their tactic often is to file extremely broad demands for discovery pursuant to the Federal Rules of Civil Procedure, and our office has to comply with all of that.

Senator BAUCUS. Have you run across any other instances where attorneys at the Department of Energy have complained to you or talked to you or discussed with you significant problems they have?

Mr. COLEMAN. All the time.

Senator BAUCUS. I mean, anything that is significant, that is alarming or causes you concern.

Mr. COLEMAN. There are often things reported to me by my lawyers that cause me concern, that I have to deal with. That is part of the job.

Senator BAUCUS. So your attorneys are complaining to you all the time, then; that is what you are telling me?

Mr. COLEMAN. Well, if you want to put it in those words. I would not say they complain all the time.

Senator BAUCUS. Well, that is what you just said.

Mr. COLEMAN. I said there are often things that concern me that have to be dealt with. I think the lawyers at the Department of Energy are working under a great deal of pressure. We would like to have more staff; everybody would. We work within the limits that we have.

There are always going to be staffing problems that come up that have to be looked at and resolved the best way you can. But there are no problems that I regard as unusual with the kind of work that we are engaged in.

Senator BAUCUS. You did authorize this report, did you not?

Mr. COLEMAN. I requested that they look at it. I do not regard it as a report, first of all, that has conclusions and recommendations. These are some things that some particular lawyer, or someone, apparently told to the staff person who made these observations.

The principal purpose for their looking into this was with respect to the adequacy of our clerical support and possible improvements in the office equipment that we had such as word processing and Xerox, as well as organization.

Senator BAUCUS. Well, let us just be honest with each other.

Mr. COLEMAN. I am being honest.

Senator BAUCUS. Part of it does deal with clerical and word processing. Here is the report; here is the cover. I will read it to you. It is a memorandum to all staff from John P. McKenna and Tom P. Humphrey; the subject is "Management Review." "Enclosed for your information is a copy of the report resulting from the recent outside study of the organization and management of this office."

It is a report of both the professional and clerical personnel and operations. Why did you not follow up this report?

Mr. COLEMAN. We have had a number of meetings, and I think most of the concerns that are expressed in this report—which were concerns that I had and wanted an outside person to look at—have been addressed in the normal course of meetings that we have had.

We are making an effort to improve, particularly the clerical questions, the adequacy of support personnel and the adequacy of equipment devoted. We also have underway a review of the organization of that office to see——

Senator BAUCUS. Let me read some more comments in this report. Under "Typical Problems," the report states:

> Supervision and management inadequate; responsibility and accountability lines virtually nonexistent; priorities for work not clear; no work strategy or sharing of information—"everyone for himself"; focus of work is only on meeting immediate requirements; difficult to evaluate employee performance; no case tracking or workload data; attorneys doing nonattorney work; clerical staff not responsive.

That is just, again, a series of some of the representative statements that are in this report.

Mr. COLEMAN. Well, may I say that the person recording those observations was not a lawyer, not a person trained at managing lawyers. I have people in that section in whom I have full confidence.

That group is under stress because of the litigation demands they have. Obviously, I had some concerns that we might be able to make improvements, or I would not have taken the step of asking someone from the outside to see what problems they might identify that need working on. They had full access to everybody they wanted to talk to, and we were interested in candid advice.

I do not regard these odd statements that may have been made—and I assume that their intent here was just to list all of the negative things they heard; they were not hired or asked to list the positive things.

Senator BAUCUS. Let me ask a question.

Mr. COLEMAN. If I might finish my answer, because you are talking about the way I manage my office, Senator.

Senator BAUCUS. You can follow up, and I will give you time to talk. But one point I want to clear up here—you say you "assume." Well, one way to find out whether your assumptions are correct or not is to talk to this person who did the report. You said you have not talked to them.

Mr. COLEMAN. I have not talked to them.

Senator BAUCUS. I am just telling you that, in my office, if I were aware of a report like this, I would want to get to the bottom of it and find out what the heck is going on.

Mr. COLEMAN. Well, I think I am to the bottom of it. I talked to the lawyers involved; I talked to the people in management. We had long meetings about what we might do to address some of these concerns, and I am satisfied with the way we have——

Senator BAUCUS. Let me just take a few of them. "Supervision and management inadequate"—what might be the problem here?

Mr. COLEMAN. I am sorry. Which one are you referring to?

Mr. BAUCUS. "Supervision and management inadequate."

Mr. COLEMAN. That is such a speculative thing. Maybe it means that management should be generally improved. I would wholeheartedly agree that we ought to, at all times, try to improve our management techniques. But I do not know what you can conclude from those four words.

Senator BAUCUS. I am just wondering what might be this person's——

Mr. COLEMAN. I have no idea—I mean, if you are talking about what particular incident caused somebody to say something that caused this fellow to write it down.

Senator BAUCUS. Another is "responsibility and accountability lines virtually nonexistent." What might that problem be?

Mr. COLEMAN. I have no idea. I do not think that is accurate.

Senator BAUCUS. Another one is "priorities for work not clear." What might that mean?

Mr. COLEMAN. When you have a number of cases you are working on, more than you can handle at any one given time, you presumably have to establish priorities. And when you have that many cases, there can at times be confusion as to which case is regarded by the Department as the most important case.

Now, that is something that the lawyers involved are not really free to decide in all instances themselves, because deadlines are established by the courts and they have to respond to those deadlines.

There may have been someone who felt that priorities as between particular work were not clear in some instances. I have no way of knowing about that.

Senator BAUCUS. Again, though, if you do not know what those mean, why do you not try to find out what they mean?

Mr. COLEMAN. Well, I have worked a long time in litigation, and I would expect to find lawyers making statements like this. I do not think they were intended to reflect a general conclusion. Certainly, this does not say that these are conclusions. They say, "These are things we heard people say and are evidence of problems that you may need to work on." And we have worked on them.

Senator BAUCUS. But it says "typical problems"; that is what the reports say. These are typical problems.

Mr. COLEMAN. And I have responded that we have addressed those, I think, in a responsible fashion and the way you would expect us to.

Senator BAUCUS. Then you are saying that you think that, yes, there is some accuracy and validity in the statements?

Mr. COLEMAN. If I had not thought that there were some problems, I would not have asked these people to go over there and give me their advice.

This is the kind of thing that I would ordinarily regard, and I am sure the person who wrote it thought it would be, a candid, confidential report to me to tell me what they found, not something that they reached conclusions on. I mean, I do not see anywhere in this report that they ever purported to express a conclusion—"here is what we found, and here is what you ought to do about it."

Senator BAUCUS. You might be thankful for that.

Mr. COLEMAN. What is that?

Senator BAUCUS. You might be thankful.

Mr. COLEMAN. No. I have talked with them. Their view is that there are certainly no problems that are not to be anticipated in a litigation group, or that cannot be overcome, or that are not being overcome. I regard it in that context.

Senator BAUCUS. These are big cases, too, are they not?

Mr. COLEMAN. I have said they are big cases.

Senator BAUCUS. I am just, frankly, a little concerned that because they are big cases and because we get this report which says these are typical statements, that maybe the American taxpayer is not getting his money's worth out of the Department of Energy.

Mr. COLEMAN. Well, I resent that statement, Senator. I think that is absolutely inaccurate.

Senator BAUCUS. It is not meant to be accusatory at all; it is just meant to be descriptive, an observation.

Mr. BLOOM. Senator, may I speak to that, too? You are asking Mr. Coleman quite properly to talk about how he manages his office. That is none of my business.

The results of his program are very important to my program, because I have program responsibility for those billion-dollar cases. I am perfectly satisfied, and I can assure you that any inference from these skimpy bullets, any construction placed on them that the American people are not getting their dollar's worth out of the litigation work of Mr. Coleman's staff, would be not only inaccurate, but it would be a slander on that staff. That staff is perfectly, eminently capable, and has demonstrated that in its cases and in the support it gives the Justice Department. That would be a grossly unjustified and unfair construction to place on such a sketchy piece of material.

Senator BAUCUS. You say the results are important. Correct me if I am wrong. It was my understanding that of the cases that you have lost at the trial level and appealed, you have lost, by far, a much, much higher rate than has the Civil Division.

Mr. BLOOM. Senator, if you wanted to get into that, perhaps Mr. Coleman should begin, but that would be a ridiculous overgeneralization. All of these cases are shared responsibility. The cases which they claim they win are cases typically in which we write the briefs, sometimes right up to the last moment.

It seems to me somewhat egregious to take a position and say that because the Justice Department made an oral argument rather than we on a case that we brought, which the Department of Energy wrote an enforcement action on, or wrote the briefs in a defensive action on, and actually worked with them on a teamwork basis right up to the moment of oral argument, that they are better lawyers than our lawyers are because the Government happened to win that case. It would be a completely unjustified and, indeed, a ridiculous inference to draw.

I think anyone who wanted to make a study of that would have to make a far more sophisticated and careful study of the teamwork arrangements and the comparative handling of these cases because, in fact, the two sides have been inextricably involved in the preparation of these cases. I know this because I was Deputy General Counsel for Litigation when I began with the FEA, and in case after case, we had far more people writing briefs than they had making arguments.

On the record, they were in a position to say that the 95-percent success rate at that time was all theirs, but, in fact, we thought we were entitled to share that result.

Senator **Baucus**. Mr. Bloom, all I can say is that your attitude, to me, represents the heart of the whole problem here; that is, it is being narrow, it is being argumentative, and you are jumping into something that is really not even according to the line of questioning we are pursuing here.

The problem is, we are trying to make sure that American taxpayers get their dollar's worth in litigating cases that involve energy legislation.

Mr. **Bloom**. So am I, Senator.

Senator **Baucus**. That is what we are trying to do here.

Mr. **Bloom**. So am I.

Senator **Baucus**. And you work for the American public.

Mr. **Bloom**. Every day.

Senator **Baucus**. So do I. It is your responsibility to make sure that the American taxpayer gets his dollar's worth, and one way we are talking about is for you to work constructively with the General Counsel's Office and also with the Department of Justice, and in this case the Civil Division.

Mr. **Bloom**. I have been trying to do that for 3 years, Senator.

Senator **Baucus**. Let me just say that from the way you have been jumping into this and your attitude here, I question whether you are standing back with enough perspective in seeking to try to resolve this thing correctly.

Mr. **Bloom**. I am seeking to bring perspective to your questions and the answers that Mr. Coleman is giving, because I do, after all, have 3 years of experience in the program, not just the basis of Ms. Babcock's previous testimony. I have 3 years' involvement, including negotiation of the memorandum and a prior position as Deputy General Counsel for Litigation. I have had hundreds of hours of meetings with the Justice Department.

Senator **Baucus**. We are not getting anywhere with your attitude right there. Why do we not just keep on with the questions; OK?

Mr. Coleman, I wonder if you could tell me what the turnover rate has been?

Mr. **Coleman**. I am sorry?

Senator **Baucus**. The turnover rate in your litigation section.

Mr. **Coleman**. Over what time period?

Senator **Baucus**. Well, over each of the last several years, or last 2 years.

Mr. **Coleman**. I would have to check; I would hesitate to guess.

Senator **Baucus**. You do not know what your turnover rate is?

Mr. **Coleman**. I think, officewide, it is on the order of 10 percent a year.

Senator **Baucus**. I am talking just about litigation.

Mr. **Coleman**. Well, I would have to check and get back to you. Recently, the Department of Justice has hired some of our people, and there have been two or three vacancies in the last month. You have to look at it over time to have any kind of a reasonable figure. If you like, I can get back to you on that.

Senator **Baucus**. If you would, please.

Mr. **Coleman**. Certainly.

[Material referred to above follows:]

For the period January 1979 to April 1980, 16 attorneys left the Offices of Regulatory Litigation (4 to other offices within the Office of the General Counsel in DOE). There were 16 attorneys hired during this period for this function.

Senator **Baucus**. Do you have a training program at the Department of Energy for new attorneys?

Mr. **Coleman**. Not denominated as such. I mean, we have experienced lawyers who work with the more junior lawyers on particular cases, and that is the only way you learn to try lawsuits, working on cases. I mean, you start off researching points of law, doing discovery work, and taking a hand at drafting a brief, and you progress to greater areas of responsibility. In that sense, we do have a training program. We do not have anything we call a training program that occurs separately and independently of the handling of cases. One exception is that we will, from time to time, have a seminar or a particular program on the substantive aspects of different regulations, where we have need to inform our litigators of new developments in regulations or new approaches that need to be taken.

Senator **Baucus**. Do you think you could properly handle additional litigation, given the numbers of attorneys that you now have?

Mr. **Coleman**. Well, when you say additional litigation, do you mean a greater number of cases, whether or not we have primary or secondary responsibility for handling them?

Senator **Baucus**. That is right. What if all energy cases were handled by the Energy Department?

Mr. **Coleman**. I think we are at the point where to handle a significantly larger number of cases, we would need to add lawyers, and we have some hiring personnel actions in progress at this time——

Senator **Baucus**. Are you subject to any freeze at all?

Mr. **Coleman** [continuing]. Which have been exempted, at least within the Department, from the freeze. OMB has to pass on that.

Senator **Baucus**. You say you are exempt from the freeze?

Mr. **Coleman**. No. I say that a determination has been made within the Department that we should hire some more litigation lawyers. In other words, we had some hiring actions that were in progress at the time the freeze came on, and I anticipate those will be honored. We had the same problem with the freeze about 1½ years ago.

We often do the same amount of work on a case whether we have primary responsibility or secondary responsibility, because for the Justice Department to successfully handle a case, as you pointed out earlier, it requires a great deal of work on our part anyway.

Senator **Baucus**. The Department of Energy has primary responsibility for litigation involving pricing of natural gas liquids; is that not correct?

Mr. COLEMAN. I believe that is correct in all three cases, yes.

Senator BAUCUS. How much is involved in those cases?

Mr. COLEMAN. I am sorry?

Senator BAUCUS. Is it safe to say that at least $1 billion is involved in those cases?

Mr. COLEMAN. The dollar figures I forget exactly; it is a substantial figure. Certainly, it is in that range.

Senator BAUCUS. Am I to understand that the Department of Energy has filed enforcement actions in these cases in January 1979? That is correct too; is it not?

Mr. BLOOM. We filed district court actions here in the District of Columbia on January 5, 1979.

Senator BAUCUS. And how are those cases progressing; are there any big problems, or are they going along smoothly?

Mr. COLEMAN. Those cases have been the subject of an order by the district judge that he would stay his hand in deciding the legal questions in those cases until cases that present similar issues in other forums are decided first.

Senator BAUCUS. How many attorneys are presently assigned full time to these cases?

Mr. COLEMAN. Just a moment; I think I can give you some specific information.

[Pause.]

Mr. COLEMAN. Mr. Chairman, I had a note somewhere on that, because I was advised that you were interested. I must say I have misplaced it; I would be happy to get back to you with a specific answer.

Senator BAUCUS. If you could, for the record, please.

It is my understanding that there are two lawyers that have primary responsibility for these cases, and they are both leaving DOE's litigation section. Would you by any chance know about that? One has already left and one is scheduled to leave June 1.

Mr. COLEMAN. This is John McKenna, the Assistant General Counsel for Regulatory Litigation, who has responsibility for those cases. He can answer the question.

Mr. MCKENNA. The natural gas liquids cases, Senator, are a group of cases. The active ones right now are going on in Delaware and Texas, and then there are some more involving one company out in Wyoming. Right now, there is a Deputy Assistant General Counsel who spends probably in the neighborhood of 60 to 70 percent of his time on these cases; he is in overall charge of them.

Senator BAUCUS. Who is that, please?

Mr. MCKENNA. His name is Don Crockett.

Senator BAUCUS. Thank you.

Mr. MCKENNA. We have within the office about five staff lawyers who spend varying amounts of their time, and have spent varying amounts of their time, on the NGL cases. In addition we have, when needed, assigned paralegal assistance to them and we have also received additional lawyer support from the Office of Special Counsel on the cases.

The staffing is not static, and it depends to a large extent upon what is happening in the cases at any given time. As Mr. Coleman pointed out, the affirmative cases instituted in the District of Columbia have been stayed, pending the resolution of the Delaware and the Texas cases. I believe that in the Delaware cases we have joint responsibility with the Department of Justice. That is my belief. I would have to check, but I believe we have joint responsibility there. The Department of Justice, I believe, has one lawyer assigned to the cases.

Senator BAUCUS. I take it, then, that there is one person who spends 60 percent of his time on the cases and there are various other attorneys within the General Counsel's Office and the Special Counsel's Office who spend varying amounts of their time on these cases?

Mr. MCKENNA. The amount of their time varies, depending upon the needs of the case at any one time. You mentioned two people who are leaving. The NGL cases have been going now for some time; I am not even sure of the date they began.

There is one lawyer who had been assigned to the NGL cases along with other cases, and she has recently left the office to go to the Department of Justice. We have another lawyer, one of the five I mentioned, who, in about another month or two, I think, is going to join our regional office in Denver. I imagine they are the two to whom you referred.

Senator BAUCUS. Did you discuss litigation strategy with the Civil Division prior to filing these enforcement actions?

Mr. COLEMAN. Prior to filing the NGL cases?

Senator BAUCUS. Yes.

Mr. COLEMAN. Yes.

Mr. BLOOM. Of course.

Senator BAUCUS. And did that work out helpfully? I mean, did you follow their advice, or did they have any good ideas?

Mr. COLEMAN. As I recall, there were differences of view as to how we should proceed in those cases. We ultimately reached a conclusion, that was shared by at least the senior people at the Justice Department, that we should proceed.

Senator BAUCUS. Did you discuss some litigation plan? I mean, did you work out with Justice some overall litigation plan?

Mr. COLEMAN. I am not sure what you mean by——

Senator BAUCUS. Well, I mean strategy. How are you going to handle all this together, so the right hand knows what the left hand is doing?

Mr. COLEMAN. Well, we were to have primary responsibility for those cases. The approach was decided upon as to where they would be filed and when, and that was as much, I assume, as was involved in the early conferences on strategy. That strategy resulted after long discussions with the Justice Department.

Senator BAUCUS. Let me ask a question or two about the case of *Tenneco Oil Co.* v. *FEA*. My understanding is that the judgment for Tenneco was affirmed by TECA on December 3 of last year, where the central issue was whether the use by Tenneco of its own oil on its own oil-producing properties was a "sale" under the terms of petroleum price control regulations.

TECA stated that the FEA's application of section 212.72 to the facts of this case is "plainly inconsistent with the language of the regulations." Are you by chance familiar with that case?

Mr. COLEMAN. I am familiar with the results of the case but I have not read the opinion.

Senator BAUCUS. But you are familiar with the result?

Mr. COLEMAN. I am familiar with the result of the case.

Senator BAUCUS. I have an April 20, 1979, memorandum from Arthur Gowran, Deputy Assistant General Counsel for Regulatory Litigation, to John McKenna, Assistant General Counsel for Regulatory Litigation. Mr. Gowran states, "For the reasons set forth hereinafter, I strongly recommend that no appeal be taken in this case," and he goes on to state why the case would be lost if appealed.

I am wondering why, with the limited resources of your litigation section and the strong recommendation by a deputy assistant general counsel not to appeal, nevertheless an appeal was filed.

Mr. COLEMAN. Well, I cannot answer that question for you specifically.

Senator BAUCUS. Maybe Mr. McKenna can.

Mr. COLEMAN. The memorandum was addressed to Mr. McKenna and so maybe he can answer your question.

Mr. MCKENNA. I only have one page of the memo, and I do not recall it, but Mr. Gowran originally recommended against the appeal. He had handled the case in the district court, where we had received an adverse decision.

To back up just a minute, it might be well to mention briefly what the case was about.

Senator BAUCUS. Very, very briefly; we have not got a lot of time here.

Mr. MCKENNA. The case involved the proper method of computing the base production control level, which is a critical element in determining how much new oil that a company has that can then be sold at the higher tier prices, or indeed at free market prices.

Tenneco, during the relevant period, had a processing agreement with another company, pursuant to which oil that they produced was processed by this other company, and the other company took part of the oil as its price for processing it, returned the oil to Tenneco, and Tenneco used it to fuel steam generators on its property.

Tenneco's position was that that oil should not be included in its base production control level—BPCL. The result of not including the oil was that on the particular properties involved, although production had, in fact, gone down consistently over the years, compared to 1972, the base period, by excluding the oil in question from its BPCL, production had gone down while new oil was going up. In fact, by eliminating the processing agreement and starting to sell the oil, Tenneco was able to sell virtually all of its production in 1974 at free market prices as "new" oil, even though its production during that period had actually gone down. To replace the oil that it used to fuel its generators, it went out and bought cheaper residual oil to fuel the generators.

So the result was that production is going down from the property and all of the new oil is going up. The linchpin of their argument was that title never transferred, pursuant to the processing agreement. The regulation in question used the phrase "produced and sold." They said this may have been produced, but it was not sold because title never transferred. That was the issue.

I forget exactly how much money was involved, but there was a considerable amount, in the millions, I believe. There was a precedential effect involved in the case. Also, we thought that the result reached in the district court was contrary to the very scheme of the regulations and their very purpose. It permitted a company whose oil production was, in fact, decreasing to be selling it all as new oil at the higher prices.

Mr. Gowran originally recommended against it. I told him to think about it, in view of some of the considerations I just enumerated. He conferred further, and he and the attorney who was assigned to the appeal ultimately came in and said that in view of the programmatic considerations, and the like, they agreed that we should take an appeal.

We then recommended to Justice that we take such an appeal. We took it. We lost in the Temporary Emergency Court of Appeals. The court itself pointed out at the conclusion of its opinion that it realized that it was achieving a funny result in this case, because while production was going down, they were getting to sell it all as new oil, but the court said it felt bound by the plain meaning of the regulations, meaning that there was no technical transfer of title.

In retrospect, we had a very legitimate position in that case, one that was entitled to be litigated, I think, in terms of its legal value and in terms of the program considerations. We lost the case. Sometimes you win them, and sometimes you lose them. In retrospect, I certainly do not regret having gone ahead with that appeal. If you are only going to appeal cases that you are 100 percent sure of winning, you will have a lot fewer appeals. I query what effect that would have on the overall programs.

Senator BAUCUS. What is your track record in appeals?

Mr. MCKENNA. Well, it depends on what period of time you are talking about.

Senator BAUCUS. Let us say the last 2 or 3 years.

Mr. MCKENNA. Well, the memorandum of understanding has only been in effect, I think, since April 1978, so the cases up until then were being handled by the Justice Department.

Senator BAUCUS. I am talking about Energy cases, cases handled by the Department of Energy.

Mr. MCKENNA. I understand, and when you said the last 2 or 3 years, we have only been handling cases, probably, in TECA since probably the middle of 1978.

Senator BAUCUS. OK; since then.

Mr. MCKENNA. The Justice Department gave figures for 1979, I think, saying that we had handled eight appeals in 1979 and had prevailed in three.

Senator BAUCUS. That is correct.

Mr. MCKENNA. I am not going to quarrel with those numbers. Since the first of this year, we have had, I think, eight cases in TECA and have won seven of them. So if you are just going to look at numbers, I suppose it depends on when you are looking. Someone might conclude that this year we are doing marvelously well, but I think a lot depends, too, on looking at what the cases are about.

Senator BAUCUS. Well, I agree. I asked the question because, as I stated, TECA's language is that the facts in this case are "plainly inconsistent with the language of the regulations," and Gowran strongly recommended against it. I am sure that most of these cases are a question of judgment as to whether to bring or not to bring, and I understand that. I raise this particular case because the court said "plainly inconsistent" and Gowran, at least at one point, strongly recommended against it.

Mr. McKENNA. I, as a personal matter, would not agree that the position was plainly inconsistent with the regulations.

Senator BAUCUS. Of course you would not; your job is not to.

Mr. McKENNA. Courts quite often, having made their decision, tend at times to overstate the result one way or another.

Senator BAUCUS. Mr. Coleman, an additional area of concern to this committee is that litigation has arisen concerning the Power Plant and Industrial Fuel Use Act. That act, as you know, requires utilities and major fuel users to switch from natural gas and oil to coal.

The first major challenge to the act's interim regulations will begin, as you know, in the fourth circuit this summer. Could you describe the current status of negotiations with the Justice Department over who will have primary litigation in these cases?

Mr. COLEMAN. We do not have a memorandum of understanding with respect to cases arising under the Power Plant and Industrial Fuel Use Act. We have requested one, and so far we have been unable to consummate any such agreement. We are in the process of negotiations now that I hope will lead to such an eventuality. I recently talked to Mr. Moorman and Mr. Shenefield about that point.

On those particular cases, in the absence of a memorandum of understanding, the Justice Department has taken the position that they should have primary responsibility. Actually, I think that when the cases were first filed, our understanding was that we would work on those cases jointly and, in fact, the lawyers at the Department of Energy were doing the lion's share of the work for a long period of time.

Recently, the lawyers at the Justice Department have taken, pursuant to Mr. Moorman's direction, a more active role in those cases and are, in fact, exercising primary responsibility.

Senator BAUCUS. One problem, though, is that it has taken some time for you to negotiate an agreement with the Department of Justice. It has been at least 15 months now and there has not been an agreement yet. Would you not agree that on the face of it, it would eliminate a lot of inefficiency if this were resolved fairly quickly?

Mr. COLEMAN. I absolutely do agree with that, Senator, and that is my intent and it has been my effort.

Senator BAUCUS. The last letter on this point, I understand, was dated March 5 from Mr. Moorman to you. Have you responded to that letter yet?

Mr. COLEMAN. I have not responded by letter; I responded by phone conversation.

Sentor BAUCUS. When do you expect to have that resolved?

Mr. COLEMAN. Well, Mr. Moorman is going to be out of town for a couple of weeks. I spoke to Mr. Shenefield as late as yesterday. I would like to have it resolved in a matter of weeks.

Senator BAUCUS. Do you think it will be, though?

Mr. COLEMAN. I cannot predict for sure. From time to time, Mr. Moorman has asserted very strong views on the question and, you know, it takes two to agree. For example, I will be willing to agree to a memorandum of understanding on the order of the one we have now with respect to petroleum cases. I think that is what Congress contemplated in the Fuel Use Act; they had a statement that we should proceed in the manner that we had under the Department of Energy Organization Act.

Senator **Baucus**. How many attorneys are there assigned in the Department of Energy to Fuel Use Act litigation?

Mr. **Coleman**. Right now, I believe about three or four.

Senator **Baucus**. Are they exclusively handling those cases?

Mr. **Coleman**. I am sorry?

Senator **Baucus**. Are they exclusively handling Fuel Use Act litigation, or are they involved with other cases?

Mr. **Coleman**. To my knowledge, we do not have any lawyers that are exclusively working on any one case all of the time. They may exclusively work on it for a matter of days or a matter of weeks while they are working on a brief, but then they will be working on other cases.

Senator **Baucus**. Are you aware that the Lands Division has created a Fuel Use Act litigation task force which has currently five attorneys working on fuel use litigation?

Mr. **Coleman**. I am aware of that; I think that they got about three of them from us.

Senator **Baucus**. What does that mean?

Mr. **Coleman**. Well, they have high respect for our lawyers, Senator.

Senator **Baucus**. What does it mean for your lawyers, though?

Mr. **Coleman**. What is that?

Senator **Baucus**. Whom do your lawyers have high respect for?

Mr. **Coleman**. Well, you can ask them that question.

Senator **Baucus**. I am interested in the structure of your office, and particularly why DOE has a general counsel and also a special counsel that does not report to the General Counsel. What is the reason and genesis of that arrangement?

Mr. **Coleman**. Well, let me give you my statement, and then Mr. Bloom can give you his. When President Carter was elected and a new Administrator of the Federal Energy Administration was chosen in January 1977—Mr. John O'Leary—there was the sense that in the past administration, inadequate attention had been given to enforcement.

The very respected head of enforcement at the Securities and Exchange Commission, Mr. Sporkin, was asked to head a task force to review enforcement efforts at the Department of Energy and make recommendations. The recommendations of that task force were that there was a big backlog of work that had not been attended to in the past; that there was a need to coordinate lawyers with auditors for the purpose of auditing the major oil companies, which would be a major task. In other words, there was a series of special circumstances where they thought the normal rule, where you have the lawyers in one section and the auditors in another section, should be changed and you would have a combined unit that could move quickly with adequate resources to conclude the audits of the major oil companies which, for the most part, had been ignored previously; also, to initiate enforcement actions. To that end, an Office of Special Counsel was created, where you have some lawyers in that office and also several hundred auditors, and the lawyers work with the auditors in teams on the audits of those big companies where you have very complicated sets of books that you are trying to review. That was the reason for setting up the Office of Special Counsel, as I appreciate it.

Senator **BAUCUS**. Why is not the person responsible for enforcement also the person responsible for litigation?

Mr. **COLEMAN**. Well, there is a collegial effort between the Office of Special Counsel and my office. If a case goes to court, the Office of General Counsel handles it. Administrative cases, because of an understanding between Mr. Bloom and me, are handled by his office. Where there are questions as to how the regulations should be interpreted, they defer to the Office of General Counsel, and where there is a matter that is in court, we have the responsibility for it. But we rely very heavily on our colleagues in the Special Counsel's Office and work together with them on those cases. That has been the experience.

Senator **BAUCUS**. Well, I frankly find that a little confusing. Why is not the person responsible for enforcement also responsible to the General Counsel? I do not understand that.

Mr. **COLEMAN**. That decision was made prior to my coming to the Department of Energy. It is my understanding that the decision was made to have the Special Counsel report to the Deputy Secretary—an official higher than the General Counsel—or the Administrator of the Economic Regulatory Administration, since both the General Counsel's Office and the ERA had interests in and were involved in, from a personnel standpoint, the creation of the Special Counsel's Office. This was intended, in my view—I was not part of the negotiations—to express clearly the high priority the Department placed on the efforts of the Special Counsel's Office.

Senator **BAUCUS**. How often does the Special Counsel or his staff get involved in litigation strategy decisions in your office? Do they recommend certain strategy, or do they insist upon certain strategy on cases being brought?

Mr. **COLEMAN**. Well, I do not know how to characterize it. Every case we are handling where the Office of Special Counsel is our client, they are intimately involved in the discussions on litigation strategy.

Senator **BAUCUS**. What if you decide that a case should not be litigated; once you make the decision not to litigate a certain interpretation of a regulation by an oil company, can the Special Counsel insist that you proceed?

Mr. **COLEMAN**. Under the working arrangements we have, the Special Counsel would be able to initiate a case before the Office of Hearings and Appeals without the concurrence of the General Counsel's Office. If it were an action in court, then it would be a matter under our cognizance and that we would handle.

Senator **BAUCUS**. Let me go back and cover a little ground on the memorandum of understanding. As I indicated in my opening statement, various witnesses before this committee have stated that the Department of Justice entered into the memorandum of understanding under duress. From your perspective, would that be a fair description of the negotiations between the parties?

Mr. **COLEMAN**. No, Senator, I would not describe it that way. As I indicated in my opening statement, Congress, as I understand it, told us to get a memorandum of understanding. If that constitutes duress, that is the kind of duress that all lawyers operate under all the time when they try to comply with the law.

Ms. Babcock may have been referring to an expressed interest by the chairman of the Energy and Power Subcommittee on why Congress direction had not been carried out in a more timely fashion. I would not characterize, though, their entering into that memorandum as duress, nor would I expect Mr. Egan to, or Judge Bell, who signed it.

Senator BAUCUS. Is it fair to conclude that it may be inadvisable for two departments to enter into a memorandum of understanding under duress, or however you want to characterize it? I was wondering whether we could learn from this experience that a litigation authority agreement will not work unless both agencies are convinced that the agreement was in their mutual interests or unless there is some more specific direction.

My point is that in this case, where Congress delegated it to the agencies to work it out, and where both agencies want more than half, there is, by definition, going to be a lot of confusion.

Mr. COLEMAN. The alternative is that Congress can specify, if they think that certain departments or agencies should handle their own litigation, and that has been done by the Congress. That was done to a degree in the Fuel Use Act, about which you spoke a moment ago.

It has been the view of the administration and the strongly expressed view of both Judge Bell and Mr. Civiletti that the Congress should not do that; that, instead, these things should be worked out between the departments. Some may be skeptical of the ability to have a realistic memorandum of understanding and work under it. I think the results, overall, have been pretty good. As I said earlier, I think that the Justice Department at the present time has taken the view that we do not really have one, and they are exercising primary jurisdiction more than they should be. I have brought that to the attention of the Associate Attorney General, and I expect we will resolve that, as we should.

I think the Department of Justice should be the focus and have ultimate control over litigation concerning the Government. That does not mean they have to handle every case or that they should handle every case.

Senator BAUCUS. You think, as a general principle, that the Department of Justice——

Mr. COLEMAN. I have no problem at all with the general principle. We have never said that we ought to handle that litigation which is not in the petroleum area or not a regulatory type matter where there often will be administrative proceedings prior to the time it goes to court. We work with the Justice Department's Civil Division all the time on those cases.

If the lawyers in the Civil Division would ever decide, "Well, we have a memorandum of understanding and we are going to try to make it work," I think that we would not have these problems.

Senator BAUCUS. Well, let us just forget any legislative history here; let us forget any memorandum of understanding. Let us throw that aside for a minute. Let us just talk about what the ideal arrangement should be between Justice and any other hypothetical agency with respect to primary litigation authority.

Some witnesses before this committee have tried to differentiate between two different areas; that is, when it comes down to policy issues and Government-wide legal issues, those are issues where the Department of Justice should have primary jurisdiction; whereas, other issues which require the expertise of an agency—the Securities and Exchange Commission in the enforcement of securities laws, for example—maybe SEC should have primary litigating authority. Is that a fair distinction in your mind?

Mr. **Coleman**. I do not have very much trouble at all with the way you would split that. In other words, where you have a constitutional question and where you have a legal question that will have an effect not only on the agency involved but other agencies—and it is an important one, not just an incidental question in the case—those are the kinds of cases the Justice Department ought to handle.

Senator **Baucus**. Let me just read a list of the kinds of cases that might fall in that category. I am curious as to whether you think they might fall in that category.

Questions of standing; that is governmentwide.

Mr. **Coleman**. It might not; it might be a question under the particular statute that the agency is enforcing. I do not know that you could generalize on that.

Senator **Baucus**. What about Freedom of Information Act cases?

Mr. **Coleman**. That is a matter of general importance, particularly in a case that presents a new question, one that has not been settled.

Senator **Baucus**. Exhaustion of administrative remedies.

Mr. **Coleman**. It is a well-established doctrine of general applicability. Ordinarily, it will turn on the facts of a particular case. It does not strike me as something that the Justice Department would think that they need to handle.

Senator **Baucus**. And, of course, constitutional issues.

Mr. **Coleman**. Constitutional issues; yes.

Senator **Baucus**. Privacy Act cases, privilege cases.

Mr. **Coleman**. I do not think you can do this by just listing statutes, I mean, there has to be some sort of a judgment involved. Those statutes are of Government-wide application and they well present an issue that ought to be handled by the Justice Department. On the other hand, it might just be a fact question under that statute, where it would not be a problem at all.

Senator **Baucus**. In the ideal world, who should make the determination of whether or not this is a Government-wide case?

Mr. **Coleman**. In our memorandum of understanding, we have deferred——

Senator **Baucus**. We are not talking about the memorandum of understanding; we are putting that aside. You and I are just talking about the ideal world here.

Mr. **Coleman**. On questions like that, I would say that the Department of Justice should have the right to say, "This is a case under this kind of a statute that we want to handle," for the reason that it has Government-wide application.

Senator **Baucus**. You think, generally, that agencies—Energy, SEC, or whatever they are, whether it is an executive agency or an independent regulatory agency—should abide by that decision?

Mr. **Coleman.** I think we would have to. Independent agencies are a much different matter, because they ordinarily have separate, independent litigation authority.

Senator **Baucus.** Let us say executive agencies, then; at least executive agencies should?

Mr. **Coleman.** I do not have trouble with that proposition as a general one. On the other hand, I think it makes sense where you are dealing with a regulatory program that is much akin to the kind that an independent agency would deal with and where independent agencies have historically had independent litigating authority—and the coal litigation we are talking about here is a perfect example. I think it is similar to the kind of thing you were referring to that the SEC does; it is similar to the kind of thing that FERC does. They deal with gas and we deal with oil; the companies are the same and the questions are very similar.

I think those are appropriate instances for agencies to handle the bulk of those cases themselves.

Senator **Baucus.** Let us talk about that for a couple of minutes. If the Civil Division has a section of attorneys where each attorney spends, let us say, 80 percent of his or her time on Fuel Use cases, or whatever it might be, it seems to me that those attorneys after a period of time would become just as expert as Energy attorneys who also spend 80 percent of their time in that area. Would that not logically follow?

Mr. **Coleman.** I am sure they would be as good a lawyer, but it is very difficult for a lawyer in the Justice Department to have the same feel for the regulations.

Senator **Baucus.** Even if they spend the same amount of time?

Mr. **Coleman.** But they are not going to be working with the program officials. I mean, experience just says that that just does not happen that way. Their focus will be on several particular cases, but to say that they are going to become as familiar with the regulatory program of the Department as a lawyer who works on that full time, that strikes me as unlikely to occur. It might occur in some instances. I think the judgment over the years is that it would not occur, certainly with respect to the independent agencies.

One other point, Senator, I think is very important. Even if that lawyer in the Justice Department does become as expert as the lawyer over in the Energy Department, for the Justice Department to handle the case, you are still going to have to have that lawyer in the Energy Department doing the same job. There is a high duplication of effort.

Senator **Baucus.** Why would you have to have him do the same job?

Mr. **Coleman.** Well, the Civil Division does not just take cases from Cabinet departments and work them up themselves; I mean, they take a case that the lawyers in the particular department recommend for litigation—the Office of Litigation that you referred to earlier.

Then, as the case goes on, the Justice Department typically looks to the Department for first drafts of briefs, for assistance in discovery, and for assistance in many aspects of the case. So, where you have a complicated program that requires a lot of lawyers on the agency's behalf, there is, of necessity, a duplication of effort.

Senator **Baucus.** But that would hold true for every other executive agency, would it not?

Mr. **Coleman.** It certainly holds true where you are dealing with regulatory programs. It holds true to a lesser degree where you are talking about a tort action or a contract action, where the lawyers for the agency will act in an assistant capacity and they will spend a lot of time on it, but not nearly as much time as in a major regulatory case or a major enforcement case, like the ones that Mr. Bloom and I have been dealing with.

Senator **Baucus.** I understand what you are saying and I respect your answer, but I do think there is a distinction without a difference in asserting that where a group of attorneys spend the same amount of time on the same subject, there is a major difference just because one happens to be in the Justice Department and the other happens to be in the particular agency. There may be a shade of difference, but I think that it is not significant.

Mr. **Coleman.** Mr. Chairman, that has been my judgment for a long time. I formed my views on this question when I was a law clerk for a Federal judge on the court of appeals, where I spent a year listening to arguments by Government lawyers who argued in at least half of the cases. My impression was that the lawyers for the Federal Power Commission and the National Labor Relations Board, to name two, consistently did a better job and were more familiar with the general regulatory scheme and could answer a question by the court that did not deal just in the narrow confines of that case, than when the Government was represented either by U.S. attorneys or the Civil Division in a case where the lawyer knew about that case, but that was it. If the judge asked him a question and it was not within the four corners of that case, he was at sea.

I formed that opinion, and that has been my judgment when I was in a private regulatory practice, and it continues to be my judgment in a different capacity.

Senator **Baucus.** Is it not true, though, that in all these complex regulatory cases, you need a combination of somebody with a lot of litigating experience along with someone with a lot of substantive experience and knowledge, and it is really a question of cooperation and a combination of those two?

Mr. **Coleman.** It could be done that way, but I think you really often find the more experienced litigators and people who are more familiar with the program in the Cabinet office, and you find, often, a very junior lawyer at the Justice Department.

Senator **Baucus.** Let us take an analogy here. I have never worked in a large law firm, but it is my understanding—and I could be absolutely wrong on this, and correct me if you think I am wrong—that large law firms have, by and large litigating sections who handle litigation, whether it is a tax case or a tort case, or whatever it might be, and they work with substantive people in the various other sections of the firm. Is that not correct?

Mr. **Coleman.** That is true of some kinds of litigation; it is not true of others.

Senator **Baucus.** But as a general rule?

Mr. **Coleman.** Antitrust lawyers ordinarily litigate and give substantive advice. The Power Commission lawyers ordinarily litigate and give substantive advice. The lawyers dealing with the Energy Department litigate and give substantive advice. I know; I have done it.

Senator **Baucus**. I asked you how many attorneys the Department of Energy had, and you said 400; is that correct?

Mr. **Coleman**. That includes——

Senator **Baucus**. I asked how many do litigating, and you said 35 or something, and you have a litigating section.

Mr. **Coleman**. That is regulatory litigation. In all, it is upward of 100; I do not recall the exact number.

Senator **Baucus**. Still, I understand that you have a litigating section.

Mr. **Coleman**. That is certainly true.

Senator **Baucus**. My point is that there is a speciality, which is litigation.

Mr. **Coleman**. But it is a speciality in a particular kind of litigation. I mean, these people are specializing in regulatory litigation; they work closely with the lawyers who are familiar with developing regulations and interpreting them. They have a close, easy, informal kind of relationship with the client, so they develop a genuine expertise in the substance of the regulations, as well as having litigating skills.

Senator **Baucus**. Is it fair to say that one of the problems in the subject that we are exploring is that there is some confusion as to who is the lead counsel in these cases; that is, whether it should be Energy or Justice?

Mr. **Coleman**. No.

Senator **Baucus**. Is that part of the problem?

Mr. **Coleman**. There may be a difference over who should be lead counsel, but ultimately we make a decision and one or the other is. If they decide they are going to be lead counsel, we respect that decision.

Senator **Baucus**. So you are saying the confusion is not——

Mr. **Coleman**. Not in the handling of the cases. As Ms. Babcock and Mr. Daniel indicated the other day, they did not think that differences over who should be in charge of a case have affected the conduct of litigation.

Senator **Baucus**. Do you think it is fair to say that to some degree—and it probably is a question of degree—the Department of Energy has a bit of a credibility problem or a public relations problem with the public; that is, the public wonders to some degree whether the Department of Energy is—I do not mean to be pejorative—but is somewhat a captive of the oil industry and it is somewhat co-opted by the oil industry, and is just too involved in regulations so complex that they really cannot do the job in regulating the oil industry?

Mr. **Coleman**. Well, the complaints that——

Senator **Baucus**. I am sure they come mostly from the oil industry.

Mr. **Coleman**. That particular one had not been made with respect to our enforcement efforts. If anything, they have said we have been too tough on them.

Senator **Baucus**. That is the oil industry; I am just talking about the public.

Mr. **Coleman**. I do not know what the public's reaction is.

Mr. **Bloom**. I can tell you what the Congress reaction has been, Senator. The Congress increased my budget last year by $4 million after they learned that we had already brought upward of $7 billion of overcharge and pricing violation claims against the major refiners.

That is perhaps some index of the reaction, as it filters through the Congress, to the aggressiveness of our enforcement program.

Senator **Baucus**. You are right; perhaps it is some indication.

On that same point, I am wondering, at least as a hypothetical matter, whether the public would have greater confidence in the settlements that the Department of Energy enters into if the Attorney General signed off and agreed to all those settlements.

Mr. **Coleman**. I do not know whether they would or not. I do not really think that should be the case, but we certainly have no problem with the notion of the Attorney General fulfilling an appropriate role in the settlement of any matter, if it is one that is in litigation.

Senator **Baucus**. I have no more questions of you, Mr. Coleman. I appreciate your testimony; you may leave or stay, at your pleasure. I do have a few for Mr. Bloom, though.

Mr. **Coleman**. Thank you.

Senator **Baucus**. I wonder, Mr. Bloom, if you could characterize your view as to the differences between the Special Counsel and the General Counsel, or amplify or clarify any points that Mr. Coleman may have made.

Mr. **Bloom**. I am sorry; between the Special Counsel and whom?

Senator **Baucus**. The General Counsel at the Department of Energy. I do not understand this arrangement between your office and Mr. Coleman's; why they are separated apart and they report separately instead of being melded together.

Mr. **Bloom**. Because mine is a program office. Since the beginning of the FEO and the FEA, there have been program offices that have focused on enforcement. Those offices were based on a cadre of auditors whose job it was to investigate compliance or noncompliance by small refiners, large refiners, resellers, retailers, and others covered by the petroleum regulations.

There was a congressional and public perception that Mr. Coleman has already addressed a very widespread one. A subcommittee staff of this committee—Senator Kennedy's subcommittee—some years ago wrote a scathing report about the inadequacies of the enforcement effort of the FEO and the FEA.

One of the basic problems was the tendency to ping-pong and the tendency to shift blame between auditors and lawyers involved in the common enforcement effort. The complaint was constantly that they were not properly integrated; they were not working in tandem; they were not working creatively together. Rather, they were separate professions and separate offices, and were competitive rather than cooperative, and this was impairing the public interest in getting an aggressive enforcement program moving forward.

The subcommittee of the House Interstate Commerce Committee came to the same conclusion; the Zarb-McAvoy report did, and, most importantly, the Sporkin task force in the summer of 1977. This was really the genesis of the effort which I hope to begin, coming out of the Sporkin task force, that led up to the memorandum of understanding.

The Office of Special Counsel was formed by taking approximately half of the enforcement program resources that had previously been addressed to the entire universe and focusing them just on the largest 35 refiners, because that is what Mr. Sporkin's task force told us should be the highest target priority for enforcement. I got a 2-year mandate.

To help resolve the problem that I have already identified that went back to Senator Kennedy's subcommittee's critique and all the other critiques prior to 1977, I made arrangements with Mr. Bowman and his predecessor at that time. At the same time we were beginning our communications with the Justice Department toward a memorandum, to find a more cooperative, cost-effective, collegial way of sharing legal resources and audit resources so that we would not be working two programs in isolation or in competition.

The result was that I was given permission to hire and use field and headquarters attorneys who would act as team members with the auditors who had traditionally been addressing the compliance problems with these refiners. In each case, before an audit enforcement action can be brought, there must be concurrence in writing, under my delegation—and this has always been complied with—by an attorney authorized by the General Counsel, acting by or for the General Counsel. He might be one who is detailed to me or he might one under a position description approved by the General Counsel, but in each case, there is independent General Counsel concurrence in an enforcement action.

What we have done very simply is tried to better focus the previous highly criticized, diffuse effort, focused particularly on major refiners, solved the old identified problem of competitive auditor and legal efforts, and integrated them all the way back to the team level in the field.

Today, under Mr. Corrallo, my solicitor, there are cadres of lawyers working every day with the field auditors, addressing the audit material, helping to give interpretations, and helping to come up with enforcement actions that are intended to eliminate subsequent long, protracted, and painful legal disputes over the correctness of enforcement position. That is the only respect in which my office differs from any other program office in the Department of Energy.

Senator **Baucus**. Do you have the authority to litigate, then?

Mr. **Bloom**. I directly litigate only administrative matters; that is, administrative enforcement actions which are brought, but I stress that even those must receive, before a proposed remedial order, an NOPV, or an NOPD, or a POD can be ordered—there must be General Counsel concurrence in the enforcement action.

I have the freedom to elect to bring those administratively or judicially. If I ask that they be brought judicially, then in addition to getting General Counsel concurrence, I must get the General Counsel's agreement to bring them, and that means referring them to the Justice Department and proceeding to get a determination of primary litigation responsibility under the MOU.

Senator **Baucus**. Are you presently involved in the process of determining for which energy cases DOE will have primary responsibility?

Mr. **Bloom**. I have relatively little to do with that. If you are talking about enforcement actions arising out of my program against major refiners, the sequence of events is this, Senator. I make such a proposal; I discuss it with the regulatory and litigation people—Mr. McKenna, Mr. Humphrey, and others you have heard from, and if necessary in a particular case, with Mr. Coleman.

I make my recommendation, and if they concur, then they take the matter to the Justice Department. If the Justice Department or our General Counsel wishes to have my lawyers sit in on those meetings collegially, to help explain the issues and explain why we think it is important, for the purposes of an aggressive enforcement program against major refiners, to have this case brought judicially, as well as for the DOE to have primary litigation responsibility, my people may be invited from time to time to share in those meetings.

Senator BAUCUS. Have you ever suggested that the Department of Energy should retain control over certain cases?

Mr. BLOOM. Should retain control?

Senator BAUCUS. Yes.

Mr. BLOOM. Do you mean primary litigation authority?

Senator BAUCUS. Yes.

Mr. BLOOM. Yes. Since 1977——

Senator BAUCUS. Can you just give me an example of one or two?

Mr. BLOOM. Well, the natural gas liquids cases, for instance, the ones for which we did, in fact, receive primary litigation control. My office requested that; DOE made that request to Justice and it was honored. That has been true in many other cases as well.

Senator BAUCUS. It is my understanding that there is some concern about major crude oil pricing enforcement cases that were referred to the Civil Division early last year for litigation and then taken back by the Department of Energy to be handled administratively. What was your role in the decision to take those cases back?

Mr. BLOOM. I have already testified at some length on precisely those cases. Those were the ones I was talking about that surrounded the letter from Mr. Egan to Mr. Coleman from which you read about an hour ago.

Senator BAUCUS. Right.

Mr. BLOOM. So I will not bore the subcommittee by repeating that.

Senator BAUCUS. Well, just tell me about the paragraph that——

Mr. BLOOM. My crude oil auditors completed and wrote audit reports identifying what DOE believed, with General Counsel concurrence, were valid enforcement charges against a significant number of major refiners. The total value of all costing violations—and I stress not necessarily overcharges, but costing violations asserted—was over $1 billion in that cluster of cases.

At my insistance, my office asked the General Counsel's Office to in turn ask the Justice Department to bring those cases and to allow the Department of Energy to have primary litigation responsibility, as we had done a few short months before with the natural gas liquid cases which were of comparable regulatory complexity and focus.

Senator BAUCUS. And the reason you felt Energy should handle them was because you felt they were similar to the natural gas——

Mr. BLOOM. No; there were much more substantive reasons than that. We had far greater resources to bring to bear; we had expertise; we had the teams of lawyers I have talked about. For instance, Mr. Corrallo had at that time 10 or 12 lawyers full time, fully knowledgeable in every one of the intricacies of these crude oil audits because they had worked on them literally from the ground up, from the beginning of the audits.

We had already had full briefings with our General Counsel staff. We thought that we had far greater resources already on board, ready to bring these important actions, bringing potential billion-dollar claims for American consumers for possible overcharges as soon as possible.

Senator BAUCUS. With respect to those cases that the Civil Division is handling, are you satisfied with the way they are handling those cases, or do you have any suggestions or any comments to make?

Mr. BLOOM. If you mean very, very broadly——

Senator BAUCUS. Broadly; that is what I mean.

Mr. BLOOM. Very, very broadly, my perspective on this started when I was Deputy General Counsel in March 1977, with responsibility for litigation and compliance. I have never felt that our colleagues in the Civil Division of the Justice Department lacked either professionalism or dedication.

Their critical constraint, Senator, is resources. Where the Congress has let down the Justice Department is by starving it, particularly in the civil area. Ms. Babcock spoke to this with some feeling and at some length. I would like to stress that this is at the absolute root of the problem. It is not the quibbling that reaches the newspapers about management.

There would be far more comfortable and collegial relations if the Civil Division of the Justice Department did not feel constantly that it was an orphan in terms of appropriations and slots and adequate budget. We have offered many times to help them get better staff, larger staff, and have a compensation system and physical amenities that would permit them to keep their staff and keep experienced people. We strongly endorsed that, and I do to this day.

I do not denigrate in any way their dedication or professionalism. The problem is, as Mr. Sporkin recognized it in 1977 in the final report—he identified that the Justice Department in the preceding period had been able to put on major refiner cases of the FEA a grand total of 4 man-years. He said that in order to have an effective compliance effort, the FEA must have more than 4 man-years devoted to its program of securing remedial action in the Federal courts, and then he went on to strongly urge that we take immediate steps at the highest levels of government to obtain the right to represent ourselves.

That has been the motive thrust in this thing from the beginning; not a desire to take somebody else's turf or jurisdiction, but to make the most effective, collegial use of the very limited government resources we have.

On balance, Justice Department lawyers are professional, dedicated, underpaid, overworked; I sympathize with them and I wish we could get along with them better.

Senator BAUCUS. Well, I have to logically ask a question. If Mr. Sporkin's reason is that Justice had only dedicated, up to 1977, 4 man-years, one can logically ask, why not take the 25 attorneys in Energy and put them over in Justice?

Mr. BLOOM. Well, Ms. Babcock did suggest that, but in long, frank discussions between the two departments, it was found that the far more creative and cost-effective method was, in fact, to share responsibility in an adult way between the resources of the Department of Energy and the resources of the Department of Justice. It is not to try to do a supplemental, back-door appropriation for Justice to give them more slots and money than the Congress would give them, but rather to use as creatively and collegially as possible our resources and theirs in a teamwork operation, based on a mutually agreed upon memorandum of understanding.

That was precisely the point at which Ms. Babcock was overruled by her superior, Mr. Egan, who decided we would do it on a cooperative basis. She did not like it then; she opposed it later. In fact, her people have probably not reconciled themselves to it to this day.

Senator BAUCUS. Does Mr. Sporkin address the question of where those additional attorneys should be?

Mr. BLOOM. Yes. He said:

> Regulatory agencies created to develop a special expertise in complex or technical areas cannot be constantly required to rationalize or justify agency policy to the Justice Department or to obtain its concurrence in pursuing actions of significant regulatory consequences. Not only can this practice be terribly demoralizing to the agency, but it can impede the implementation of critical agency policy decisions.

That task force unequivocally spoke for the proposition that there should be a memorandum. In fact, his position was much harder than the one we settled on. We genuinely compromised that issue.

Senator BAUCUS. Mr. Sporkin comes from an independent regulatory agency too, which is much different than an executive agency. At least Mr. Coleman tends to think there is a big difference, and I tend to think there is a big difference too.

Mr. BLOOM. Certainly, there are statutory differences.

Senator BAUCUS. There are also programmatic and functional differences.

Mr. BLOOM. We are by no means the only executive agency that has this problem. As Mr. Coleman said at the beginning of his testimony, EPA, the Labor Department, and others have been actively seeking and obtaining—I have a copy here of the EPA's memorandum of understanding—the same result we did. The Labor Department has done that too.

Senator BAUCUS. My question, though, is why do the EPA and the Department of Justice get along? They do have an understanding and they get along and have a good working relationship. Why is there a difference here?

Mr. BLOOM. I am glad you asked me that. I think there are three or four basic reasons, purely from my point of view; I do not profess to speak for the whole Department here. As one with 3 years' experience both as Deputy General Counsel and as Special Counsel, the problem has been that at a time when the Justice Department's Civil Division started out with a sense of grievance because they were starved for resources and felt that a number of agencies—this was long before DOE talked about memos—were already encroaching on them, taking advantage of their weak and vulnerable conditions, understaffed as they were, with requests for memos—remember, the EPA memorandum was signed, in June 1977, before we began our request in September or October.

The last thing that had happened to Ms. Babcock and the others was that they felt that they had already been forced to yield ground. They approached this matter, therefore, somewhat defensively and somewhat nervously.

I think what happened is, we came to them and said: Look, the Department of Energy, as a result of the Sporkin task force, is planning to bring the largest enforcement offensive ever brought against a major American industry. We are going to bring scores—it turned out to be hundreds—of major actions, some of them involving billions of dollars. This is going to require tremendous application of enhanced government legal resources and better coordination.

Justice's reaction was: Fine; here is one where we draw the line. We are going to take and hold control of these—at least those people in the Civil Division. Now, our relations have been somewhat more difficult, even though this is an absolutely systemic and characteristic problem with Labor and FCC and the National Maritime Commission and a dozen other executive agencies. The reasons ours have been on the cutting edge is that we represented, at a time when they were already defensive and already felt a little scarred and injured, a large, sexy, important program promising to bring important cases, involving multimillion dollars, cases that the Justice Department's Civil Division lawyers understandably wanted and wanted to control.

At the same time we were saying we were bringing these things, we said: Look, you do not have resources enough to handle your present caseload, let alone these. Therefore let us work out a memorandum so that the Department of Energy, which has more slots and more money. can staff up and take, appropriately, some of the major, purely regulatory cases, and sort out the ones that you can take as primary and the ones that we can take, and hopefully resolve all the friction that has existed between us.

I think we made a good-faith effort to do that. The Department of Energy did devote an enormous part of its resources. I started with zero lawyers and I am up, including the ones allocated from Mr. Coleman's office, to over 100, just in my office. My people do not actually go into court, as Mr. Coleman's do, to help the Justice Department.

We have lived up to our part of that bargain. The problem is that the Justice Department has a sense of grievance that is starting from way back, starting from a position of defensiveness; that they are now being asked to watch a brandnew Cabinet department staff up and take and directly handle, or seek to handle, some of the most exciting cases with large dollar amounts in an aggressive enforcement program. That naturally leads to frictions.

Senator Baucus. Do you agree with Mr. Coleman's characterization of ideal allocation of primary litigating authority between Justice and any hypothetical executive agency, forgetting any memorandum of understanding? Let us put all that aside again and let you and I just carry on this conversation.

Mr. Bloom. There is one difference.

Senator Baucus. What is the one difference?

Mr. Bloom. I would have it provided by statute. I think it is highly undesirable to have to keep having a reference to shifting political and policy judgments and concerns. I think the ideal resolution is for the Congress to provide for certain executive departments, such as those that have complex regulatory programs like ours, authorities in legislation, just as the FERC statute does in the DOE Act—that those people responsible for staffing and bringing those complex regulatory cases should litigate them directly, and all the others of general governmental impact should be handled by the Justice Department.

Senator **Baucus.** Do you agree, then, as a general principle, that the Justice Department should have primary litigating responsibility and the exception would be those executive agencies, and the burden would be upon those agencies to show, either by statute or otherwise, that they would have the——

Mr. **Bloom.** Yes, sir, I think that has to be the case.

Senator **Baucus.** If that is the case, then, I think I can understand Justice's concern. You are right; this is a new field. It is glamorous, it is sexy, it is appealing. What attorney would not want to get involved in these cases?

If, as a general principle, Justice should handle the primary litigating authority and the exception has to be borne by another agency that wants to handle it itself, then why, by statute or by a memorandum of understanding, should not Justice have the primary responsibility in these cases, with some way to work out an arrangement where Energy would assist and aid with its own attorneys?

Mr. **Bloom.** Certainly, in some of them; that was the whole effort of the memorandum of understanding, to avoid case-by-case conflict and controversy. It was intended to provide by interagency agreement that on a particular criterion—now, it turned out to be a somewhat ambiguous formula—but by a formula set down in writing and signed off by the Cabinet level directors of both departments, we would agree.

The memorandum does not say that every single complex regulatory case brought by Paul Bloom or anybody else in the Department of Energy automatically goes to us. It gives them the call, but it creates a kind of presumption that in those major regulatory cases where we wanted and asked for it, we should expect it in a substantial number. That was the closest we could get to a meeting of the minds in advance to avoid having to burden individual cases with that determination; that was the best we could do. We thought it was working for a while and we would like to see it go back to working.

Senator **Baucus.** Let me ask a few questions about the global consent orders that you have entered into with Cities Service Co., Phillips Petroleum, Standard Oil, and maybe a couple of others; I am not sure.

Would you briefly describe the purpose and scope of those consent orders?

Mr. **Bloom.** Yes, sir. Global consent orders are just a special case of consent orders. Consent orders are provided in DOE regulations and have been in our ancestral form back to the FEO and the FEA for a long time. I think that 205.199 of our regulations provides for consent orders.

A global consent order is just a somewhat catchy phrase for one that seeks at one time and in one order to resolve an entire array of audit issues that are produced by a certain audit. You have to understand, Senator, that when I took over in October 1977, I was given a 2-year mandate by Secretary Schlesinger to complete the base period or embargo period audit of the largest 15 refiners by the second anniversary of the activation of my office. That is a pretty tall assignment, because these were 15 of the largest companies in the world.

We were talking about their NGL compliance and NGLP's, their crude oil and all their refinery pricing, as well as allocations, mandatory oil imports, and entitlements. That was a huge area to cover, bearing in mind that none of them had ever been done before.

So one of my hopes had been from the beginning, Senator, that in addition——

Senator **Baucus**. I do not mind your talking, but the statements you are going to make have nothing to do with the questions I am going to ask.

Mr. **Bloom**. I beg to differ, Senator.

Senator **Baucus**. How do you know what questions I am going to ask?

Mr. **Bloom**. I know the one you did ask, and that is the one I am trying to answer.

Senator **Baucus**. OK, but if you would keep your answers shorter, I would appreciate it.

Mr. **Bloom**. I understand, but your questions are complex. We are talking about hundreds of millions of dollars in very complex actions. I cannot give you yes or no answers to a question of why or what the nature of a consent order is.

Senator **Baucus**. All I am asking you to do is to give this committee the courtesy of shortening your answers by maybe 30 percent. Can you do that?

Mr. **Bloom**. I will do my best; I will do my best, Senator, but I have to put my answers in perspective so that they will not be misunderstood by the committee.

Senator **Baucus**. Well, just put them in perspective in a few paragraphs instead of long, involved discourses.

Mr. **Bloom**. May I finish?

Senator **Baucus**. Yes, you may.

Mr. **Bloom**. I was pointing out that we had very broad areas covered by the audit. We issued 240 enforcement actions totaling over $10 billion. Occasionally, the companies addressed by these enforcement actions would come in and say: Look, we think we are right on these issues, but we would like to explore settlement, but only if we can get out from all of these things. We do not want to settle with you on four or five and still face the certainty that we have to tie up our expensive litigation resources and our expensive Washington and in-house lawyers for months and spend millions of dollars, and still have to carry on our books contingent liabilities of hundreds of millions of dollars in case the Government wins.

Well, they came in and said, let us talk settlement, if you are interested. I had obtained written authority in my delegation to do that. We undertook those; some have been successful and some have not. The ones that have been successful are the ones that are on the public record published in the Federal Register that you have identified. They have involved massive systems of remedies and restitution which have involved hundreds of millions of dollars of downward bank elimination, hundreds of millions of dollars of price reductions, price rollbacks, refunds, cost absorptions, and other forms of relief.

For the sake of brevity, I will defer the rest of that and see if your followup questions desire any more specifics.

Senator **Baucus**. That is great; that means you can get back and be more effective in your job. You do not have to waste time in this hearing.

Those consent orders, as you have indicated, do include the settlement of ongoing litigation; is that correct?

Mr. **Bloom.** The settlement of ongoing litigation?

Senator **Baucus.** Yes.

Mr. **Bloom.** In some of our consent orders, not all of them, we do contemplate the dismissal—not the settlement in the sense of negotiating a position that would be entered in the court—but some of them do provide for the dismissal of litigation by the Government against a company or by a company against the Government.

Senator **Baucus.** What about Cities Service, Phillips, and Standard?

Mr. **Bloom.** All of those, while they involve many other issues, do contemplate the dismissal of at least one item of litigation by the company against the Government or the Government against the company.

Senator **Baucus.** Paragraph 9 of the memorandum of understanding states:

> Regardless of where primary litigative responsibility is proposed, the attorneys of the Department of Energy shall be afforded adequate notice of an opportunity to participate in any and all settlement negotiations. In civil regulatory cases, any settlement shall require the concurrence of both the Department of Energy and the Department of Justice.

I am wondering, to what degree did Justice attorneys participate in those three consent orders?

Mr. **Bloom.** They were advised of them. They have requested extensive submissions of explanatory material in order to accomplish their evaluation of the relevance of those consent orders to items of litigation over which they believe they have responsibility. As far as I know, we have supplied every request for information that has been forthcoming from the Department of Justice.

The Department of Justice has under consideration at this time, to the best of my knowledge, the question of whether it will, or when, or how it will concur in the action contemplated in those consent orders; that is, to dismiss those cases.

Senator **Baucus.** So the Department of Justice has not reached a decision?

Mr. **Bloom.** They have not advised me of that. As a matter of fact, there is a very live dialog continuing. The Department of Justice, very justifiably, has taken a very careful look at some of the underlying audit materials. In some cases, they wanted audit notes, workpapers; they wanted analyses and critiques. I have never objected to that, and we have, in fact, provided voluminous materials to the Department of Justice to help them make that evaluation.

Senator **Baucus.** Are these consent orders valid without the Department of Justice's approval?

Mr. **Bloom.** I believe they are.

Senator **Baucus.** I do not know what legal effect the MOU has, but the MOU says that it shall require the concurrence of both.

Mr. **Bloom.** That is for the settlement of a case.

Senator **Baucus.** That is right.

Mr. **Bloom.** I am talking now about consent orders which, without settling any issues in a case, resolve an entire audit period between the company and the DOE Office of Special Counsel.

Senator **Baucus.** There may be a semantic question here. When we talk about settlements, does that include dismissal of certain suits? It does; does it not?

Mr. **Bloom**. Some of our consent orders contemplate that just as the Department of Energy asked the Department of Justice to bring cases at a time when DOE believed that a company in question was in violation, when the DOE determines because of a global settlement that as to a given period, say between 1973 and 1979, that the company is not in violation, at that time we believe, since we have signed off an agreement with the company, that we do not any longer take the view that they are in violation and that the appropriate step is for those cases to be mutually dismissed. In other words, we simply betoken the reality, which is that the Department charged by law with enforcing those regulations no longer asserts the position that the company in question is in violation.

Just as we ask the Justice Department to bring them when we no longer believe the companies are in violation, we ask the Justice Department to dismiss them.

Senator **Baucus**. How much money is involved in these cases? How big are these cases?

Mr. **Bloom**. It depends on which ones you are talking about. In the case of Cities and Phillips, one of the cases involved——

Senator **Baucus**. Standard Oil?

Mr. **Bloom**. Well, the consent order with Standard Oil was represented on the front page of the New York Times as $700 million. Actually, that is a very generous view of it. Standard is actually paying $100 million cash in refunds and rollbacks and restitution directly to consumers, plus $180 million of bank elimination.

Senator **Baucus**. There is a lot involved in these cases; that is my point.

Mr. **Bloom**. Oh, yes; they are important cases.

Senator **Baucus**. What about the General Counsel; does he get involved in these consent orders?

Mr. **Bloom**. The General Counsel's Office must concur in each, and has concurred in each consent order entered into between my office and a company.

Senator **Baucus**. Have the companies begun to comply? You say Standard has?

Mr. **Bloom**. Well, they have not turned over the money yet. In some of these cases the companies have begun compliance.

Senator **Baucus**. Is compliance a problem here?

Mr. **Bloom**. No, no. We have set up a special audit module just to insure compliance with all the promises and consent orders. That started over 1 year ago after our Kerr-McGee settlement, which was the first one and represented a total of a little over $60 million, including a $46 million price rollback at wholesale and retail gasoline stations, with a small part of that hearing on oil. We set up a module then to audit or monitor company compliance with that and we have found no significant violation by the companies in that respect.

Senator **Baucus**. What happens if the Attorney General does not approve the consent orders; what is going to be the legal effect?

Mr. **Bloom**. Well, I have not asked him to approve them. I have signed consent orders which contemplate that now that the Department of Energy no longer disputes the compliance of company X with the regulations, that the company should be prepared to dismiss all pending litigation involving issues of compliance for that period against the Government, and the Government should reciprocate by dismissing any affirmative enforcement actions or counterclaims against the company covered by that consent order.

I believe that is perfectly within the authority of the Department of Energy. If the Department of Justice wishes to take other action, it will have to advise me and the company of that. Eventually, I suppose, it would be up to the judges in those cases to determine whether the court wished to proceed or did not wish to proceed with those enforcement actions, notwithstanding the consent orders.

Senator BAUCUS. My question really goes to the litigation in these consent orders. Could you tell me, to the degree that you have this information in your head or at your fingertips, which sections of each consent order deal with litigation; that is, how much of these consent orders involve dismissal of——

Mr. BLOOM. I could not give you a specific number, Senator; I would have to calculate it. To give you an example, with the Getty consent order, which did not involve the Justice Department because all litigation issues were exempted, there were 4 items in litigation and about 20 items that had nothing to do with litigation. We resolved the 20 and did not touch the 4, but that is not an atypical arrangement; I think that is a typical split.

Sometimes the litigation is as small as a few hundred thousand dollars on a given item; sometimes it may be millions of dollars.

Senator BAUCUS. The question really goes to the three cases that we have been discussing. What happens if the Attorney General wants to litigate those cases?

Mr. BLOOM. Well, then he would be in the unusual position of seeking to litigate against a company when the client agency no longer wishes to litigate against the company and, instead, has signed a consent order acknowledging that the company has made payments and restitution and refunds which constitute full compliance with the regulations for that period. That would, in my opinion, put the Attorney General in a somewhat anomalous position.

Senator BAUCUS. I guess what I am trying to get at here is, can you sign a consent order without the approval of the Attorney General?

Mr. BLOOM. There are some kinds that I certainly could not. If, for instance, a consent order purported——

Senator BAUCUS. I am taking about these three cases. Do you have the authority?

Mr. BLOOM. I believe I did, and do.

Senator BAUCUS. Where is that authority?

Mr. BLOOM. That is in the delegation of authority to me to enter consent orders.

Senator BAUCUS. What you are saying to me is that if you decided that you wanted to sign a consent order involving litigation, you have the authority, and that precludes the Department of Justice from proceeding?

Mr. BLOOM. No, Senator, not if I am purporting in any way, shape, or form to enter a stipulation or to resolve an issue of law in dispute in that case. Only the Justice Department, with its supervisory authority, can do that, and that would fall under the memorandum of understanding.

If, for instance, in the natural gas liquids case——

Senator **Baucus**. Who has the authority to dismiss the cases?

Mr. **Bloom**. Who has the authority to dismiss them?

Senator **Baucus**. That is right.

Mr. **Bloom**. Technically, the Justice Department, or we, if we have primary responsibility. It depends on who has litigation responsibility.

Senator **Baucus**. What about these three cases? I am just trying to get at these three cases. Who has the authority to dismiss suits in these three cases?

Mr. **Bloom**. Well, I would say that is an open question. We would have to talk to the Justice Department about that and look at it. We have not approached it from that——

Senator **Baucus**. You say you would have to talk to the Justice Department about that?

Mr. **Bloom**. Well, we would want to.

Senator **Baucus**. That sounds like an unclear point. Should that not have been resolved before you signed these consent orders?

Mr. **Bloom**. Well, Senator, the ideal way to to these things would be to have everybody in the Federal Government completely on board on everything you do before you take an action. One of the problems I have had is that I have a massive time constraint program involving not just dozens but scores of administrative and legal enforcement actions, and we do not always have the luxury of the time to await all of the sometimes slow-moving bureaucratic processes that some elements of the Federal establishment would prefer.

Senator **Baucus**. What about this memorandum of understanding which you rely on which says, "In civil regulatory cases, any settlement shall require the concurrence of both the Department of Energy and the Department of Justice"?

Mr. **Bloom**. It is my position that that consent order does not purport to settle a case. What we are settling with the company—I should not even use the word "settle"—what we are agreeing to is that the Department of Energy is withdrawing all charges, without acknowledging the correctness or continuing to accuse them of incorrectness. We are simply withdrawing all charges of regulatory infraction against them.

The company, without admitting any violations whatever and without stipulating to the entry of any judgment or settling and cases, is simply agreeing to make what we deem to be adequate compensation to the customers and consumers who may have been overcharged; in the case of Amoco, for instance, $100 million cash, plus the very significant bank reduction.

When we deem that appropriate, we think we have the same right to tell the Justice Department that we no longer want to litigate; that is the same right we had when we originally went to the Justice Department and asked them to litigate. They do not originate these cases, and we do not think they have the right to insist on litigating when the client agency that referred them no longer wishes to litigate.

Their job is to litigate, with our full support, when there is a dispute between the client and an outside party. When we have settled on a consent order, there is no longer a dispute.

Senator **Baucus**. Once the Department of Justice agrees to file a suit on their behalf, should not the Department of Justice be a party to any dismissal?

Mr. **Bloom.** Well, possibly you would get different answers from the Department of Justice. I have tried to tell you, Senator, that I have given them notice. I agreed with Department of Justice officials after our first consent order a long time ago that wherever an issue arose in a consent order where a company came in and offered to compromise—let me give you a hypothetical case that cites one that is under negotiation right now, so I cannot use the name of the company.

Senator **Baucus.** Go ahead.

Mr. **Bloom.** There is a case pending in one of the Federal courts. I did not wish to have that matter which is pending in litigation included in the settlement discussions at all; I saw no point in it. The company offered, halfway through the settlement discussions—they said: "You know that case that is pending in *x* area for so much? Let us seek to compromise and settle that case as part of this global discussion."

I immediately called Mr. Linder of the regulatory team in the Civil Division and asked him whether he wanted to send somebody over or whether he had any objection, as a threshold matter, to having this matter included or excluded. He took the matter under advisement, talked to his superiors, and called me back in a few days and said he did not care, given the terms we were talking about, whether we included it or excluded it.

I contacted him immediately when we learned that there was a possibility. In fact, what has happened in that case is that the company has offered, in effect, to lose the case; that is, to withdraw its appeal and to pay the entire amount that has already been entered against it as a district court judgment.

That is an illustration of a situation where the Justice Department is involved. For instance, if the company had said: I want to settle that, but at 80 cents on the dollar or 70 cents on the dollar or 50 cents; I do not want to pay 100 percent of what the district court said I owed the U.S. Treasury, obviously I have no shred of authority to resolve that as long as it is pending and the Justice Department is counsel of record. That is a situation where the Justice Department would have had to be involved and was involved.

Senator **Baucus.** Frankly, I find this whole question kind of curious. Usually, it is the Department of Energy or some other client agency which claims that it wants to bring a case, but the Department of Justice is not being a good attorney and is not representing its client very well and decides not to bring a case. Now we are discussing the reverse, potentially, where Justice may want to bring a case and the client does not.

To me, it just points out the recurrent confusion in this area. I do not think this memorandum of understanding has clarified things very much, because you are interpreting it one way and they are interpreting it another way. I do not know what their view is on this particular point. It is an area where everybody wants a piece of the action.

Mr. **Bloom.** Contracts are like that, Senator; they constantly have to be rethought and sometimes improved. I think we stand ready at the Department of Energy to go on talking to the Department of Justice. If they can suggest to us positive improvements in this memorandum, it is not carved in stone and we will be glad to consider them.

Mr. Coleman talked to Mr. Shenefield as recently as yesterday about the very problem you are mentioning, to try to promote amicable and quick resolution of any possible differences.

Senator **Baucus**. I must say that in my reading of the memorandum of understanding—that is, that one portion that states that concurrence of both Departments is required for settlements—that your action seems euphemistically to be unilateral only. I think it is more than that, frankly; I think it is a little highhanded, without first getting the concurrence, as the memorandum of understanding requires, of the other Department.

This is going to be an ongoing problem, frankly, and it is going to be one that I am going to watch very closely and very often; I am very interested in it. The main reason is this, and you alluded to it a few minutes ago. There has been not only a proliferation of litigating authority away from the Justice Department in the last several years, but an unnecessary and extreme amount of proliferation of litigating authority; that is, too many agencies have too much of the action.

It happens largely because there are different agencies who like it and so it gets stuck in some section of a bill. Obviously, many legislative committees around here want the power too, so they may add these provisions in bills that affect agencies within the jurisdiction of their committees. They have constituencies and the Justice Department really does not have any kind of a constituency.

In labor legislation, energy legislation, or EPA legislation, there are constituencies involved, and there are legislative committees which oversee those agencies and those constituencies, which is not the case at all with Justice.

The problem is that I think the people of the country get a little confused when they see all this. To some degree, it gets to the point where one agency is litigating against another. I think that most people want the Federal Government to speak with one voice. I think that most companies, when they are dealing with the Government and involved in a lawsuit, would rather deal with the Federal Government in that way. I know that is the ideal, extreme case, but that is what they prefer, and I think we should work in that direction. There is just too much confusion, from the public's viewpoint.

Second: There is a growing inefficiency with this kind of squabbling and bickering. Frankly, I do not fault the Energy Department any more than the Justice Department; as near as I can tell at this point, there is fault on both sides.

We are spending a lot of time at this hearing today talking about an issue that we should not be spending time on. You are not at work; I am not doing something else; Mr. Coleman was down here for a couple of hours. Frankly, it is a bit wasteful.

Mr. **Bloom**. That is correct.

Senator **Baucus**. My worry is that unless we start taking the time now to address some of these problems, it is going to get worse in upcoming weeks, months, and years. It is time now to start focusing on who should litigate so that we avoid a lot of these problems.

I know you are doing this, but I ask you to continue to work to resolve this effectively and fairly, because there is going to be more than enough work for you to be involved with, regardless of how much the Justice Department has or Lynn Coleman's office has. Your day is too short as it is, I am sure.

Mr. Bloom. Sure.

Senator Baucus. So I just ask you to keep working on this constructively and fairly, because I am going to be looking at this. From time to time, I hope that you and Mr. Coleman will report back to this subcommittee formally or informally, and that can be worked out later, as to the progress that you are making with the Department of Justice in resolving these issues.

That is where we are going to leave it, and I hope that when we do meet again, it will be on happier terms. Thank you.

[Whereupon, at 12:47 p.m., the subcommittee was adjourned.]

DEPARTMENT OF JUSTICE AUTHORIZATION OVERSIGHT SUMMARY

THURSDAY, MAY 1, 1980

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met pursuant to call at 10:45 a.m., in room 2228, Dirksen Senate Office Building, Senator Joseph R. Biden, Jr., presiding.

Present: Senators Biden, Baucus, and DeConcini.

OPENING STATEMENT OF SENATOR BIDEN

Senator Biden. The meeting will come to order. I apologize for the delay in the beginning of these hearings and thank the witnesses for their patience. By way of explanation, we are in the process of our fourth attempt to gain cloture of a very contentious piece of legislation that you all will be asked to enforce and I don't know what the outcome is. I left immediately after I voted, as you can see by the clock. The vote is still underway and I didn't want to hold you up any longer than we already had. I expect several of my colleagues who are presently on the floor, who have expressed an interest in this hearing, to be present this morning.

This morning the Senate Committee on the Judiciary concludes its hearings on the oversight of the Department of Justice in preparation for its formulating the Department's authorizing legislation for fiscal year 1981.

I find it particularly noteworthy that our efforts to scrutinize the operations and plans of the agencies charged with the administration of our system of justice reach a conclusion on a date set aside throughout the United States as Law Day.

Today's hearing allows the committee to accomplish a number of objectives. In the first instance, it provides us with the opportunity to solicit the Department's response for the record to a number of inquiries on matters that have not been dealt with specifically in our previous hearings but are nonetheless of concern to this committee. In addition, the hearing offers the committee a forum to discuss concerns about particular findings that have surfaced during the oversight proceedings. It also provides the Department an opportunity to increase the public's understanding of these concerns through a discussion of how they plan to address them.

This entire hearing process, which we conclude today, has also afforded us the opportunity to publicly scrutinize the Department's budget as well as formulate an assessment of its performance within the parameters of that document.

Faced with the mood of the public, as well as this institution, and I might add as well as the agency, with regard to the Federal budget as a whole, this committee has not had an easy task in reaching its assessment.

The committee is well aware that programs will have to be changed and goals will have to be reevaluated. Our task, as well as the Department's, will be to see that our system of justice doesn't suffer in the process. And that's going to be more difficult with the consequence of the limited number of dollars and the changed attitude up here on the Hill. With that objective in mind, let us proceed and offer a moment of silent thanks for the fact that you're not in the position of the FTC, this morning.

Our two witnesses this morning are Deputy Attorney General Charles Renfrew and Associate Attorney General John Shenefield. I have just been corrected by staff who is the fellow whose notes I used all through law school. He continues to have an obsessive reverence for the bench, and he informed me that I should refer to you as Judge Renfrew. I don't care what we call you, but you can call me Joe, I'll call you Charlie, and we'll move on. With that, why don't you gentlemen proceed.

I guess, Judge, why don't you begin.

STATEMENTS OF DEPUTY ATTORNEY GENERAL CHARLES RENFREW AND ASSOCIATE ATTORNEY GENERAL JOHN H. SHENEFIELD, DEPARTMENT OF JUSTICE

Mr. Renfrew. Thank you, Senator, I'm very pleased to be here testifying in behalf of the Department, along with Associate Attorney General John Shenefield, to seek funding authorization for the activities of the Department of Justice for fiscal year 1981.

As you know, Attorney General Civiletti has already appeared before your committee to present an overview of the Department's authorization request. During the past several weeks, you have also heard testimony from many Department officials on the portions of the Department's request that concern activities under their particular supervision. You have also received supporting data and materials, including the Department's proposed fiscal year 1981 authorization bill. When combined with the committee's hearing record, you should have a comprehensive base of information to use in considering our request.

I would like to highlight briefly the major aspects of the authorization of those activities for which I am responsible as Deputy Attorney General. To do this I would like to return to the three themes that the Attorney General identified in his testimony to you on March 6.

First our request is consistent with the President's policy of minimizing Federal Government spending to assist in the fight against inflation.

Since the Attorney General stated this theme in his testimony several weeks ago, the President has taken further steps to insure that Federal spending is reduced substantially. Recently you have received the President's budget amendments for fiscal year 1981, which reduce the Department's initial budget request by some $421 million, to the amended total request of some $2.24 billion.

Second, the Attorney General stated that the authorization request represents our continuing efforts to concentrate funding in law enforcement bureaus on areas of national importance which cannot be effectively handled at the State or local level.

Finally, the authorization request reflects our policy of establishing realistic priorities. As the Attorney General and other departmental officials have discussed with you, we have made a consistent effort to increase resources for our highest priority programs, even though our resource request, as amended, represents a net decrease in positions and funds from the 1980 fiscal year amounts.

With these three themes in mind, I would like to review briefly the major elements of the Department's authorization request in the criminal justice area.

Our law enforcement activities will continue the commitment of the Department of Justice to pursue vigorously the detection and investigation of criminal law violators, with principal attention paid to the areas of foreign counterintelligence, organized crime, white-collar crime, public corruption, and narcotics trafficking.

For the FBI, we are requesting an increase in positions for the FBI's organized crime and white-collar crime programs in order to continue support of these priority activities. I would like to note that these proposed increases are offset by decreases in lower priority programs and by the conduct of more efficient field programs. Also, the President's fiscal year 1981 budget amendment will not reduce the number of funding for special agents.

Another law enforcement priority area, the operations of the Drug Enforcement Administration, will be supported by a requested personnel increase for domestic enforcement. I know that Administrator Bensinger had briefed you on the changing sources of supply of drugs in this country, including the relatively recent large-scale importation of heroin from the Southwest Asia area. Funding increases are also requested to begin the development of a voice privacy communication system, which should result in protecting the lives of DEA agents and insuring the secure conduct of DEA enforcement activity.

The authorization request for the U.S. Marshal's Service includes increases for the execution of Federal fugitive warrants and for the witness security program. As our law inforcement activities reach increasingly more sophisticated and lucrative levels of criminal activity, it is essential that we increase extraordinary protection to critical Government witnesses whose lives may be in jeopardy because of their testimony.

The Marshal Service authorization request also contains staff decreases for the court security program, and a decrease in positions as a result of proposed legislation to discontinue the service of civil process for private litigants. As the service of private process has been discussed before you in detail, I will simply note that our proposal in this area reflects our belief that the service of private process can and should be performed by private enterprise, except in the case of indigents or where the court finds in an extraordinary circumstance that service by a Federal marshal is needed.

The success in our law enforcement efforts must result, of course, in effective prosecutions. For the Criminal Division, staff increases are requested for expanding the efforts of our economic crime units. For the Civil Rights Division, we are also requesting staff increases to bolster our investigation of criminal civil rights investigations and violations. And, for the U.S. attorneys, we are requesting staff increases to improve attorney training and to develop and implement automated information systems.

In the area of corrections, our request addresses many of the concerns that previously have been raised by this committee. For example, recent changes in the Bureau of Prisons systems for classifying inmates, increased use of halfway houses, and changing Federal prosecutive priorities have contributed to a reduced Federal prisoner population. As a result, the authorization request reflects the closing or phasing down of the antiquated penitentiaries at McNeil Island, Atlanta, and Leavenworth. Also the President's budget amendment reflects additional savings that will result from accelerating the closing of the McNeil Island facility.

Our authorization request would also provide new resources for the activation and expansion of previously approved institutions, for inmate services such as medical care, vocational training, drug aftercare programs, and for improving medical services at the Springfield, Mo., Medical Center and elsewhere.

Finally, I am sure that the members of this committee have reviewed closely the President's proposed budget amendment to reduce the request for the Office of Justice Assistance, Research and Statistics [OJARS]. I would like to make two brief observations about that action.

First, the President, in taking actions to reduce the overall Federal budget, has had to make extremely difficult decisions as to which activities would be reduced. As the Attorney General stated as one of his themes before you several weeks ago, we must make a serious commitment to reduce Federal spending to assist in the fight against inflation.

Second, the budget amendments transmitted to you also contain requests for reprograming from certain LEAA funds to provide operating funds for several key programs during the balance of this fiscal year. I urge you to support those transfers.

That concludes my statement, Senator Biden, and I will be pleased to answer any question that you or any staff member may have.

Senator **Biden**. Thank you, Judge. Mr. Shenefield, maybe you can make your statement now and I'll ask questions of both of you.

Mr. **Shenefield**. Mr. Chairman, I'm also pleased to be here this morning to testify in support of the Department's Authorization Act. I would, if you don't mind, dispense with reading my statement and simply highlight the major theme that is pointed out in some detail in the statement. That major theme is the importance of conserving and centralizing the Attorney General's litigation authority.

For 100 years and more now, it has been an important premise, and the Attorney General's approach to representation of the Federal Government, that it was important for him to control the voices with which the Government speaks in court.

It's important because the Government as a matter of fairness ought to speak with one coherent voice. However, we live in the real world and in this real world there are efforts that are constant and unrelenting to decentralize litigation authority; efforts that I am sure are proposed by people who feel that they are as capable as Justice Department attorneys to represent this agency or that program.

I ask this committee simply to count the costs of taking litigation authority away from the Attorney General and distributing it among other agencies. To count the cost in terms of diffusion of authority to speak in the courts for the United States. To count the costs in terms of increased parochialism where one agency speaks on behalf of the U.S. Government. To count the cost in terms of being represented by those with much less litigation experience, without experience before a particular district court and particular district judge, without knowledge of local rules and all the rest.

That is not to say, and I would never say, that it is inappropriate for the Department of Justice to work out methods of accommodation with agency lawyers to comprise joint task force efforts in court. That is an important initiative and we adhere to that, but the Attorney General, the Deputy and I are concerned about this. We are grateful for the attention to and the concern of this committee about this problem. We look forward to working with the committee and its staff in dealing with the problem over the next year.

Thank you, Mr. Chairman. I'll be happy also to answer questions.

Senator **Biden**. Thank you. I have a whole range of a questions and, as I indicated earlier, my colleagues indicated they would be here and they have, as you might have guessed, to steal a word from your testimony, Mr. Shenefield, their own parochial interest and so I warn you ahead of time that we're going to be going all over the board—at least as far across the board as your jurisdiction expands.

Judge, what's your evaluation of the Department's use of the RICO Act. Before you answer, it's fair to tell you that there has been slightly conflicting testimony from the Department on how well the act has been employed. I have acknowledged before and I acknowledge now that I am strongly of the opinion that it is not employed well enough, not because of a desire not to use it, but a lack of expertise and training among people within the Department who have the responsibility of using it.

Mr. **Renfrew**. I think it is true that the use of the RICO statutes has been comparatively recent. I think that people have been increasingly aware of their existence and I think that we see more legislation of that type being utilized to fight organized crime.

There are problems with RICO cases. I come from a district, the Northern District of California, where a major RICO case, the first phase of the Hell's Angels case, is presently being tried. RICO trials are very difficult trials, they are time consuming, expensive and raise very serious and technical questions, whenever you have multiple defendants.

I think that you can see a greater use of RICO cases in the future, Senator, because it is one of, I think, the better tools to combat organized crime.

Senator **Biden**. I would hope so, Judge. I think the record has been made fairly clear that part of the problem is the lack of facility, lack of understanding, lack of knowledge of statutes and how to utilize them. Similarly, there is the lack of knowledge of international and national banking practices, accounting practices.

The FBI has been a little bit ahead of the game in my opinion, relative to DEA in this. And I know Mr. Bensinger has indicated his willingness and desire to increase that capability. I also am aware that Phil Heymann has committed to an increase.

I cite it to you now just to let you know that next year when you're up that's one of the things that I'm going to be asking again. What did you all do to better train your personnel to equip them to be better able to implement the statute. I acknowledge it's complicated, but, if you'll pardon a personal point of view being expressed, I can think of nothing that we can do that will be more effective in combating organized crime, especially with the burgeoning drug problem, absent eliminating and eradicating the source of the drugs, than going at the infrastructure, the financial infrastructure of these organizations.

Mr. **Renfrew**. And, Senator, I can tell you that, as you know with the recent convictions that were obtained in the "Black Tuna" case in the Southern District of Florida, this came about as a result of a very high level and continuing cooperation between the Bureau and the Drug Enforcement Administration and the U.S. Attorney's Office. They were able to get convictions in a very large-scale, organized-crime and narcotic-trafficking case, and the experience that they have there with the more sophisticated tracing of financial records and the like we are using as a basis for further investigations and prosecutions of that type. I have well in mind your comments and suggestions.

Senator **Biden**. I think that that is evidence of the fact that it can be done. We have underway in this committee a study with the U.S. attorneys across the country trying to determine what their acquaintance with the act is and their inclination and predilection to use it.

I am willing to venture that their acquaintance is limited, their inclination is slim and their expertise is none. I'm not being critical in this particular phase; the program that had been designed to educate prosecutors to the use of the act is scant. I believe—I'm trying to recall from memory—I think it was a 5-day training program. Much more needs to be done, and I sincerely hope that you'll give that your personal attention to the extent that you'll consider what I'm saying.

I have many more questions, but Senator Baucus who has commitments at 11:30 would like to ask a question. Is that right Max?

Senator **Baucus**. Thank you very much, Mr. Chairman. First of all, Judge Renfrew, I want to thank you for your letter to me of April 22. With the permission of the chairman, I'd like to have that letter included in the record at this point.

Senator **Biden**. Without objection, it will be included in the record.

[The letter referred to above follows:]

The Deputy Attorney General,
Washington, D.C., April 22, 1980.

Hon. Max Baucus,
U.S. Senate,
Washington, D.C.

Dear Senator Baucus: I am writing to express the views of the Department of Justice on the draft "Department of Justice Professional Responsibility Act," which you are considering offering as an amendment to the Department's fiscal year 1981 authorization bill.

On March 13, 1980, you chaired a committee hearing at which three witnesses from the Department of Justice, Assistant Attorneys General Maurice Rosenberg and Kevin Rooney, and Counsel on Professional Responsibility Michael Shaheen, testified on a proposed amendment of the Department's fiscal year 1981 authorization bill. The amendment, which you proposed with Senators Cochran and Kennedy, would merge the functions currently being performed by the Office of Professional Responsibility and the Internal Audit Staff of the Justice Management Division into a consolidated Office of Professional Responsibility and Audit.

As you know, two of the Department's witnesses at the March 13 hearing head the organizations directly affected by the proposed amendment (Office of Professional Responsibility and the Justice Management Division), and the third witness, Assistant Attorney General Rosenberg, conducted a study on the performance of inspector general functions in the Department, which was submitted recently to the Congress. The gist of these witnesses' testimony before you was that the responsibilities of the Office of Professional Responsibility (OPR) and the Internal Audit Staff (IAS) are comprehensive, and that they are discharged effectively under the present organizational arrangements.

Following the hearing, a member of your staff and two members of the Judiciary Committee staff met with me and several other Department officials to discuss a proposed substitute for the amendment, No. 1679, that you have already proposed. The draft substitute, the "Department of Justice Professional Responsibility Act," focuses solely on the responsibilities of the Office of Professional Responsibility, thus addressing one of the concerns expressed at the March 13 hearing that the functions of OPR and IAS should not be merged into one organization. The staff persons have asked for the Department's views on the draft substitute amendment, so that our views can be considered before the committee takes action on the fiscal year 1981 authorization bill.

I appreciate this opportunity to raise our concerns about the proposed substitute amendment with you directly. I have reviewed the draft substitute closely, with advice from Mr. Shaheen, from Assistant Attorneys General Rooney and Rosenberg, and from several others in the Department. I feel strongly, for the reasons outlined in some detail below, that this legislation is not required in view of the stature, effectiveness, and independence of the Office of Professional Responsibility as it has existed since 1975 by order of the Attorney General.

First, I would like to address the need for such legislation. The administrative charter of OPR, which can be found at 28 C.F.R. § 0.39, was promulgated by order of Attorney General Levi in 1975. That charter and, perhaps even more important, the actual operating responsibilities of OPR, have remained unchanged by Attorneys General Bell and Civiletti. I am not aware of any material complaints by the public, the Congress, or employees of the Department that the Counsel on Professional Responsibility has been in any way limited in the fullest discharge of his duties during the more than four years of OPR's existence to date. And, in fact, I believe that it fair to observe that the Office, by virtue of the Counsel's performance, has obtained a publicly visible stature and independence which exists quite apart from the order's formal statement of the responsibilities of OPR.

The stature and independence of the Office of Professional Responsibility must, and will, be maintained by the Attorney General, by me, and by the other officials of this Department.

I believe that codification would not enhance the independence and effectiveness of OPR, and further, it could make some undesirable changes in the arrangements that now work very effectively. While it is difficult to assess the full nature of these risks, I believe that they are sufficiently serious to make enactment of this amendment inadvisable in the absence of a demonstrated need.

For example, the Counsel is granted broad powers of inquiry and investigation. As a result, the operations of OPR are conducted with the flexibility required to address the range of matters within the Office's jurisdiction, and the Office's operations are conducted under tight control of the Counsel, in order to ensure security and confidentiality. This combination of flexible operations and tight control cannot be, I believe, provided for adequately by statute.

Similarly, the Attorney General must have the flexibility to increase the responsibilities of OPR in a timely fashion by administrative action. For example, the Attorney General soon will publish an order, in which the President has concurred, which provides for the protection of Department of Justice "whistleblowers" by the Counsel on Professional Responsibility, as required by the Civil Service Reform Act of 1978. I will be glad to send you a copy of this order for your information.

As another example of the Attorney General's commitment to a strong OPR, he soon will publish an order assigning responsibilities for the detection of waste, fraud, and error in Department of Justice programs; the contents of this order were discussed at the March 13 hearing. The order provides, inter alia, for early and full involvement of the Office of Professional Responsibility in matters involving allegations of fraud or malfeasance. The OPR also will work closely with the Internal Audit Staff, and with the units in the Department's organizations with responsibilities in this area. Again, I will be glad to send you a copy of this order for your information.

The draft substitute amendment also provides, in alternative phrasing, that the Counsel on Professional Responsibility will be appointed by the President. The Counsel position is now a career reserved appointment. This arrangement was chosen to foreclose arguments that OPR considers the political implications of its investigations, conclusions, or recommendations; to permit removal of the Counsel only for malfeasance or misfeasance and prevent his removal as the result of changes in Administration; to provide Attorneys General with the benefit of advice based on the experience of OPR under preceding Attorneys General; and to ensure that experienced career professionals oversee integrity investigations. These factors argue strongly for retaining the current framework for appointment of the Counsel. And, I believe that the stature and reputation of the Office assures its prestige, without having to provide for appointment of the Counsel by the President.

While the draft substitute amendment was presented as a statement in statutory form of the present powers and responsibilities of the Office of Professional Responsibility, I should note that the draft adds several requirements for reporting to the Congress. For example, draft Section 207 would require an annual report containing a description of "each allegation of employee misconduct" and a description of any recommendation made by the Counsel for administrative sanctions or prosecution which is not followed by Department officials or the Attorney General. I believe, and Mr. Shaheen agrees emphatically, that such detailed reporting requirements are inconsistent with the Attorney General's executive responsibility for the actions of the Department of Justice. The Congress, as demonstrated by your hearings and personal attention, is committed to full legislative oversight of the operations of the Department. This oversight process ensures that the Attorney General's management of the Department is subjected to careful review, without prejudicing the discharge of his responsibilities, as well could be the result of these reporting requirements.

Before concluding, I would like to touch briefly on several other issues raised by the proposed amendment. First, none of the Department's offices or litigating divisions is created by statute; the amendment, if enacted, thus would be a significant departure from this practice. This also would raise the issue as to whether the powers and responsibilities of the other organizations should be written into statute in order to avoid disproportion or misperception of their importance.

Second, the Department has stressed consistently that the annual authorizing bills should not be used to effect major changes in the Department's organization and responsibilities. We believe that such a significant change as that posed by this amendment would set an unfortunate precedent for matters that deserve separate and more focused attention in the legislative process.

Third, the draft amendment provides that the Counsel is to establish uniform standards for the administration of disciplinary sanctions. Under current practice each organization head is responsible directly for the administration of such standards, consistent with existing departmental guidelines that provide a uniform set of penalties for misconduct. This approach allows for the necessary diversity and flexibility required to meet the disciplinary needs of each organization, buttressed by the uniformity which results from the role of OPR in making recommendations as to corrective actions that should be taken by the Attorney General or other officials of the Department.

In conclusion, I would like to return to what is the principal issue underlying the proposed substitute amendment: ensuring the independence and effective functioning of the Office of Professional Responsibility. Beyond the arguments stated above, I must point to the exemplary record of the Office of Professional Responsibility. The Counsel, by the responsible discharge of his duties, has given his office a stature which ensures the continuing existence of the OPR function in its full and present form. The Department of Justice of this Office's record, we are committed to its continuing effective functioning, and we rely upon its success.

Thank you for this opportunity to present the Department's views which, I believe, demonstrate clearly that the proposed amendment is not required. I will be glad to meet with you personally to discuss this further at your convenience.

Sincerely,

Charles B. Renfrew,
Deputy Attorney General.

Senator Baucus. Judge Renfrew, could you for the record tell us if anything can be done to improve the perception of the independence of the Office of Professional Responsibility.

Mr. Renfrew. To improve the perception of the independence? I would think that to the extent that people are more familiar with its operations and the way it carries out its responsibilities that it would become clear that that is a highly independent and effective office that operates to carry out that important responsibility.

Senator Baucus. But what can be done to improve the perception?

Mr. Renfrew. Well, as I say, anyone who has examined the record of that office under three different Attorneys General could not help but be impressed with its independence and with the fact that it is representative of a very flexible, high-level, competent approach to dealing with the problems of lack of professionalism, violations of the Canon of Ethics and the like within the Department of Justice.

Senator Baucus. You don't think there are changes that could be made to improve the office?

Mr. Renfrew. At the present time, I do not.

Senator Baucus. During our hearings on the internal audit staff, there were many questions raised about the auditing components of the Department of Justice. I wonder if you could tell the committee what the Department is doing with respect to the placement of the auditing component within the Department and what the Department believes it needs to do to improve its auditing capabilities.

Mr. Renfrew. Well, as you know, at the present time the internal audit staff is placed under the Justice Management Division and operates in that capacity.

I do not know of any change that should be made in the positioning of the internal audit staff which would assist it in the performance of its duties.

Senator Baucus. During an earlier hearing, it is my understanding, that the Attorney General was in the process of examining whether the auditing functions should be relocated. I'm just curious whether or not the Attorney General or anyone else in the Department has completed that examination.

Mr. Renfrew. I can ask. Perhaps I can be of assistance, Senator. Were you talking about the internal audit staff, or were you talking about program evaluation? If we're talking about program evaluation——

Senator Baucus. We're talking about the internal audit staff.

Mr. Renfrew. To my knowledge, it is contemplated that the internal audit staff will stay with the Justice Management Division.

Senator Baucus. What about program evaluation?

Mr. Renfrew. The decision has not been made as to the proper location for program evaluation.

Senator Baucus. When will that decision be made? Is there a timetable?

Mr. RENFREW. I'm not aware of any timetable. The matter is under present discussion within the Department and a decision has not been made.

Senator BAUCUS. Mr. Shenefield, as you know, for the last several weeks we have been discussing the memorandum of understanding between the Department of Justice and the Department of Energy. Could you tell this committee what the current status of that memorandum is and whether or not you've decided to rescind the memorandum or modify it?

Mr. SHENEFIELD. I think it is fair to say that the memorandum of understanding is in existence; no decision has been made to rescind it. My own sense of it is, Senator, that it would be desirable, as I mentioned in my opening statement, to try to work out a method of cooperation with the Department of Energy rather than creating an issue that would result in litigation authority going all one way or all another way.

For instance, under the Emergency Petroleum Allocation Act, it seems to me that it does make some sense for there to be a split in the carrying out of litigation authority. That is to say that there can be joint litigation teams or certain cases can be delegated to the Department of Energy. The General Counsel of the Department of Energy and I are aware of problems on both sides.

We are attempting to negotiate out those problems and to, in effect, I guess, to use your word, to modify the memorandum of understanding to bring it more in line with reality and the needs on both sides. I think in candor I should tell you that it is pretty clear to me, on having examined it closely, that there's been some failure of performance really on both sides. We need to pay attention to that and get it dressed up quickly.

Mr. BAUCUS. What would you consider the best way for you to keep this committee informed as to the status of the memorandum. One way would be for the committee to request the Department to submit a report, an annual report. I get kind of tired of reports. I'm sure you do too. I'm curious though if you have any suggestions as to the best way to keep us informed as to what's happening in this area.

Mr. SHENEFIELD. Well, we might consider a process of periodic consultation in which we discuss with the committee or any of those members who are interested, how various memoranda are working. Some memoranda seem to go along smoothly without any major problems and others seem to have produced problems.

On the other hand, if some abbreviated report were thought advisable, I'd be happy to get involved in that kind of a process.

Senator BAUCUS. I take it the Department would not object to a provision in the authorization bill requesting a report at the end of the year.

Mr. SHENEFIELD. I don't have any objection to providing a report.

Senator BAUCUS. What's the Department's view of a provision in the authorization bill requiring the Department to submit a memorandum of understanding affecting litigating authority to the Senate and House Judiciary Committees for a 30-day review, prior to the memorandum going into effect?

Mr. **Shenefield.** I don't think there's a strong view one way or the other on that. I don't know that it's critical. The words of the memorandum of understanding make less difference than how the two parties live under the memorandum. But I don't have any personal or particular problem with that. It might be preferable to utilize a more informal arrangement whereby as a part of the consultation process, copies of the memoranda would be reviewed and we could explain them or discuss them.

Senator **Baucus.** The point here is that I'm trying to find some way to keep the Senate and House Judiciary Committees and the Congress better focused on the problem of the erosion of litigating authority of the Department of Justice.

I'm wondering if there's some way we could set up a mechanism where the Justice Department would inform this committee on a formal basis of the degree to which the Department's litigating authority is changing.

Should you report annually, biannually, or semiannually?

Could you advise us as to what mechanism seems to make the most sense?

Mr. **Shenefield.** Well, I guess as much as you and I both dislike the idea, some kind of periodical report would make some sense. I hope it wouldn't be necessary to do it more frequently than annually, but it might be well to have an accounting. It wouldn't be difficult to put together an accounting of what's happened over the past year to litigation authority.

Senator **Baucus.** Would a report from the Department every 2 years make sense to you?

Mr. **Shenefield.** This river flows slowly enough that that probably is frequent enough. Of more concern to me, frankly, is the subject that we treated in our last hearing on this subject, is the kind of early warning system. How do we deal with anticipated decentralizations of litigation authority for our part to the extent that we know about them?

Our office of legislative affairs is certainly alert to it, but there are, I gather, a number of proposals that seem to move fairly far along in the process before we come across them, and that's of concern to me.

Senator **Baucus.** I think you're right. Early warning is also a problem. I'm trying to find a way to have bills that affect litigating authority to be referred to this committee for review.

Mr. **Shenefield.** That would be an excellent idea.

Senator **Baucus.** Some procedure that would provide an early warning.

Mr. **Shenefield.** That would be excellent if we could get that.

Senator **Baucus.** One final question, Mr. Chairman. Occasionally the Department objects to provisions of legislation that require reports. With respect to this authorization bill, instead of objecting to the reporting requirements, could you instead inform this committee what concrete steps you are taking in each area in which we're asking for a report. In that way the committee will be in a better position to determine whether or not these reports are necessary.

It would be helpful if you could give us some assessment before we mark up the authorization bill.

Mr. SHENEFIELD. Well, we certainly will try and maybe the best way to do that is to get the staffs together and try to figure out what is needed and we'd certainly be happy to accommodate that.

Senator BAUCUS. Thank you very much. Thank you, Mr. Chairman.

Senator BIDEN. Thank you. Would you elaborate on that a little bit, Mr. Shenefield. I'm not sure what you mean.

Mr. SHENEFIELD. I gather the question is, is there a way before the language is put in concrete that we can help the committee and its staff a little bit by suggesting what the contours of a report might be, or what kinds of specific information a report that is requested in an authorization bill might call for and to the extent that we know what is being contemplated, we'd be happy to do that.

I don't think we know in detail everything that's in the authorization bill, so it's a little bit hard for us to anticipate.

Senator BIDEN. Does the Department have a position on whether or not in this authorization bill we would be able to mandate a report?

Mr. SHENEFIELD. I think the Department is in general trying to minimize the number of mandated reports in the authorization bill. There's an inertial effect in report requirements which is that everybody wants one and they proliferate. That's the best word to use, I guess.

My own sense of the Department's willingness to accommodate has always been that a report if asked for outside the authorization process is just as likely to be forthcoming and just as helpful.

Senator BIDEN. The reason I raised it is that my experience in the committee is that unless it's mandated, it doesn't happen.

Mr. SHENEFIELD. That hasn't been my experience. I've written a lot of reports that weren't mandated.

Senator BIDEN. Well, when are we going to get the Department's promulgation of the Federal correction standards that were promised to me personally in this committee 3 years ago, by then Attorney General Judge Bell.

Mr. RENFREW. I don't know if I can put it to rest, Senator, but I can certainly address it. I have been personally reviewing the proposed Federal standards for corrections for jails and for prisons. I have gone through them, made a number of changes and suggestions which have been analyzed by the people in the Bureau of Prisons and a number of changes have been made.

I also have asked the people in the Bureau of Prisons to go out and to see what would be the incremental costs that would be required if we were to adopt these standards in the operation of the Federal prisons. Those data are being gathered, the financial information is being gathered. I expect that we will have it within the next several weeks. I will review it again and take it up with the Attorney General.

Mr. BIDEN. Good, we have no objection, in fact I would object if you didn't analyze what the cost factors would be. What I object to is the fact that it took 3 years.

All I'm saying is that I would prefer, and I think you'd get the cooperation of this committee—I know you'd get my cooperation, and Senator DeConcini—if you all said to us, look fellows, we can't get that done in 6 months, or a year, it's going to take us 3 years to do that. Then we'd say, all right, within 4 years give it to us.

But you come up and tell us things and then don't fulfill them. I can think of five reports that I have personally asked for as a subcommittee chairman where we were told, don't worry, we're got that coming right up, right up to the Hill, and I never received them.

So, I must acknowledge that it is part of my frustration to think that the only time, as they say in the southern part of my State, that we can grab ahold of you boys, is when we got your money. And right after that changes, we find somehow things just dribble off the end of the table.

Now I prefer you telling us we just don't know what we're talking about, privately or publicly if you wish. Ask: "What are you asking me for those reports for? I mean you know that's not what you want to do. You want to do the following." But I don't get anything like that.

But I don't get anything like that.

I always get, "we'll get it right up there." I mean, you know, keep your door open tonight, it may come after 11, and it doesn't come. I don't want to fight that old battle and maybe sometime I can come down there or you all can come up and we can just hash out what some of these things that aren't forthcoming are and you can give us some more realistic estimates.

Mr. **Renfrew.** Why don't I do that?

Senator. **Biden.** I think that would be useful.

Mr. **Shenefield.** One thing that might be helpful, at least on this side of the table, you're dealing with a new team. If there is old business of that kind, we may not be aware of it. We'd like to be aware of it. It would be helpful to kind of collect all of the requests and see what is over there.

Senator **Biden.** Good. For example the reason why I pursue the question of the report on standards for Federal prisons is that last year my subcommittee, this is a full committee hearing, but the subcommittee of which I am a member, proposed an amendment to improve the Bureau of Prisons medical services to Federal prisoners. In light of a recent court case on medical services to prisoners, it becomes important to know what plans the Department has with regard to how to improve key aspects of their program.

I mean, it becomes difficult to operate legislatively if we may find what we're doing in an attempt to help is wrong.

But what happens is we go out and we say, well, we have a demonstrated problem and we should legislate that problem. We should speak to the problem. We're required to at least acknowledge that we're not going to legislate. Then we go ahead and take out action and find out that because we didn't have the information presented to us that is in hand with the Attorney General's office, it was either a mistake or it won't work or it was counterproductive, or it cost too much money or it was long overdue. I mean, we just don't know some of it.

It's the same with caseloads for U.S. attorneys that we went through that [illegible] years ago. It would just be helpful.

My analysis of your 1981 request, surfaces, we don't call them inconsistencies, but at least some concern that I have.

In the first instance, you are proposing to terminate LEAA.

Second, you're proposing to reduce FBI and DEA's support to State and local law enforcement. And third, you're proposing an increase in State and local responsibilities for certain concurrent jurisdiction offenses.

How do we reconcile the suggested transfer of these responsibilities with the responsibility of the Department? I seems as though we may be piling on a little bit here. It's one thing to pull out or diminish LEAA funds, dollars assistance, or transfer them, as you suggested, Judge, in the beginning of your statement.

What do we say to these local officials, aren't we piling on a little bit right now?

Mr. **Renfrew.** Let me say, in the first place, that as I see your question, it isn't the problem of inconsistency. Both aspects of your questions——

Senator **Biden** [presiding]. No; I agree.

Mr. **Renfrew** [continuing]. Involve a reduction in available funds to the Department of Justice. The problem is that with the elimination of LEAA do we compound the difficulties of local law enforcement by at the same time reducing the Federal exercise of concurrent jurisdiction? And the answer clearly is "yes."

Now what we're trying to do, however, in this whole area is make the Federal presence one that appears where we have resources, where we feel the State does not have resources, where we have an overriding Federal interest, such as in the enforcement of the civil rights laws.

Now we recognize that there are difficulties, indeed as you know, the Attorney General wrote to the President as to his concerns about the reductions and indeed the elimination of the LEAA funds for this very reason. What we are doing is increasing our efforts in cooperative efforts to insure that we don't have duplicative investigative and prosecutorial acts on the part of State and Federal people. But there is a real problem; there's no question about it.

Senator **Biden.** Judge, I think what you said is accurate.

My concern is there's no inconsistency; you're being perfectly consistent and that concerns me. The consistency concerns me to the degree that it seems as though if I were in the Department of Justice and I wanted to put pressure on the Congress to alter their course of action with regard to LEAA, what I'd do would be to terminate LEAA as directed and I'd also see to it that about everything else that I was dealing with in local law enforcement agencies would also be terminated.

Any place where there was a duality of jurisdiction that the localities have come to rely on, I would—and it would be consistent—I would begin to pull back from that. That in turn is going to further increase the concern of State and local officials.

I mean, it's one thing for them to be told that there's going to be less or no LEAA funds coming in. It's another thing for them to be told that the concurrent jurisdiction with the FBI in bank robberies is no longer in effect going to be concurrent; it's all theirs. It's another thing for them to be told that at the same time that DEA support is going to be reduced. If I'm the chief of police of a city, or the mayor of a town, I'm beginning to say, "Wait a minute. What's going on here?"

Local law enforcement capabilities are this year in one fell swoop being diminished significantly as a consequence of the Federal Government pulling out.

That's my concern. Whether it's wise to do them all this year or whether or not we should let the local agencies down a little smoother than we have.

Mr. **Renfrew**. Well, Senator, all I can say is we have tried to do it within the restraints that have been externally imposed upon us. The budgetary restrictions in light of the inflationary environment simply are controlled by other than the Department of Justice.

But I think we have to bear in mind that this also reflects a reality that essentially criminal investigation and prosecution is primarily a responsibility of local and State authorities. In the case of the concurrent jurisdiction, the reduction in the concurrent jurisdiction, the exercise of it pursuant to prosecutorial discretion, is not going to have anywhere near the impact that the elimination of the LEAA funds will have, for example.

We're not talking about that significant a change in policy.

Senator **Biden**. No; I agree. Externally imposed requirements by both the economy and by the White House, the Office of Management and Budget and the U.S. Congress, all those factors combined, force you to prioritize in a way you haven't had to before.

What I'm suggesting is that, or what I was asking and you've answered, is that it's clear that local law enforcement assistance, whether it relates to concurrent jurisdiction or LEAA programs directly, is obviously an important priority, it is nonetheless one of the less important, least important of the priorities.

You've made a choice that that's a place with limited dollars you should be cutting. I'm not laying it on you fellows, I want to go on record so no one thinks I'm trying to put the heat on someone else. I firmly believe that the original program suggested by General Bell, when he came in, relating to the restructure of LEAA, was the way we should have gone. I was disappointed that we didn't go that way, and I was satiated somewhat by the adoption of the so-called Biden amendments requiring prioritization within it, but nonetheless, I preferred the original plan.

So I'm not dissatisfied with what's happening. All I'm saying is that it seems as though it's being hit in one fell swoop fairly strongly.

Mr. **Renfrew**. It is Senator. We are conscious of it, and for this reason we are intensifying the efforts to coordinate criminal law enforcement to share experiences and skills and techniques and training with State and local law enforcement people so that they can better utilize their own limited resources.

Senator **Biden**. For the record and not, and this is not a report. For the record, would you submit a rundown or an outline or breakdown on how you are going about that. I mean, what types of things are you doing.

The way I'd like you to answer that question for the record, if you would, is it as if you're responding to me as a metropolitan chief of police. How are you going to tell me what you're going to do to coordinate things better for me, not generally, because the Federal Government always wants to coordinate. What specific kinds of things are you doing to coordinate?

You did prioritize in a way that these end up off the list, and I'd like to know what's going to be done in terms of coordination. I've gone on too long, why don't I let Senator DeConcini ask some questions.

Senator DeConcini. Chairman Biden, thank you very much. Judge Renfrew, the multi-State geographic areas of the country have put together some most successful intelligence gathering units that you may be aware of.

Mr. Heymann has been appointed by Attorney General Civiletti, along with Mr. Bensinger in the head of LEAA to make the determinations as to allocating the line item moneys that were appropriated for that. Certainly in times of budgeting cutting, everything has to be scrutinized very carefully. I wonder if you have had an opportunity to review that process.

I have talked to Mr. Heymann about it, I wonder if you have had an opportunity or Mr. Shenefield if you've had an opportunity to take a look at the multi-State projects that are across this country that are coordinating efforts among multiple States and their local agencies and have been able to inspire some very fine cooperation from Federal law enforcement agencies. Have you had an opportunity?

Mr. Renfrew. I've had an opportunity to look at it, but not in any real depth, Senator, I can't claim any real familiarity with it. I am familiar with it both with respect to the discretionary funds from the LEAA as well as the special grants that you authored.

Senator DeConcini. Now, if the LEAA funds are going to go out, if I——

Mr. Renfrew. Yes; I understand they are 18-months grants that will expire at the end of next fiscal year.

Senator DeConcini. Right. I believe they will and problably will not be funded here. What is your feeling about the special line item grants?

Mr. Renfrew. Well, my limited exposure with OMB has been that anything that starts with G-R-A-N-T is just deleted and no one reads any further then that. I'm being somewhat facetious, but my limited exposure has been that grant programs are generally the first to be redlined.

As you know we have had a number of these regional programs and we have been satisfied with the cooperative efforts that have resulted from both the number of local and State authorities involved in working with the Federal authorities.

Now, what will happen past fiscal 1981 when that bill's grants run out, with respect to OMB, I do not know.

Senator DeConcini. If Congress elected to continue a line item provision for the multiple or joint State local law enforcement agencies, do you see any problem or objection of continuously making and handling the administration of those grants.

Mr. Renfrew. No, sir.

Senator DeConcini. In the Justice Department?

Mr. Renfrew. No, sir.

Senator DeConcini. Judge Renfrew, during your confirmation hearings, an Hispanic-American group expressed themselves on a policy of the Department of Justice that effected their interests. Several groups made references to promises made by Attorney General Civiletti during his confirmation. I want to refer to several of those promises to which you spoke at your confirmation hearing and in response to a question from Senator Kennedy and myself, and just get an update on a couple of them.

One of them was reviewing U.S. attorneys offices to determine where special civil rights units should be established and in establishing them, for your purposes if you don't have your letter here, you answered in part,

> * * * the new policy involves establishment of special civil rights units in U.S. attorneys offices, 28 offices have been selected to have special units (including Arizona). Thank you.

Some offices already have units operating. All have been given a February 1, 1980, deadline to establish an organizational structure. He expects—he being the Attorney General—all offices to be set up by spring. This program is not expected to require significant expenditures, if more money is needed, it will be requested in fiscal year 1981.

Can you bring us up to date.

Mr. RENFREW. Yes, sir. All of the offices have been established with the exception of the office here in the District of Columbia. We expect that to be established within a very short period of time.

Senator DECONCINI. You have met that deadline.

Mr. RENFREW. Yes.

Senator DECONCINI. I would like the record to show my appreciation for your efforts in achieving that, because I felt it was a very precise time for you and the Attorney General to set and I think it's admirable that you have achieved that.

Another area, are you going to need more money for those operations?

Mr. RENFREW. We adhered to the original statement, we think the offices can be established without any substantial increase in funds because of the manner of their establishment.

Senator DECONCINI. The other area you mentioned was doubling the number of Hispanic Americans in top management positions in the Department of Justice, and your answer referred to a GAO report.

How is that proceeding?

Mr. RENFREW. Well, what has occurred, Senator, is that the Attorney General has issued some policy statements to all of the departments and offices and bureaus and boards within the Department of Justice, giving them 60 days within which to establish blueprints for meeting certain goals, and timetables for achieving them.

We expect shortly there will be a response to those inquiries and that will be the effort by which the Attorney General's goals will be met.

Senator DECONCINI. Now, going back to the previous line of questioning, the multiple State proportionate programs. Do you plan, Judge Renfrew, to have an opportunity to evaluate any of those programs by visiting them or what is your schedule in the next 6 to 8 months? I'm interested in your observation and evaluation yourself.

Mr. RENFREW. I have not any immediate plans to do so, but it is something I will certainly consider.

Senator DECONCINI. Will you consider that in your travels and your busy schedules.

Mr. RENFREW. I certainly will.

Senator DECONCINI. Perhaps visiting the one in Tennessee or the one out in the West or the one in California or the new one in New England.

Mr. Renfrew. Surely.

Senator DeConcini. I'd like to address the problem of either of your reactions to Senate Resolution 374, which passed the Senate April 1 by a vote of 97 to 0.

The resolution expressed the consensus of the Senate with regard to the policy of the Standing Committee on the Federal Judiciary of the American Bar Association not to recommend individuals over a certain age to lifetime Federal judgeship.

A recent letter from Attorney General Civiletti to Congressman Claude Pepper, chairman of the House Select Committee on Aging, indicated general support of the ABA guidelines. The resolution opposes this policy as it's discriminating solely on the basis of age. What are your views, either one or both of you regarding that policy, and do you see any change in the Justice Department's reaction to that.

Senator Biden [presiding]. For the record, state your age before you answer that.

Mr. Renfrew. The Attorney General, of course, in the selection and review of persons to be nominated by the President for appointment to the bench has set out the various criteria that he has considered in the past. I think that there is always a concern that whatever bills are passed should not interfere with the constitutionally delegated authority with the President to make his nomination, subject of course, to the advice and consent of the Senate.

I think that, depending upon the particular age involved, there would be some obvious concern, depending upon the particular ages that are being addressed. There would be a concern, for example, if you sought to appoint as a district judge someone who had never served as a judge and who is, say, in his eighties, and who is required to work for 10 years before he became eligible for a pension.

There would have to be some legitimate concern as to the physical ability of a person to perform the duties for the period of time required before they'd be eligible for a pension.

Senator DeConcini. What if he was 65, a former trial judge, and one of the most prominent lawyers in one of the Southwest States, former mayor in a city of about a million people and had the highest recommendation of the ABA except for judge.

I guess my real question, Judge Renfrew, is, do you expect the policy of the Department to change in light of the Senate resolution?

Mr. Renfrew. I certainly think that the Department would take the Senate resolution in mind and I don't think that an age, a particular year would be the determining factor, whether the Department would recommend someone to the President or not.

Senator DeConcini. Well, the Department has not recommended anyone over the age of 65 and I believe has only one up here at the age of 63.

Mr. Renfrew. Well, I'm not familiar with those particular nominations. I know in my own circuit that Judge Kilkenny was nominated for the Court of Appeals for the Ninth Circuit when he was 67 or 68.

Senator DeConcini. When was that?

Mr. Renfrew. That was sometime in the late 1960's or early 1970's.

Senator DeConcini. Do you know of any such appointments in the last 3½ years?

Mr. **Renfrew**. I do not, but I have not reviewed all of the appointments. I haven't made any study of them.

Senator **DeConcini**. What would be your reaction if the Congress passed the statute that prohibited the use of the ABA policy?

Mr. **Renfrew**. I would be concerned about the proliferation of statutes. I would think that the resolution of the Senate would be something that the Attorney General would certainly take into account and give very serious consideration.

I would think that from my perspective that there's nothing magic between somebody 64 years 11 months and 29 days old and someone 65 years and 2 days old.

Senator **DeConcini**. If they were qualified.

Mr. **Renfrew**. If they were qualified.

Senator **DeConcini**. Your position is that the mere fact of the age, at least in the midsixties, ought not to be the reason for not making the appointment?

Mr. **Renfrew**. Yes, sir.

Senator **DeConcini**. That's your own personal opinion?

Mr. **Renfrew**. Yes, sir.

Senator **DeConcini**. Have you had an opportunity to talk to the Attorney General about that subject?

Mr. **Renfrew**. I have not.

Senator **DeConcini**. Mr. Shenefield, do you have any comments, probably I know that more in your area of handling the judge appointments.

Mr. **Shenefield**. Actually the judicial appointments are handled right out of the Attorney General's Office, I have nothing to do with them, but my personal views are the same as Judge Renfrew's.

Senator **DeConcini**. I have a couple of other questions which I'll submit for the record; also, I have some questions from Senator Dole, which I'll ask that you respond to.

Thank you very much.

[Additional questions from Senators DeConcini and Dole can be found at the end of today's hearing.]

Senator **Biden**. You're welcome. Gentlemen, to pursue the point about judgeships. There is a concern, as has been made known to you by the overwhelming vote of the Senate. I have a concern along the same lines that's greater; I think it's much more disturbing that there's no one under the age of 35, that I know of, being appointed.

Having been elected to the Senate at 29 you probably would guess that I'm not very impressed with arguments that people need extensive trial experience to be good judges. As a matter of fact, I think, that may be one of the inhibiting factors of making good judges.

I would like to know for the record, and I imagine it's easy enough to be done and maybe we can do it without you having to do it, but how many judges in the Federal system have been appointed under the age of 35?

Mr. **Renfrew**. Well, right off hand, I guess I wasn't expecting a question like this, I know that, I believe, Charles Wyzanski was appointed before he was 35. I believe that Al Murraugh of Oklahoma and later chief judge of the tenth circuit was appointed before he was 35.

I think that Judge Pointer in the Northern District of Alabama was appointed when he was about 35 or 36, Judge Irving Kaufman was appointed certainly when he was in his midthirties. There are a number of them, Senator.

Senator **Biden**. Good, that's reassuring. I have a series of questions that Senator Cochran is very concerned about relating to case management.

They go to the questions that I raised earlier about reports and availability of statistics upon which to make judgments. The committee staff has had a series of meetings or conversations with department personnel on the case tracking and management information systems, plans submitted by the Department on April 15, pursuant to section 11 of last year's act.

As you know, we're concerned that that document is not an adequate plan for fully coordinated systems and are unclear how best this committee should proceed to support the development of a case-tracking statistic. I have a number of questions from Senator Cochran that relate to that. I will ask only two of them and ask that the reremained of them be answered for the record

For the record, the record closes on the beginning of next week I don't think it will take a lot of time to answer them, in the next couple of days, if it's possible.

But one I'd like to ask is, can the Department commit today to preparing a systems development plan along the lines of the one proposed in section 11 of this year's act.

Mr. **Shenefield**. Senator, let me begin by stepping back from that immediate question and respond to the preliminary remark. My impression from having read the report and read the plan that was submitted in recent weeks and having talked, having been part of the meetings that led up to that presentation, is that what was submitted, while general in nature, touches all the bases in section 11.

It does not have in great detail some of the items I know that some might have preferred to see, but I think it reflects the central wisdom of the approach that the Department is now well along on and that approach is this.

In putting together a plan for compatible and comprehensive information, aggregation and case tracking, you don't start on a clean slate. My own former division, the Antitrust Division, I will say perfectly modestly because I didn't have all that much to do with it, has the kind of system for itself that we're now talking about for the Department as a whole. On the other hand, there are some other divisions that are much further behind.

So the effort has got to be to take existing systems and not stop one or not make them all a mirror image of one another, but to mesh them and meld them so that they make a compatible and comprehensive system together.

The report and the plan submitted describe where each of the divisions are and the Department's intention to bring the several different systems up to a point of compatibility and comprehensiveness. If there are specific items that are requested, we will do of course our best to produce them, costs and schedules and what not. And I could talk with you about them right now, if you like.

Senator **Biden**. I think the point you make appears to be valid. The Antitrust Division had a system that you're satisfied with. I don't know all that much about it, but I expect you are correct, it's a good system, well underway.

By implication, another division within the Department might not be best suited for the same system the Antitrust Division has. But you're not suggesting that the U.S. attorney in the Southern District of New York should have a system different than the U.S. attorney in San Francisco, are you?

Mr. **SHENEFIELD**. No; what I am suggesting is that in dealing with U.S. attorneys and divisions, criminals, land and antitrust we really don't need to impose identical and unvarying patterns on each.

Senator **BIDEN**. I think I'm still with you, but in terms of the ability of this committee to use any of the data that would be assembled, it seems to me that we would have to have an identical system for the U.S. attorney in New York as in San Francisco in handling a particular type of case.

Mr. **SHENEFIELD**. Let me make three quick points that I think will exactly greet the valid point that you're making.

First of all you've got to have common definitions as to what you're talking about. Second you've got to have all of the systems, whether U.S. attorney system or the litigating division systems, produce compatible information. Which means they've got to all ask for, to the extent that people want them, common data elements. Then the U.S. attorneys systems, Judge Renfrew, I take it, will all have the same general approach among themselves.

Mr. **RENFREW**. It will.

Mr. **SHENEFIELD**. But I wanted to allay the concern that you expressed that in some way the Department had fallen short. I don't think it has fallen short. There's a schedule that we have clearly in our own minds. The process now has the kind of momentum required to meet its scheduled dates and it's likely to reach fruition. Let me just say because it's very important, I would hate to see, and I mean that in just exactly those words, I think it would be very destructive to have a provision in the authorization bill that in some sense ground the whole process to a halt, forbade the expenditure of funds or anything of that sort, until something else was done.

The momentum is great. Mr. Slaughter, who is the Special Assistant to the Attorney General, has really capitalized on a long period of preparation, and if we move forward and don't get diverted into byways and diversions, we ought to have a pretty good functioning departmentwide system by this time next year, departmentwide.

Senator **BIDEN**. Assuming that you're correct, about broad outlines of the plan, I think what you say follows on from that. This has not been an area of intense scrutiny by me personally, so I must acknowledge that I have not read the plan.

Staff tells me, they have read the plan and they believe it does not do what you suggest, although it intended to do that. I guess the question that I have is, have you read the plan?

Mr. **SHENEFIELD**. Twice.

Senator **BIDEN**. You've read the plan twice.

Mr. **SHENEFIELD**. And most of the earlier drafts.

Senator **BIDEN**. And you believe that it does meet the requirements that you believe need be met.

Mr. **SHENEFIELD**. I think so, what that section seemed to me to call for was a plan submitted to you, to the Congress, to reassure you that the Department of Justice after years of rhetoric on the subject was in fact doing something about it.

Senator **Biden**. Well, even more than that it's necessary that it produce a system that allows us to extract from that system particular data so that we can in fact make legislative judgments relating to the expenditure of money.

So we're not just looking for motion, we found that 2 years ago when we got into the oversight. Not that the claims were being made fraudulently or with an intent to mislead. I mean we'd sit there and there would be a whole panel of witnesses. One would say yes, the other would say no, and then they'd look at one another and say well, it's different in New York than it is in San Francisco.

Mr. **Shenefield**. The same need, I may say, the same need existed within the Department. Management decisions were being made more impressionistically than anything else and the hope is that with this kind of system in place, the information that you need, the information that the managers of the department's affairs need would be the same and that it would therefore be useful.

I think that maybe a useful step, if we haven't already gotten it, would be for those of the staff that are most concerned about it to tell us, and now would be better than later, what are the elements, what are the data elements that you need. Perhaps that's already occurred and I just don't know about it.

Senator **Biden**. The Bureau of Justice statistics apparently, according to staff, have analyzed the plan.

Mr. **Shenefield**. We got their report yesterday and their views, I'm not in any depth familiar with them, but they will be taken into account. I understand that Mr. Renshaw who is the head of that, at least for now, is meeting with Mr. Slaughter or has met with him and those views will be taken into account.

Senator **Biden**. Will those views be made known to us.

Mr. **Shenefield**. I don't see why they shouldn't be. I wouldn't be surprised if they aren't already.

Senator **Biden**. Well, apparently they are not and I guess that's what we would like.

Mr. **Shenefield**. It may be helpful to have a little piece of background, which is that virtually everybody in the Department was consulted quite early in the process and some of them consulted several times.

That particular entity, that particular person for reasons that I don't know, was not consulted until members of the committee's staff suggested that they ought to be consulted and they were and they've now written some sort of report. I'm not familiar with whether it makes any sense or not. I am content with the plan itself.

Senator **Biden**. Well, Senator Cochran, specifically, would like before we mark up the plan to have the result of that analysis, the Bureau of Justice Statistic analysis shared with the committee.

Mr. **Shenefield**. Fine, I don't have any problem with that.

Senator **Biden**. Then you will agree with that.

Mr. **Shenefield**. Fine. But let me underline my point again because I think it shouldn't be lost sight of. The most harmful thing would be to have a provision that stops the process dead in its track.

Senator **Biden**. I understand your point and I will communicate that point directly to Senator Cochran and it may very well be that once the analysis is shared with Senator Cochran and other members that have a specific concern about that, that their concern will diminish or they will want to work with you during the next year to implement some of the aspects where the plan may have been criticized.

Mr. Shenefield. What I would like to offer to you is that Mr. Slaughter and I will come down with that report and with the other commentary we've had within the Department and talk to Senator Cochran and try to give him some sense of how that report fits in. I think that will be very helpful.

Senator Biden. It was just made known to me that you don't have a copy of the committee draft.

Mr. Shenefield. That's correct.

Senator Biden. Before you leave today, if you have any interest, we'd be delighted to make that available to you.

Mr. Shenefield. We would like to have it.

Senator Biden. I think you should have that.

Mr. Shenefield. And that would help us answer some of the other questions.

Senator Biden. Good. Let me check here. As I said, my colleagues had divided the remainder of the oversight questions into four categories and I asked the ones I was concerned about. As my colleagues are unable to be here, I want to check with their staffs whether or not there are any particular areas that they want addressed at this point, before we go to markup.

Apparently there's nothing I need pursue at this point beyond what we've just covered and one other point. I think we are pretty well set to go to markup on this, if we can get that report. You get a copy of our proposed draft, or the staff-proposed draft and comment freely. I mean you can pick up the phone directly and call me.

I want to cut down as much of the formality and the formal requirements, the written requirements that we can. If you've got a problem, after reading it, pick up the phone and call me.

I don't think there's anything that requires a great deal of work, and any comments you have on the draft and I think we'll be in good shape and ready to go.

I sincerely appreciate your patience in sitting there for 45 minutes before we got underway. I know you're very busy and we don't apologize enough and sincerely enough for your schedules are equally as busy as ours, but we keep you waiting. But again, Judge, you're used to having done that with a lot of attorneys, so you know the problem from both ends.

Mr. Renfrew. The nice thing about being a judge is that you are never late. Things may not commence when they are scheduled, but you are never late.

Sentor Biden. Well, Senators sometimes act that way, but we're late lots of time.

Mr. Shenefield. His reputation as a judge was that the attorneys were keeping him waiting.

Senator Biden. Is that right? Again I really do appreciate your indulgence and if we can get that report and the analysis I think we're pretty well along the way.

[The prepared statements of Messrs. Renfrew and Shenefield follow:]

Prepared Statement of Charles B. Renfrew

I am pleased to have the opportunity to appear before this committee with my colleague, Associate Attorney General John Shenefield, to seek funding authorization for the activities of the Department of Justice for fiscal year 1981.

Attorney General Civiletti has already appeared before you to present an overview of the Department's authorization request. During the past several weeks you have also heard testimony from many Department officials on the portions of the Department's request that concern activities under their particular supervision.

You have also received supporting data and material, including the Department's proposed fiscal year 1981 authorization bill. When combined with the committee's hearing record, you should have a comprehensive base of information to use in considering our request.

I would like to highlight briefly the major aspects of the authorization of those activities for which I am responsible as Deputy Attorney General. To do this, I would like to return to the three themes that the Attorney General identified in his testimony before you on March 6. First, our request is consistent with the President's policy of minimizing Federal Government spending to assist in the fight against inflation. Since the Attorney General stated this theme in his testimony several weeks ago, the President has taken further steps to insure Federal spending is reduced substantially. Recently you have received the President's budget amendments for fiscal year 1981, which reduce the Department's initial budget request by $421 million, to the amended total request of $2.24 billion.

Second, the Attorney General stated that our authorization request represents our continuing efforts to concentrate funding in our law enforcement bureaus on areas of national importance which cannot effectively be handled at the State and local level.

Finally, the authorization request reflects our policy of establishing realistic priorities. As the Attorney General and other Department witnesses have discussed with you, we have made a consistent effort to increase resources for our highest priority programs, even though our resource request, as amended represents a net decrease in positions and funds from the fiscal year 1980 amounts.

With these three themes in mind, I would like to review briefly the major elements of the Department's authorization request in the criminal justice area.

Our law enforcement activities will continue the commitment of the Department of Justice to pursue vigorously the detection and investigation of criminal law violators, with priority attention given to the areas of foreign counterintelligence, organized crime, white-collar crime, public corruption, and narcotics trafficking.

For the FBI, we are requesting an increase in positions for the BFI's organized crime and white-collar crime programs, in order to continue support of these priority activities. I would like to note that these proposed increases are offset by decreases in lower priority programs and by the conduct of more efficient field programs. Also, the President's fiscal year 1981 budget amendment will not reduce the number or funding for special agents.

Another law enforcement priority area, the operations of the Drug Enforcement Administration, will be supported through a requested personnel increase for domestic enforcement. I know that Administrator Bensinger has briefed you on the changing sources of supply of drugs in this country, including the relatively recent large-scale importation of heroin produced from opium poppies cultivated in Southwest Asia. Funding increases are also requested to begin development of a voice privacy communication system, which should result in protecting the lives of DEA agents and ensuring the secure conduct of DEA enforcement activities.

The authorization request for the U.S. Marshals Service includes increases for the execution of Federal fugitive warrants and for the Witness Security Program. As our law enforcement activities reach increasingly more sophisticated and lucrative levels of criminal activity, it is essential that we increase extraordinary protection to critical Government witnesses whose lives may be in jeopardy because of their testimony. The Marshals Service authorization request also contains staff decreases for the court security program, and a decrease in positions as a result of proposed legislation to discontinue the service of civil process for private litigants. As the service of private process has been discussed before you in some detail, I will simply note that our proposal in this area reflects our belief that the service of private process can and should be performed by private enterprise, except in the case of indigents or when the court finds in extraordinary circumstances that service by a Federal marshal is needed.

The success of our law enforcement efforts must result, of course, in effective prosecutions. For the Criminal Division, staff increases are requested for expanding the efforts of our Economic Crime Units. For the Civil Rights Division, we also are requesting staff increases to bolster our investigation of criminal civil rights violations. And, for the U.S. attorneys we are requesting staff increases to improve attorney training and to develop and implement automated information systems.

In the area of corrections, our request addresses many of the concerns that previously have been raised by the committee. For example, recent changes in the Bureau of Prisons system for classifying inmates, increase use of halfway houses, and changing Federal prosecutive priorities have contributed to a reduced Federal prisoner population. As a result, the authorization request reflects the closing or phasing-down of the antiquated penitentiaries at McNeil Island, Atlanta, and Leavenworth. Also, the President's budget amendment reflects additional savings that will result from accelerating the closing of the McNeil Island facility. Our authorization request also would provide new resources for the activation and expansion of previously approved institutions, for inmate services such as medical care, vocational training, and drug aftercare programs; and for improved medical services at the Springfield, Mo., Medical Center and elsewhere.

Finally, I am sure that the members of the committee have reviewed closely the President's proposed budget amendment to reduce the request for the Office of Justice Assistance, Research and Statistics (OJARS). I would like to make two brief observations about that action. First, the President, in taking actions to reduce the overall Federal budget, has had to make extremely difficult decisions as to which activities will be reduced. As the Attorney General stated as one of his themes before you several weeks ago, we must make a serious commitment to reduce Federal spending to assist in the fight against inflation.

Second, the budget amendments transmitted to you also contain requests for reprogramming from certain LEAA funds to provide operating funds for several key programs during the balance of the fiscal year. I urge you to support these transfers.

Prepared Statement of John H. Shenefield

I am pleased to testify today with Deputy Attorney General Renfrew in support of the Department of Justice's fiscal year 1981 authorization request. You have just heard from Judge Renfrew on the Department's criminal justice and law enforcement programs and several senior representatives from the noncriminal side of the Department, the area for which I am responsible, have testified previously and in some detail in support of their programs and funding requests. I shall discuss the highlights of the programs of the organizations which report to me and then be happy to answer your questions.

On our side of the Department, the civil side, the top priority is to provide our client agencies with the highest quality legal representation, both in enforcing their policies and programs and in defending them when they are sued. We are constantly aware of the delicate balance our role imposes upon us. On the one hand, we are to insure that the United States speaks with one voice in our country's courts, while at the same time reserving to the various Departments and Agencies we represent the formulation of policy in implementing the programs the Congress elects to enact.

Inevitably, our role as litigators for the Departments and Agencies engenders tensions: Many of the Departments and Agencies feel that they should handle their own litigation. However, your constituents must be able to orient their affairs in accordance with the law of the land and not be buffeted between various bureaucracies, one advising or condoning a pattern of behavior as law abiding and another condemning the same conduct in later litigation. This is not to say that it would not be appropriate to delegate litigating authority administratively for certain cases or categories of cases to particular departments or agencies.

The Civil and Lands Divisions are working closely with their client agencies to resolve disputes as to our varying roles in litigation and we appreciate greatly the support members of this committee have given us in fending off attempts to fractionalize our litigating authority legislatively.

I believe that the resources we seek for our litigating divisions will provide the Department with sufficient money and personnel to adequately represent the interest of the United States as they are presently foreseen.

In addition, $2,977,000 of the increased budget we seek is for equipment to increase the Department's automated litigation management and support capability, consonant with the plan Attorney General Civiletti recently furnished this committee in response to section 11 of the Department's 1980 Authorization Act.

The Attorney General has announced publicly that one of his top priorities will be improving our environment by vigorous enforcement of the laws aimed at cleaning up our air and water and seeing to it that our citizens need not fear that radioactive or other hazardous wastes will be dumped near their wells or buried beneath their children's playgrounds.

For the Lands and Natural Resources Division we have requested $15.6 million and 338 positions.

The Attorney General is also committed firmly to the protection of the civil rights of women and minorities in the housing, voting, employment, and education areas. For this reason, we seek increases in the Civil Rights Division's authorization to $16.8 million and 454 positions.

As you heard when Assistant Attorney General Sanford Litvack testified this past Monday, the 939 positions and $46.3 million requested for the Antitrust Division are calculated to enable that Division to carry out its mission of preserving and promoting a free and competitive economy.

The Civil Division is engaged primarily in defensive litigation on behalf of a broad spectrum of Departments and Agencies. It was subject to close scrutiny during the oversight process this spring, and we are requesting $25.8 million and 660 positions for Civil to enhance its capacity to react defensively and, at the same time, to provide more litigative capability in affirmative areas such as pursuing civil fraud remedies on behalf of the Government.

The Tax Division priorities include increased emphasis on criminal tax prosecutions, litigation in defense of monetary claims and closer coordination between the Internal Revenue Service and the Department of Justice in the prosecution of nontax Federal criminal cases. We are requesting $20.8 million and 574 positions to fund these important functions of the Tax Division for fiscal 1981.

For the worthy work performed by the Community Relations Service, we ask for a modest increase in dollars to $5.3 million and 111 positions. This increase reflects recognition of CRS's efforts in conciliation and mediation which have proven effective in defusing many tense and potentially violent situations in local communities all across our land last year.

The request for $18.5 million and 450 positions for the Justice Management Division is but a slight increase over last year's authorization and is scheduled to provide for growth in the Department's labor relations staff, to enhance black and Hispanic equal employment opportunity programs and to support efforts to modify the Department's 10-year-old accounting system to assure that it will have the capability to provide managers with more timely information and support so that we can better comply with congressional and OMB requirements.

The requested increase in authorization for my office to just over 2 million and 45 positions is primarily to fund staff for the Federal Legal Council, the Litigation Notice System and the computerized Legal Research systems, all mandated by the President in Executive Order 12146.

I have left for last our request for the Immigration and Naturalisation Service of $347.7 million and 10,716 positions because current events require that special attention be paid to this authorisation. We are all well aware of the mass exodus of Cubans and Haitians, who are landing in Florida daily. At this time, no one can be certain how long this migration will continue or how many of these people will find their way to our shores. Obviously, processing this volume of people strains the resources of the INS and entails expenditures which were not, and in fact could not have been, foreseen when we calculated the budget for the Service. It may well be that we will have to come back to this committee when all the costs are in and seek additional funds to cover expenditures incurred in responding to these emergencies and I hope the committee will entertain any required supplemental requests with the same hospitality that has been extended to our present authorisation requests.

The figures I have used above reflect the President's latest transmittal to the Congress of his proposals to reduce his original budget request. Most of the cuts in the Department's authorization are in pricing level adjustments. In general legal activities, for example, there is a $1.3 million reduction in the amount we had sought to compensate for inflation while for INS, there is a corresponding reduction of $1.9 million.

Senator **Biden** [continuing]. And holler fellows if you've got any immediate problem with the draft. Thank you very, very much. The hearing is adjourned.

[Whereupon at 12:10, Thursday, May 1, 1980, the hearing was adjourned.]

QUESTIONS OF SENATOR BIDEN AND RESPONSES OF DEPARTMENT OF JUSTICE

When you submitted your FY 1980 supplemental and transfer requests, did you also submit revisions to your FY 1981 budget, annualizing those FY 1980 requests?

None of the revisions to the FY 1981 requests included annualization of FY 1980 supplementals.

If you didn't, are we to expect you to request even more transfers of LEAA funds in FY 1981 to meet federal needs? Or will you come forward with requests for supplemental authorizations?

Should additional funding requirements be necessary in FY 1981, the options for funding would include (1) curtailment or reduction of lower priority programs which would enable the Department to reprogram funds into these areas, (2) transfer of funds between Department appropriations, or (3) requests for supplemental appropriations.

Senior Trial Attorneys

The Assistant Attorneys General of the Civil, Civil Rights, and the Antitrust Divisions testified that retaining litigators is difficult for them due to civil service and pay limitations. Could you address the issue of litigator retention from a Departmental perspective?

The retention of senior litigators within the Department, both in the litigating Divisions and the United States Attorneys' Offices, is a continuing and increasingly more difficult problem. Our current attrition rate is approximately 20% per year. That means that approximately 800 of our 4000 lawyers leave every year. Unfortunately, most of those who leave are experienced attorneys and senior litigators, i.e., the attorneys that we can least afford to lose. Senior litigators who have five or more years of experience are lured away from the Department by private law firms by tremendous increases in salaries. It is not unusual for many of these litigators to be offered double or even triple their government salary to move to the private sector.

Would authorizing the Department more supergrade positions alleviate the problem any?

In addition to the pay aspect of this problem as noted above, we also have difficulty retaining senior litigators because of our inability to promote them into Senior Executive Service positions that will allow them to continue to be litigators rather than managers. Very often, litigators who develop into fine litigative craftsmen are selected, based upon their litigation skills, to become Assistant Section Chiefs, Section Chiefs, and even Deputy Assistant Attorneys General or First Assistant United States Attorneys. Promoting these senior and expert litigators into management positions is often the only method of rewarding them with higher salaries and thus motivating them to stay a little longer with the Department. The difficulty, of course, is that these litigators then must do less litigation and more management which is not what they are best equipped to do, or prefer to do. Recently, we have been able to secure a small number of Senior Litigation Counsel positions in the Senior Executive Service that have allowed us to begin to alleviate this problem. We do not, however, have a sufficient number of these positions to provide our senior litigators with a reasonable number of opportunities to continue litigating and yet receive the higher salaries that were previously reserved only for attorney-managers.

Are any changes in civil service requirements necessary to alleviate the problem?

The Office of Personnel Management managerial qualifications necessary for entrance into the Senior Executive Service have caused considerable delay in the filling of the existing Senior Litigation Counsel positions in the Senior Executive Service. In one case, the proposed Senior Litigation Counsel left the Department prior to the completed processing of his papers by OPM because of the delays experienced. Our Senior Litigation Counsels are normally individuals with minimal formal supervisory or managerial experience. As a result, it is difficult for them to meet the requirements imposed by OPM's Qualifications Review Boards. The problem might be alleviated by either delegating to the Attorney General the authority to approve the managerial and technical qualifications (the latter are already determined within the Department) for attorney positions within the Senior Executive Service or by amending the current managerial qualifications required to include case management experience, legal training, trial experience, and liaison with other agencies. In the alternative, these types of experiences should be considered as fully qualifying as proof of managerial potential for the Senior Executive Service.

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Travel

It is rumored that the FY 1980 ceiling on travel expenditures is having a devastating impact on routine, law enforcement activities of the Department.

What is the precise nature and extent of the impact of the ceiling on the Department of Justice's ability to carry out its responsibilities?

Law enforcement activities of the Department are largely dependent on travel, indeed many of these activities are totally travel or transportation, for example, detention and deportation of aliens and transport of Federal prisoners to places of confinement. Specific effects of the current travel ceiling are listed below:

Federal Prison System. The Federal Prison System faces delays in the activation of several Federal Correctional Institutions; elimination of prisoner airlift; delaying the closing of the U.S. Penitentiary at McNeil Island until FY 1981, and further reducing staff training involving primarily line correctional officers.

U.S. Marshals Service. Travel in this account includes transportation of prisoners, witness security, execution of criminal warrants, and service process. This cannot be legally curtailed and will result in expenses in excess of limitation currently available for the Service.

Federal Bureau of Investigation. The Federal Bureau of Investigation has had to reduce or cancel completely manager's training for career development programs, meetings with professional law enforcement organizations, municipal, county and state law enforcement training at field level, some foreign travel, field police training programs, and cancel or delay numerous transfers.

Immigration and Naturalization Service. Although current ceiling is sufficient to carry out expected travel in this account the situation involving Haitian and Cuban refugees may soon cause a need for supplemental funding. If a decision is reached to deport large numbers of these refugees or establish major detention centers, the current travel ceiling may be insufficient.

Drug Enforcement Administration. The Drug Enforcement Administration (DEA) has severely curtailed all administrative travel and will be forced to delay personnel reassignments necessary to continue DEA operations. Additional pressure has been placed on the travel ceiling because of the recent increases in airfares and the increased number of high rate geographic areas. Without ceiling relief these rate increases will reduce operational travel which includes such items as agent travel in the course of investigation, undercover operations, travel related to trials and maintenance and regulatory travel.

Litigating Activities. A major portion of the Department's litigation activities are directly linked to its law enforcement program. The effective and efficient prosecution of a criminal matter, an espionage matter, a matter that involves criminal anti-trust violations or criminal violations of the hazardous substances and toxic waste provisions mandated by the Congress are directly effected by the ability of prosecutors to travel in pursuit of a case. The travel limitations have significantly curtailed travel related to trials and prosecutive purposes. It is counterproductive to expend considerable resources on a case only to have it rejected by the court due to lack of key prosecutorial expertise which is absent because of insufficient travel funds.

If we exempted the Department from any future travel ceiling with respect to essential travel only, what controls would you implement to hold down non-essential travel?

As you know, the Department initiated actions in FY 1979 to comply with an OMB directive to reduce administrative travel by 15 percent. This policy has continued in FY 1980 and the Attorney General has issued the following instructions to all organizations in an attempt to reduce travel within the Congressional limitation guidelines:

- Eliminate all travel for training except that directly related to line operations.
- Eliminate all administrative travel.
- Eliminate all geograpic relocation of people not related to emergency situations or to the activation of new facilities.
- Prohibit the use of government vehicles for travel to and from an employee's place of residence.
- Eliminate multi-person travel where it is not essential to the Department's mission.
- Eliminate all foreign travel.

Exemptions to the above restrictions may be granted for specific cases with the approval of the Deputy Attorney General or Associate Attorney General.

Some of the above restrictions would have serious implications if they were to remain in effect over the long-haul and the Attorney General would revise the guidance somewhat if the travel ceiling were eliminated. However, the Department is committed to fiscal restraints that would result in close management scrutiny of its travel and transportation program.

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Immigration

To what extent was the Department involved in the formation of the Administration's policy on the Cuban boat people?

The Department of Justice, along with several other cabinet agencies and representatives of the National Security Council and Domestic Policy staff have counseled together on an ongoing basis with regard to the Cuban arrivals in Florida over the past week to ten days. The Attorney General himself has been involved in the Administration's policy deliberations as have other high-level Departmental officials including the Deputy Attorney General and the Acting Commissioner of the Immigration and Naturalization Service.

Does I&NS have the manpower to process the Cuban refugees?

I&NS has had to divert staff from other activities and locations to Florida to respond adequately to the Cuban emergency. All Federal agencies have had to take similar measures.

If reprogramming is going to be required, what existing programs will be reduced to provide those resources?

I&NS is in the process of preparing a major reprogramming proposal for consideration by the Department of Justice. This proposal is the result of extensive discussions and analysis within the agency and has been necessitated by a range of changing priorities due to events which could not have been foreseen when the FY 80 budget was originally submitted. Because the extent of the Cuban program is unclear at this time, it is not certain whether reprogramming will be required. Nevertheless, expenditures for the Cuban program are being tracked and coded separately in the event adjustments need to be made at a future time.

Do you anticipate the need for a supplemental request to process the Cuban refugees?

If the Cuban program materializes according to the projections presently being made, a supplemental request is likely to be required not only by I&NS but by a range of Federal agencies. Should such a supplemental be developed by the Administration, I&NS' obligations would be included.

Mr. Civiletti testified at this Committee's opening hearing two months ago that the nomination of the I&NS Commissioner would be forwarded us within ten days . . . so we are still waiting. What is the problem, when can we expect it to be resolved?

The Attorney General personally has handled the I&NS Commissioner matter because of the importance which he attaches to the appointment. Unfortunately, certain problems have arisen which could not have been foreseen. The Attorney General is very anxious for the Administration to forward an outstanding nominee for your consideration. We very much regret the delay and trust that a nomination can be forwarded in the not-too-distant future.

Department of Justice
Coordination of Local, State, and Federal Law Enforcement Activities Related to Concurrent Jurisdiction Offenses

Coordination between local, state, and Federal law enforcement efforts for offenses with concurrent jurisdiction has traditionally been attempted through a variety of informal local or regional mechanisms. The Department of Justice is continuing its efforts to formalize, intensify, and support such coordination mechanisms, which are particularly vital to effective criminal justice during this period of scarcity of law enforcement resources.

The principal mechanism has been Federal-State Law Enforcement Committees, which were initiated by the Department in 1972, and which are United States Attorney-sponsored regional bodies of law enforcement managers--particularly prosecutors. The Department currently offers speakers, research facilities, and limited financial support to Committees in over 35 states and to similar state or local groups in many of the remaining jurisdictions. Quarterly mailings to the Committees include discussions of Department policies, priorities, and operative procedures.

Similar groups function in specific areas. For example, Cargo Security Working Groups, composed of local, state, Federal, and industry representatives, now endeavor to coordinate enforcement in the area of theft from interstate shipments in 15 major jurisdictions.

A new coordinating mechanism has been established. The Executive Working Group for Federal-State-Local Prosecutorial Relations was formed by the National District Attorneys Association (NDAA), the National Association of Attorneys General (NAAG), and the Department of Justice to create a forum for the coordination of law enforcement policies and for the exchange of law enforcement information having a nationwide impact. The April 11, 1980 meeting was typical in its coverage of lapses in concurrent jurisdiction offense prosecution, and Federal support for local prosecutions. While meetings of the entire body are held quarterly, the Resource and Planning, Concurrent Jurisdiction, and Legislation Committees function continuously. Typical of the function of these committees was the Concurrent Jurisdiction Committee-sponsored creation of a procedure permitting local prosecutors to determine whether witnesses or defendants in local prosecutions are enrollees in the Federal Witness Protection Program (and are thus using federally-supplied fictitious identities).

The Department recognizes that coordination activities, though increasing in scope and effectiveness, need further improvement. Department-conducted surveys, such as the November 1979 Report to the U.S. Congress entitled "United States Attorneys' Written Guidelines for the Declination of Alleged Violations of Federal Criminal Laws," and Department-financed surveys, such as the Institute for Law and Social Research study, now in progress, into the prosecution of dual jurisdiction offenses, are intended to identify geographic and statutory areas in which a lack of enforcement coordination has resulted in an inadvertent decriminalization of concurrent jurisdiction offenses. Both studies will also identify specific causes of such "lapses" with a view toward the design of corrective measures.

The financial crisis existing for many state and local governments has resulted in a scarcity of local investigative and prosecutorial resources and a consequent inability to effectively process massive quantities of "dumped" Federal cases. Accordingly, the Department is attempting to coordinate shifts in Federal enforcement activity, caused by modifications in Federal law enforcement priorities, with local law enforcement agencies to assure that deferred cases do not exceed local capabilities.

Federal-State Law Enforcement Committees, discussed above, are intended to provide a forum for the establishment of formal agreements to divide responsibilities between local, state, and Federal investigative agencies and prosecutors without creating enforcement gaps.

The Executive Working Group, discussed above, provides a forum for the exchange of information regarding intended alterations in Department policy and regarding local predictions of the effects of such proposed changes.

Finally, Federal investigative agency support is offered to all local and state prosecutors. The Drug Enforcement Administration, Bureau of Alcohol, Tobacco, and Firearms, Postal Inspection Service, and Secret Service are committed to the development of concurrent jurisdiction offense cases for local prosecution. The Federal Bureau of Investigation and, to a lesser extent, other Federal investigative agencies continue to offer training, laboratory services, expert skills, and interstate investigative support to local law enforcement agencies.

QUESTIONS OF SENATOR DE CONCINI AND RESPONSES OF DOJ

Can you assist me in gaining access to the DeFeo Report?

The Department advised your staff that you, or a member of your staff with a security clearance, are welcome to make arrangements with Deputy Assistant Attorney General Irvin Nathan to read the DeFeo report at the Department. Mr. William Christiansen of your staff was subsequently designated by your office to read the report. Because Mr. Christiansen does not have a security clearance the FBI has been running the normal background check on Mr. Christiansen as a prerequisite to his obtaining the necessary clearance.

QUESTIONS OF SENATOR DOLE AND RESPONSES OF DOJ

On December 27, 1979, President Carter signed into law the Justice System Improvement Act, a four year extension and reorganization of the LEAA program. This bill was very similar to the Administration's own reauthorization proposal. In late January, the President sent to Congress his fiscal '81 budget which included an $84 million increase for LEAA. Yet, two months later, on March 31st the President proposes to severely curtail that budget eliminating all increases and essentially closing down the program of direct assistance to the states, a cut from $521 million for law enforcement assistance to $125 million, or a cut of $393.5 million. In addition, the Administration is proposing to take additional amounts out of the balance of unobligated LEAA funds for fiscal '80 and transfer to other functions in the Department. Can you explain this sudden change of attitude about LEAA funding in just 60 days? Has the need for the program been eliminated? Is crime no longer a serious problem? Do state and local criminal justice agencies have all the resources they need to deal with crime problems and the administration of justice? Is the Administration calling for similar cuts in the 1200 other Federal aid programs or are not most of them receiving increases?

After the President's original FY 1981 budget had been transmitted to Congress, the severity of the nation's economic problems became more apparent and the President decided to reduce the FY 1981 budget request further. The magnitude of the Department's share of this reduction gave us no alternative other than to reduce the resources initially proposed for the Law Enforcement Assistance Administration's (LEAA) major grant programs. This action does not mean that we consider crime to be less of a serious national problem. Simply put, the Department was required to reassess its immediate priorities, and the result of this reassessment was our belief that critical Federal resources needs must first be met.

A reorganized LEAA program will continue to focus on the problems of juvenile justice and, through the conduct of research and statistical programs, provide a leadership role to State and local governments. As is the case with the many other problems that they face, State and local governments may not have all the resources that they may need to deal with crime. However, they have shown in the past a capacity to assume the costs of LEAA-funded "seed programs," and we hope that this trend will continue in the future.

The Administration is calling for a variety of reductions within other Federal aid programs. However, I am not familiar enough with the specifics of these proposals to discuss each individually.

It appears as if the Administration is preparing to shut down the LEAA program. Is that true? Have you notified LEAA of this, if it is your intention?

The Department's FY 1981 budget reductions will require the majority of LEAA's major grant programs to be phased out. We have notified LEAA officials of this eventuality.

If the program is being shut down, do you have a sense of the timing for this phasing out? What will happen to the LEAA employees? There are approximately 60,000 people at the state and local level whose jobs are funded by LEAA grants. Many of these are multi-year programs. What is your intention with respect to these projects? Will they be continued until they have run their course or are they to be shut down immediately? If they are to be continued, who will administer and monitor these grants?

A phase-out of LEAA's major grant program will necessarily occur over a period of time. The Department is well aware that many LEAA-supported projects are multi-year in nature and that the related funds must be properly monitored and accounted for during the remaining life of the grants. We do not intend to shut down these projects immediately. A significant number of LEAA employees will be required simply to efficiently and effectively manage this phase-out activity. Job placement assistance will be available to those employees who are no longer needed in LEAA. I do not anticipate that any employees will be terminated or that they would suffer any adverse impact as a result of the LEAA personnel level reduction.

Do you expect to send up new legislation repealing the LEAA or is this a temporary budgetary hiatus?

We are in the process of identifying what statutory changes must be proposed in order to restructure the LEAA program along the lines envisioned by the FY 1981 funding modifications. We do not view this as a "temporary budgetary hiatus."

The FBI's preliminary 1979 Uniform Crime Report figures are due to be released shortly. Do you have any indications of what they will show?

Preliminary 1979 Uniform Crime Report figures indicate that several categories of serious crime are on the rise.

One of your supplemental requests is to divert $13 million from LEAA to the FBI and DEA to pay for increased fuel costs. One of the first LEAA projects which the Carter Administration shut down was the so-called "Police Patrol Car" project. One of its major objectives was to encourage the development of a more fuel efficient patrol car. Could you provide the data as to the number and size of the cars which the Justice Department uses? Aren't they mostly all standard-sized sedans?

We are currently in the process of collecting information as to the number and size of the cars which the Department uses. The decision to terminate the so-called "Police Patrol Car" project was based on a variety of factors, most of which did not pertain to the laudable objective of designing a fuel efficient operation. The Department is actively pursuing a policy which will result in an increased reliance on smaller, more fuel efficient cars.

The Administration is also requesting that $7 million be taken from LEAA to pay for security costs of the National Political Conventions. In '72 and '76 these costs were paid for by supplemental request. Is this program higher priority than the LEAA discretionary grant programs which deals with correctional reform, for example, or STING, or ICAP?

At least in 1976, costs associated with providing security at the National Political Conventions were funded through a congressionally supported LEAA reprogramming action. The Department has proposed that the same vehicle be used for funding the 1980 conventions. The funds proposed for reprogramming are to be derived from unused Law Enforcement Education Program (LEEP) resources. The types of LEAA discretionary grants program which are identified in your question would not be affected by this particular proposal.

I am informed that the Administration is going ahead with plans to first, transfer the Law Enforcement Education Program (LEEP) from LEAA to the Department of Education and then, shut it down completely. Is this true? If it is true, how do you reconcile these actions with the intent of Congress as expressed in the Justice System Improvement Act of 1979?

The Administration is proceeding with plans to transfer the LEEP program to the Department of Education (DOE), in accordance with DOE's Organization Act of 1979 (P.L. 96-88). It is the Department's opinion that this transfer is compatible with the congressional directive thus far given with respect to this program. We believe that most of the original objectives underlying the LEEP program have been achieved, and, for this reason, consideration is indeed being given by the Administration to terminating these grants.

QUESTIONS OF SENATOR COCHRAN AND RESPONSES OF DOJ

United States Department of Justice

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

WASHINGTON, D.C. 20530

May 6, 1980

The Honorable Thad Cochran
United States Senate
Washington, D.C. 20510

Dear Senator Cochran:

At the Judiciary Committee's hearing on Thursday at which Deputy Attorney General Charles B. Renfrew and Associate Attorney General John H. Shenefield testified, Senator Biden concluded the session by asking that further information be produced for the record including certain responses on case information and tracking systems. On that subject, he asked for answers to certain questions propounded by you along with a copy of a report dated April 30, 1980, to Mr. Edward R. Slaughter, Jr., Special Assistant to the Attorney General for Litigation, from Mr. Benjamin H. Renshaw, III, Acting Director of the Bureau of Justice Statistics, we are pleased to enclose both.

We would like to comment briefly on Mr. Renshaw's analysis of the Department's plan submitted on April 15. His ideas are interesting and generally accepted for starting an information system from scratch. Generally, those responsible for developing the systems of the individual organizations within the Department have followed similar steps, and the same general procedure will be followed in the development of the Department's Information Aggregation System. However, in the view of the responsible officials within the Department, Section 11 of the 1980 Act, with its relatively short deadline, sought a more general plan. Thus the plan submitted set out the information apparently necessary to the Congress, OMB, and the Department for management, budget, operational and statistical purposes, and committed the Department to provide such information. In our view, such a plan was necessary in any event before we went to the next step.

We hope this letter and its enclosures will be helpful. Departmental personnel are available to answer further questions which you or other members of the Committee may have.

Yours sincerely,

Alan A. Parker

Alan A. Parker
Assistant Attorney General
Office of Legislative Affairs

Enclosures

cc: Senator Edward M. Kennedy
Senator Joseph R. Biden

ANSWERS TO QUESTIONS BY SENATOR COCHRAN ON CASE MANAGEMENT

QUESTION 1: Committee staff has had a series of meetings or conversations with Department personnel on the case tracking and management information systems plan submitted by the Department on April 15, pursuant to Section 11 of last year's act. As you may know, we are concerned that the document is not an adequate plan for a fully coordinated system and are unclear how best this committee should proceed to support the development of case tracking statistics.

1(a): What would be the impact of centralizing all the increases slated for expansion of existing case management systems and directing that they not be expended until a systems development plan is prepared along the line of the proposed revised Section 11?

ANSWER: The impact of centralizing all the increases slated for expansion of existing case management systems and directing that they not be expended until a systems development plan is prepared along the line of the proposed revised Section 11 would be devastating to the litigating divisions and to the United States Attorneys' offices. As the plan submitted on April 15 makes clear, the Executive Office for United States Attorneys has for two years been in the process of developing, with the aid of an independent entity known as "INSLAW", a carefully planned system. The procurement process is now underway for equipment to test the system at four sites, and by October 1, 1980, installation will have just been completed. It is our estimate that the development of the 1981 plan would require a year at the very minimum. Were expansion funds for FY 1981 to be frozen during that period, testing could not go forward, the team at INSLAW would be dispersed, the supervisory expertise within the Department would be lost, and any future system would have to start from scratch.

The impact would be felt no less in the litigating divisions. The systems in place and under development are already extremely useful to the divisions and are on the point of being much more useful. Many of the systems are used not only for case management information and tracking but for automated litigation support, resource accounting and even word processing. To freeze development funds for them would prevent their completion and usefulness after a great deal of money has already been spent. Ironically, the divisions which would be least affected are those with effective systems in operation, while those most affected would be those which are now actively involved in developing improved systems.

QUESTION 1(b): Considering the cost of developing, implementing, and maintaining information systems, wouldn't the delay be a short-term loss for a long-term gain?

ANSWER: The delay occasioned by proposed revised Section 11 would not be a short-term loss for a long-term gain, despite the cost of developing, implementing and maintaining information systems. The money to be spent in 1981 will be well spent, regardless of other developments. All of the systems will reach a level of development during FY 1981 in which they will be able to produce compatible data for aggregation. Having such data available is essential for developing and testing the Department's Information Aggregation System. Moreover, if all systems development were shut down, the money spent to date would have been wasted to a great degree.

QUESTION 1(c): What would be the impact of permitting ongoing efforts to continue, but also directing that the systems development plan be prepared?

ANSWER: If the Congress were to permit ongoing efforts to continue, but were also to direct that a systems development plan be prepared along the lines of that described in proposed revised Section 11, the effect would obviously not be as disastrous as it would be if all development were stopped. However, if the Department were required to retain an independent entity, efforts within the Department to insure compatibility between the systems would be brought to a halt. While the development of the individual systems would continue, the fact that an independent entity was developing a comprehensive plan would make it virtually impossible for the Department to continue with efforts to obtain common definitions and acceptable information aggregation procedures. Obviously, a great deal of time would be required of Department personnel to work with the independent entity, and it would be pointless for common definitions to be hammered out for a system which might be scrapped when the plan were developed. There would be a great danger, therefore, that the developing systems would become increasingly incompatible during the course of the plan's development.

QUESTION 1(d): Would you commit the Department today to preparing a systems development plan along the lines of the proposed Section 11 of this year's act?

ANSWER: In our view, we have complied with the requirement for a plan as set out in Section 11 of this year's act. However, we are most anxious to cooperate with the Judiciary Committee in working out details of implementation. Certainly a plan for assuring the production of compatible data and for development of the Department's Information Aggregation System will be necessary, and in our view such a plan would meet the requirement of Section 11 even as envisioned by staff members of the Judiciary Committee and of several Senators on the Committee. To the extent our concept of a final system and the concept of Judiciary Committee staff members are at variance, we shall be glad to discuss our differences and attempt to resolve them.

QUESTION 1(e): **Would you commit the Department today to implementing the systems development plan even if it requires dictating the changing of the direction of existing systems, assuming the systems development plan once completed indicates that changes are necessary?**

ANSWER: **We anticipate that existing systems will be modified if the plan noted in the answer to Question 1(d) reveals that modifications are necessary.**

Memorandum

Subject	Date
Critique of the DOJ Plan for Case Management Information and Tracking Systems	APR 30 1980

To	From
Edward R. Slaughter, Jr. Special Assistant to the Attorney General for Litigation	Benjamin H. Renshaw III Acting Director Bureau of Justice Statistics

Before reading the Plan, I decided to put down the steps (methodology) that I would have recommended be followed in its preparation. I came up with the following broad topics.

1. Analysis of Decisions. What are the decisions taken in each of the DOJ Divisions which require information that will be provided by information systems in support of management? This should be a rough analysis of decisions with reference to case work flow, looking at areas where the Divisions need help, e.g., important decisions that are made by default.

2. Analysis of Informational Requirements. What information is required and relevant to make these decisions and to respond to internal and external inquiries concerning the status and results of litigation?

3. Analysis of Existing Systems. What management information systems are now in place? What information do they provide? Who are the primary users of the information? What are the current uses of the information, particularly in terms of the earlier analysis of decisions? What enhancements to these systems are planned? Are they viable? What action has been taken to implement these plans?

4. Analysis of Areas of Comparability. What information needs to be compatible across these systems in terms of both internal (organizational component and overall DOJ) management needs and external (Congress, OMB, other agencies) inquiries and requests for information? This step should involve the aggregation of decisions, that is what are the decisions with the same or overlapping information requirements?

5. Analysis of Costs. What are the developmental (for new systems) and operational/maintenance costs (for existing systems) associated with accomplishing the necessary reporting and systems development?

6. Analysis of Controls. What are the procedures for detecting deficiencies and correcting them as experience is gained with using the data for decisions and for responding to inquiries?

There are of course numerous "classical" designs for the implementation and operation of management information systems which are far more extensive than this outline. I've attached some literature, including the Implementation Plan for one of the major systems that we fund (a state corrections information system called OBSCIS), the adaption that the Canadian National Work Group on Justice Information and Statistics made from the OBSCIS plan for a national program, and the "bible" on documentation of systems put out by the National Bureau of Standards.

My reading of the Plan suggests that the procedures followed were less rigorous than I would have urged, but this may be a function of your limiting the material actually included in the Plan. However, the impression given is of a laissez-faire document with limited comparability of the sections dealing with individual Divisions and limited attention to cross-cutting technical matters. Let me be more specific on the issues of compatibility and costs.

The Issue of Compatibility

Clearly the issue of compatible data must be approached in a realistic manner, recognizing that the practices of many decades will not be easily changed. While a study of the type I outlined would determine in large part which data needs to be compatible by specifying the reporting requirements, my limited knowledge of Department operations suggests that a certain minimum is already recognized as requiring compatibility. These are:

a. The definition of "case", "matter", and any other stage that is used or referred to by any DOJ organizational component (such as pre-matter investigation or complaint, etc.);

b. A standard, minimum set of keys by which to identify cases, matters, and investigations such as agency file number, DOJ file number, USAO file number, court docket numbers. Rather than adopt -- or try to adopt -- one numbering system, the capability to retrieve information using several identifiers should be provided;

c. Where reasons for discretionary action are recorded, e.g. reasons for declination, a suitable base definition for those reasons should be established. Common data elements require a common coding structure. There will probably need to be some ability to expand the number and kind of reasons within a standard framework in order to allow for organizational differences;

d. A standard case typology for civil and criminal cases should be developed. Again, not all components will be interested in the same level of differentiation of case types; therefore, the typology should be flexible enough to allow for differentiation and aggregation according to the use to which case type reporting is to be put;

e. Explicit regulations should be propounded and enforced concerning accounting for shared cases. The regulations should address both the sharing of case responsibility and the sharing of actual litigation activity among components of the DOJ and between DOJ and other agencies.

Some of the items mentioned above have gone unrecognized in the Plan; what is needed is a realistic procedure which will identify and describe the individual items of data, their sources, and a method — perhaps different for each organizational component — for including them in each system.

Budget Components and Costing

For me the weakest aspect of the Plan — and what may have helped to produce the negative reaction by Senate Judiciary staff — is the total lack of standardization and necessary detail in the presentation of implementation costs for the systems discussed. With little knowledge of the existing systems, several of the cost figures seems invalid and improbable on their face. For instance, Civil Rights indicates that operational costs for a five year period will be more than twice implementation costs, an unheard of ratio. Costs for the Criminal Division, particularly operating costs, seem understated given normal operating or maintenance requirements. But let me return to basics.

In order to determine what the various aspects of case information management will cost and how costs compare across systems, it is necessary to measure the costs for each aspect of the system in the same manner in each organizational component. Costs are divided into two broad categories: development and operations. The following lists suggest the level of detail which should be provided:

a. Development and Implementation

(1) Requirements Analysis
Review of existing recordkeeping
Review of data support requirements

(2) Computer Hardware (purchase or lease cost)

Terminals
Printers
Lines
Central Processing Unit
Disk Drives
Tape Drives

(3) Application Software and System Functions

- Case Tracking
- Time Reporting
- Litigation support
- Legal Retrieval
- Word Processing

(4) Training

- Development of Materials
- Training of operators, coders and quality control
- Training of users (managers, line attorneys, operators)

(5) Manual Support

- Forms Design
- Paperflow procedures
- Quality Control procedures
- Procedures Documentation
- User Guides

b. Annual Operating Costs

(1) Computer Hardware

(2) Applications Software Maintenance

- Corrective
- Adaptive
- Perfective
- Maintenance of Documentation

(3) Maintenance of Training Materials and Training Operations

(4) Maintenace of Forms and Procedures

(5) Analysis of Data

(6) Data Quality Control Procedures

Of particular importance for adequate cost projections that will not produce nasty surprises in the form of unanticipated budget requirements is the b.(2) category above. By corrective I mean the need to investigate and fix bugs (problems) in the hardware or software that may be minor or may require significant program changes and testing. By adaptive is meant changes and testing for new hardware, for new operating systems, and for adaptions and enhancements identified by the attorney-users. Under perfective comes changes and testing to improve efficiency and reduce costs of operation.

In order to assess the relative costs projected for the case tracking function reported in 3.a.(3) above, a profile of the function, a technical description of the system, and description of its integration with other applications should be provided.

a. The profile should address the following issues:

Periodic Management Reporting Capability
Periodic Statistical Reporting Capability
Ad Hoc Management and Statistical Reporting
On-line Inquiry Capability
On-line Data Entry Capability
Forms and Document Generation
Security
Historical Purging

b. The technical description should address the following:

Programming Language
Hardware Independence
Source of Application Software
Planned ability to accommodate changes in data input and output requirements

c. A description of how case tracking will be integrated with other applications should address the following:

Word Processing
Time-keeping
Litigation Support
Legal Retrieval/Indexing

While this may seem overwhelming, my point is that the absence of across-the-board comparable multi-year cost data for, at a minimum, (a) development and implementation costs for hardware, software, and training and (b) operating costs for hardware, software, training material maintenance, and analysis of data would undercut the validity of the report for most reviewers.

With reference to the last item, each Division presentation would have benefitted from an indication of the resources and associated costs for analysis of the data generated in terms of internal policy uses of the data, support for budget preparation, day-to-day management uses of the data, and responses to outside requests for information.

Federal Level Criminal Justice Statistics

The next item touches the scope of the Plan, specifically its treatment of only the Divisions in Main Justice as opposed to other DOJ bureaus and offices with responsibility for processing Federal criminal cases and offenders; as such, this may be the only "statistical" concern per se. Let me try and explain this notion of Federal transaction statistics.

From the inception of the LEAA program, our statistical office, through a cooperative effort with state governments called the Comprehensive Data Systems (CDS) program, has funded states to support submissions to the Uniform Crime Reports program in the FBI and to develop computerized criminal history and offender-based transaction statistics for states and cities. This support was based on the conclusion that the best basis on which to recommend improvements in systems for the administration of justice was from the enormous diagnostic value of tracking the flow of case/persons through the stages of these systems. Precedent for the importance of statistics that describe how the criminal justice system handles its workload spans sixty years from 1922 when Felix Frankfurter and Roscoe Pound directed and edited an analysis of 5,000 cases in Cleveland to the work of Attorney General Bell following his departure from the Department in analyzing several hundred cases in Atlanta. The kind of analysis that can result is suggested by the study (attached) "A Cross-City Comparison of Felony Case Processing", prepared by the Institute of Law and Social Research based on data from the PROMIS system as it operated in twelve metropolitan areas and one state.

What would the Federal equivalent look like? First it would begin with a Federal equivalent to the Federal Bureau of Investigation's Uniform Crime Reports Program (UCR). This "equivalent" would not be a replication or mirror image of the "national" statistics which the FBI gathers on a voluntary basis from states and localities. It would build on the UCR concept of definitional uniformity to establish activity levels for areas of Federal crimes, rather than crime counts per se. It could build on the computerized criminal history records of Federal offenders now available in the FBI.

The intention would then be to track cases and offenses through the U.S. Attorney's offices and the Criminal Division, thence to the Administrative Office of the U.S. Courts, and finally into the Bureau of Prisons.

This concept of Federal level statistics is not new; it is my understanding that a statistical systems working group operating in the Department in 1975-76 initiated consideration of this statistical linkage. Moreover the FBI's Uniform Crime Reporting section is prepared to cooperate in the initiation of such a series.

Implementation of this concept could be in three stages: (1) address the feasibility of such a statistical linkage among agencies capable of producing the data which are under the authority of the Attorney General; (2) with an understanding of (a) problems in linking FBI investigative activity and crime count data with the litigation activities of the U.S. Attorney's offices, and (b) the statistical capabilities of the Bureau of Prisons, the Administrative Office of the U.S. Courts could be brought in on the technical issues related to their integration into the statistical series; (3) finally other Federal (Secret Service, Treasury) and state agencies which generate cases for litigation Divisions could be addressed.

Discussion of this concept of Federal level transaction statistics would seem to have been essential to address the requirement in Section 11(b)(2)(B).

Other Issues

Two remaining items might be mentioned. The reference on p. 28 that suggests that the Divisions "complete their individual systems" while the Department develops definitional uniformity with common data elements and coding requirements, ignores the natural sequence of these activities, as was suggested earlier. Unless the systems types in the Department are more saintly and well adjusted than any I have known, once they have systems "in place" they will be intractable about changes. My earlier reference to the state of systems development does not require FREEZING such activity in the Divisions, but it should foreclose "final" applications until the compatibility issues are addressed, perhaps by the "center".

The issue of the "center" is my final point. Perhaps I got a better sense of it from our conversation than from the paper. It should be conceived of as having two roles, one as a focus for user feedback (a users group), and as a technical working group that functions in part on the basis of legal guidance from the users, e.g., my earlier example of the need to develop a standard set of reasons for declinations. The first role is not mentioned and I believe it should be.

I hope these thoughts are helpful.

U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

May 27, 1980

Honorable Edward M. Kennedy
Chairman
Committee on the Judiciary
Washington, D.C. 20510

Dear Mr. Chairman:

On May 1, 1980, when Deputy Attorney General Renfrew and I testified on the Department's fiscal year 1981 Authorization Bill, Senator Biden indicated that he, and perhaps other members of your Committee, felt that the Department had in the past not responded in a timely manner to requests for certain information. Both the Deputy and I are concerned that requests of which we are not aware may have been made to our predecessors. We would appreciate it if you would let the Committee members know that if any of them has such a request outstanding, we would be pleased to hear from him and will do our best to respond promptly.

All of us at the Department are most appreciative of the Committee's support, and we look forward to continued cooperation with its members and staff as we work together to improve the Federal justice system.

Sincerely,

John Shenefield

John H. Shenefield
Associate Attorney General

[illegible]

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

July 9, 1980

The Honorable John H. Shenefield
Associate Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Shenefield:

Thank you for your letter to the Committee requesting a listing of the studies which have been requested by the Committee but have not yet been received. I am enclosing for the Committee a compilation of the outstanding material. Your assistance in obtaining the reports would be most appreciated.

The Committee appreciates your concern.

Sincerely,

Edward M. Kennedy

Enclosure

DEPARTMENT OF JUSTICE REPORTS OUTSTANDING

International Oil Investigation

Shared Monopoly

International Energy Association

Undercover Operations Audit Results

Responses to Questions Sent to Immigration and Naturalization Service

Number of FBI Evaluations, e.g. Fugitive Program, Legal Attache Program, Personal Crimes

Phase II and III of Prosecutorial Guidelines

Gary Thomas Roe Report

Responses to U.S. Attorney Questions Submitted at May 11 1980 Hearing on Oversight

Standards for Correctional Facilities

Impact and Effectiveness of the Amendment made by Title II of the Psychotropic Substances Act of 1978

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